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A Conceptual, Practical, and Political Guide to RICO Reform

Gerard E. Lynch

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A Conceptual, Practical, and Political Guide to RICO Reform

Gerard E. Lynch*

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I. INTRODUCTION

RICO is nearing its twentieth birthday,¹ but it may not be a happy one. In fact, 'tis the season for critics of RICO to be, if not jolly, at least highly active. A House subcommittee and the Senate Judiciary Committee have held hearings on RICO reform, the popular and business press has published numerous debates and criticisms involving fairly arcane points of civil and criminal law, scholars and lawyers have filled law reviews and legal newspapers with articles often critical of the statute, and the pressure has been building for statutory changes.

* Professor of Law, Columbia University. B.A., 1972, J.D., 1975, Columbia University. The Author is on leave serving as Chief of the Criminal Division in the Office of the United States Attorney for the Southern District of New York. This Paper was delivered at the Vanderbilt Law School Symposium on November 10, 1989. It is based on testimony given before the Subcommittee on Crime of the House Judiciary Committee on May 4, 1989. A portion of the paper also was presented at a conference on RICO sponsored by the Cato Institute in Washington, D.C. on October 18, 1989, and will be published under the title "How RICO Augments the Powers of Prosecutors" in a volume to be published in 1990 by the Cato Institute. The Paper was completed before the Author joined the Department of Justice. Needless to say, the conclusions are his own and do not reflect the views of the Department of Justice.

1. RICO was passed in 1970 as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 941, 947-48 (1971) (codified at 18 U.S.C. §§ 1961-1968 (1988)).

As the pressure for change has intensified, and the debate has moved away from judges and law professors into newspaper columns and the political arena, increasingly dubious claims have been heard on both sides of the reform issue. It may be useful to give a kind of consumer's guide to the arguments frequently heard during these debates. In particular, I would like to focus on the RICO reform bill that has progressed the farthest in Congress, with a view to answering two related questions: What are the strengths and weaknesses of that bill, and why has that bill had greater political success than more conceptually sound reforms? Before turning directly to those questions, however, I would like to address some of the mythology that surrounds the debate over RICO because the arguments of both proponents and opponents of RICO reform are either inaccurate or irrelevant or both.

II. THE ORIGINS OF RICO: MYTH AND HISTORY

Critics of RICO tend to foster the myth that RICO was originally designed to make it a crime to be a member of organized crime, and that it consequently is inappropriate for use against "white-collar" criminals. This version of the origins of RICO is misleading in several ways. In fact, the original notion behind RICO was even narrower than the critics contend, but by the time the Act actually was passed, it had grown far broader than its earliest concept.

The original bills that grew into RICO, and the first version of RICO presented to Congress, were narrower in focus and critically different from an attempt to criminalize membership in a criminal organization. The point of the provisions, according to their original sponsors, Senators Roman L. Hruska and John L. McClellan, was to cope with the specific threat of organized crime's infiltration into legitimate business. The main thrust of the law was to punish either the investment of criminal profits in a legitimate "enterprise" or the acquisition of an interest in such an enterprise by extortion or fraud.²

This purpose is manifest in what were at one point the only two substantive crimes created by RICO, which remain in the statute as 18 U.S.C. sections 1962(a) and 1962(b). These provisions punish acquiring an interest in an enterprise with the profits of a pattern of racketeering and acquiring such an interest by means of such a pattern.

These provisions are not well known because they are seldom used. Nearly all civil and criminal RICO cases are brought under a different

2. In order to keep this presentation readable, I have tried to keep footnotes and other citations to a minimum. When particular citations are not provided, the relevant documentation can be found in Lynch, *RICO: The Crime of Being a Criminal* (pts. 1-4), 87 COLUM. L. REV. 661, 920 (1987).

section of the law, section 1962(c), which legislators did not add until later. It is important to understand sections 1962(a) and 1962(b), however, because they are the keys to understanding the three powerful and controversial concepts that form the heart of the statute: the enterprise, the pattern of racketeering, and the mandatory forfeiture of the interest in the enterprise.

First: the enterprise. An enterprise is whatever organized crime can infiltrate. However, Congress knew that an enterprise could be almost anything. Functionally, it could be a business, a labor union, or a government bureau. Formally, it could be a corporation, a partnership, an unincorporated association, a subdivision of some larger entity, or even a sole proprietorship. In order to cover the range of legitimate activities that organized crime could seek to invade, the definition of enterprise had to be extremely broad—so broad as to be virtually all encompassing. Congress deliberately chose as broad and vague a term as possible, to cover every possible subject of organized crime penetration, and the definition given to it was equally open ended.³

Second: the pattern of racketeering. The central criminal activity in subsections (a) and (b) is the penetration of the enterprise, not the pattern of racketeering. In this context, it makes sense that the definition of pattern also should be broad. Suppose a mobster is muscling into a trash collection business by extortion and violence. We do not want to have to wait for a long series of acts to invoke RICO. Two is plenty, and maybe even one should suffice.⁴

Nor should we be concerned in this context about whether the acts display sufficient “continuity and relationship”⁵ to form a “pattern.” Acts directed at acquiring an interest in a particular enterprise in violation of subsection (b) by definition would display relationship; they

3. 18 U.S.C. § 1961(4) (1988) (defining “enterprise” to include “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”). Note that even this extraordinarily general description is not technically a definition; the use of the word “includes” suggests this is an illustrative list of types of enterprise, not a closed-end definition. Although much attention has been given to the fact that the definition of “pattern of racketeering activity” is not a true definition but a “minimum necessary condition for the existence of such a pattern,” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2899 (1989), it is in fact the case that neither of the central abstract concepts that define a RICO violation is defined; the statutory “definitions” in each case constitute minimum requirements or illustrative lists.

4. Under another little used part of the law, the acquisition of an interest in an enterprise by even a single act of loansharking is enough to trigger RICO. See 18 U.S.C. § 1962(b) (1988); see also *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) (concerning RICO prosecution based on collection of unlawful debt).

5. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) (quoting S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969)).

would necessarily have "the same or similar purposes [and] results,"⁶ the acquisition of the interest. The "continuity" requirement hardly could have been intended to be talismanic here. The Supreme Court's assertion that a pattern of racketeering must extend, or threaten to extend,⁷ over a substantial time period, whatever its merit in the context of section 1962(c), seems out of place in the infiltration context: Congress hardly can have intended to exclude from RICO someone who succeeds in acquiring control of a business rapidly through a few acts of violent extortion merely because the victim yields quickly.⁸

For subsection (a) as well, the potential breadth of the definitions of "pattern" and "enterprise" is not troubling: the act of investing the proceeds provides a critical unifying element to whatever crimes form the pattern. The gist of the offense is investing the proceeds from a series of crimes, and if what constitutes a series is somewhat vague, or the list of crimes subject to the rule is extremely long, we still do not have to worry about the law escaping a fairly specific context.

Third: the mandatory forfeiture of the interest in the enterprise. In the context of subsections (a) and (b), once again, this type of forfeiture is a completely logical, and intrinsically proportional, punishment. It is logical, because the whole point of the statute is to drive the mobster out of the legitimate business. As in the antitrust context, divestiture is

6. *H.J. Inc.*, 109 S. Ct. at 2901 (quoting the definition of "pattern" in the Dangerous Special Offender Sentencing Act, 18 U.S.C. § 3575(e) (repealed 1984)).

7. *Id.* at 2902 (ruling that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct").

8. Perhaps the Court would say that in such a case the "continuity" element is provided by the threat of future predatory activity inherent when someone acquires a business interest through fraud or violence, because that person can then be expected to conduct the acquired business through more illegal acts. Permitting this kind of implicit threat of continuity to satisfy the "continuity" requirement, however, essentially undermines the temporal aspect of that standard.

The confusion that is engendered by the "pattern" requirement strikes me as bogus. The notion that the concept of "pattern" is too vague to be understood by a jury of English-speakers of ordinary intelligence can be credited only against the background of judicial efforts to twist a rather basic (if hard to define) concept into elaborate knots in order to find patterns in criminal cases and find lack of pattern in civil suits to which the courts are hostile. The "threat of continuity" line in particular is a clear effort to bring back within the "pattern of racketeering" organized crime behavior that only excluded by imposing overly rigid temporal tests of pattern in civil cases. See *United States v. Indelicato*, 865 F.2d 1370, 1382-83 (2d Cir.) (en banc), *cert. denied*, 110 S. Ct. 56 (1989).

Far more than obscenity, a "pattern" is something that we know when we see it; it is the nature of our intelligence to group things into patterns based on perceived relationships, while finding some things too random—too "isolated and sporadic," if you will—to be so grouped. Asking jurors quite simply whether the acts fall into a pattern or are just isolated and sporadic instances of crime strikes me as a perfectly responsible course. Subdividing the fundamental notion of pattern into rigid subtests of "relationship" and "continuity" seems unnecessarily arcane, and it is no wonder that the courts have wrought wonders of confusion by attempting a technical definition of a readily understood lay term.

a logical response.⁹ You cannot take the enterprise out of the crook, but you can take the crook out of the enterprise. The punishment is intrinsically proportional to the wrong done: the size of the mobster's interest in the enterprise is either the percentage of the business he owns due to investment of criminal proceeds, in which case the value of his interest is directly proportionate to the criminal profits used to acquire it, or it is the interest he obtained by acts of fraud or extortion, in which case it is the direct fruit of those crimes.

This package of laws may or may not have proved successful in the fight against organized crime. At the time of their enactment, some critics were skeptical. If the government can prove that the mobster committed the pattern of crimes that produced the profits, what would be gained by taking on the additional burden of tracing the proceeds? If the mobster has obtained a business interest by force or fraud, proof of the RICO violation by definition includes proof of other crimes. Certainly, as things developed, these provisions have been little used. Whether or not the criminalization of infiltration would have been particularly valuable, the provisions at least formed a tight, coherent, specific response to a species of criminal activity—the infiltration of legitimate enterprises—that was of concern to the Congress and with which the criminal law did not, at that time, explicitly deal.

Contrary to the prevailing myth, nothing in this original package of legislation was aimed at punishing membership in organized crime. Indeed, the statute as written says not a word about the Mafia and, furthermore, does not really require the crimes constituting the pattern of racketeering to be “organized” in any sense at all. A single free-lance criminal entrepreneur could violate the statute by committing the required two crimes and investing the proceeds, or by forcibly or fraudulently acquiring an interest in an enterprise. The only link to “organized crime” in the Mafia sense was that the list of so-called “predicate” crimes that could form part of the pattern was confined to crimes thought to be “characteristic” of organized crime. There is a catch-22, however. Because Congress was aware that a main characteristic of the mob was that it would try anything for a profit, the list covers practically every serious crime in the criminal code.

This point brings us to the second myth favored by critics of RICO: that prosecutors and the courts expanded the scope of RICO beyond Congress's original intent. The facts undermining this myth are crystal clear. First, it was Congress itself that expanded RICO far beyond its original purpose. Second, whatever Congress intended in 1970, Congress

9. Applying an antitrust model to the anticompetitive practices of the mob in legitimate enterprises was the original theory of RICO.

subsequently has approved the work of the courts in the course of revising RICO in 1984. Far from disapproving of the decisions of the courts that had given RICO a broad interpretation, Congress specifically ratified some of those decisions, implicitly approved of others, and did nothing to restrict the meaning of the statute.

The device by which Congress originally expanded RICO beyond its original intent was simple: the addition of subsection (c) to section 1962. Subsection (c), which makes it a RICO crime not only to *acquire* an enterprise by racketeering but also to *conduct* the affairs of an enterprise by a pattern of racketeering, radically expands the coverage of RICO. Indeed, the overwhelming majority of RICO cases, civil and criminal, are predicated on subsection (c), or on conspiracies to violate that provision. The other provisions have had only limited application; section 1962(c) has proved almost infinitely adaptable.

Section 1962(c) does two critically important things. First, it makes anyone who engages in a "pattern" of criminal acts in the course of managing any legitimate enterprise guilty of a RICO offense. Section 1962(c) is not limited to racketeers invading the straight world. Anyone already in the straight economy who commits a series of crimes can become, by virtue of this statute, a racketeer. Thus, an investment banker who commits a pattern of securities fraud in the course of managing the affairs of a corporation or other business enterprise is a racketeer; likewise, a corrupt politician who takes a series of bribes in the course of running his office is a racketeer.

Second, just as an ordinary businessman or politician can commit a racketeering violation without contact with organized crime, so can an ordinary criminal violate RICO without infiltrating legitimate business. Under section 1962(c), as interpreted by the Supreme Court in *United States v. Turkette*,¹⁰ the organized crime family itself is an enterprise—a group of individuals associated in fact—and anyone who conducts such an enterprise through a pattern of crimes (and how else would one conduct an organized crime family?) violates RICO.¹¹

It simply is wrong to blame the courts or the Justice Department

10. 452 U.S. 576 (1981).

11. To return to the first myth for a moment, nothing in the legislative history of the Organized Crime Control Act of 1970 shows that Congress even appreciated that RICO made it a separate crime to commit crimes in furtherance of an organized criminal group. Indeed, criminalizing membership in the Mafia was so far from the mind of Congress as reflected in the legislative history that for several years it was a bitterly controversial issue in the courts whether an association of individuals for wholly illicit purposes, such as the Mafia, as opposed to a legitimate business or labor association, could be a RICO enterprise at all. To make this point, of course, is not to claim that the Supreme Court's decision in *Turkette* was wrong. Whatever the subjective expectations of members of Congress might have been, the text they voted into law is plainly broad enough to encompass the result in *Turkette*.

for expanding RICO. Congress took care of that itself. The expansion of RICO into white-collar crimes, political corruption, and illicit enterprises is simply the result of straightforward application of the language chosen by Congress. Anyone who participates in conducting the affairs of any sort of enterprise—a judge or member of Congress running her office, a business executive conducting his business, a labor leader directing the affairs of a union, the treasurer of a charitable organization or social club—by means of a “pattern of racketeering,” which means little more than committing two related crimes over a period of time, is guilty of racketeering under a perfectly straightforward reading of the statute.¹²

Moreover, Congress extensively revised RICO in 1984 and did nothing whatever to cut back on the statute as it had been interpreted in the courts. Instead, it broadened the law in a number of crucial respects, including the controversial forfeiture provisions. By the 1984 revision, the use of both civil and criminal RICO in white-collar and political corruption cases, as well as against organized crime groups, was well established, as was the widespread use of civil RICO. Whether or not Congress knew what it was doing in 1970, it cannot be claimed that by 1984 it was unaware of what its words had accomplished.

RICO’s critics thus often advance a distorted version of the origins of RICO to gain a rhetorical advantage. They wish to discredit current applications of the statute by suggesting that those applications they disfavor are aberrational distortions of the statute foisted on the courts by over-aggressive prosecutors and greedy plaintiffs. RICO’s defenders (and particularly its leading draftsman and proponent in chief, Professor G. Robert Blakey) have their own origins myth. To them, everything that has been done in RICO’s name (or at least everything that has achieved any acceptance in the courts) was consciously intended by Congress as part of an innovative, revolutionary revision of our approach to crime control. This version is, in my view, no more accurate. Whatever might have been intended by the draftsmen on the congressional committee staffs, the committee reports and debates in 1970 provide no evidence that the members of Congress who voted for RICO foresaw what would be done with it.¹³

These various myths about RICO’s history should be of limited importance today. Besides their basic inaccuracy, they are not relevant to

12. Congress has directed that RICO be interpreted “liberally . . . to effectuate its remedial purposes.” Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, § 904, 947 (1971). The “expansive” interpretation of RICO complained of by its critics, however, requires no liberal stretch of its terms, but only a literal reading of its plain meaning.

13. Indeed, prosecutors and plaintiffs took a decade to appreciate the scope of the statute’s language. RICO cases were rare during the 1970s.

the current issues facing the courts or the Congress. It is worth remembering that Congress never has debated whether it wished to enact the radical revisions of the federal criminal code that RICO has effectuated. In 1970 these effects were not foreseen, and in 1984 they were mostly taken for granted. But we now have almost twenty years' experience with RICO, and the questions today should be what RICO does, whether we are pleased with its effects, and what can be done to eliminate those effects we do not desire. Those questions should not be overly influenced by assertions about RICO's origin.

III. WHAT CRIMINAL RICO DOES

Although most of the public and judicial criticism of RICO concerns its civil applications, it is logical to begin an examination of what RICO does by addressing criminal RICO. The impact of RICO on criminal law should be primary for at least two related reasons.

First, RICO is primarily a criminal law. In its origins and in its structure, RICO is a criminal statute with a civil appendage. The law makes certain forms of activity criminal, and then permits persons injured by such activity to sue the perpetrators civilly for damages. It thus seems perverse to focus first on the implications of the civil remedy. If RICO properly defines a species of criminal activity, and particularly if it describes an especially aggravated form of offense, it is difficult to see what could be wrong with permitting victims of such crimes to obtain redress, including punitive or treble damages. The scope of the civil cause of action, after all, is identical to that of the criminal offense. Any overbreadth in civil RICO is therefore by definition an overbreadth in criminal RICO as well.

Second, it is an axiom of our system that criminal laws ought to be narrowly drafted and strictly construed. The consequences of criminal conviction are far more drastic than those of losing a civil suit—even one labeled a "racketeering suit" and carrying treble damages and attorney's fees. Again, then, it seems peculiar to ask first whether civil RICO needs to be limited or is unfair to defendants. It should be remembered that any application of civil RICO that seems to impose unfair or excessive liability on a defendant by definition also could be the basis for sending that same defendant to jail for twenty years and imposing massive criminal forfeitures.

What, then, hath RICO wrought on the criminal code? The practical effects of RICO are far broader than the addition of one more crime to the already fat volume of federal criminal statutes. Unlike most statutes defining crimes, RICO does not define and prohibit some particularly described type of conduct. Indeed, it is not clear that RICO addresses "conduct" in any vernacular, physical sense at all. Most

crimes are defined in terms of physical acts or concrete results. While borderline cases exist, the general types of behavior defined as "homicide" or "rape" present a manifest picture recognizable by a lay observer. RICO, in contrast, is defined in terms of abstract relationships: the "enterprise" is a structure of relationships among individuals or entities, and the "pattern of racketeering" is a form of relationship among crimes. A RICO violation, unlike a robbery or burglary, has no paradigmatic physical form.

Because RICO is such a broad and abstract crime, it is capable of application to a number of different types of conduct in a wide range of circumstances. Because each type of conduct to which it is applied exists in its own unique context of preexisting substantive and procedural rules, the effect of superimposing RICO on the remainder of the criminal code varies according to the type of conduct involved. It therefore is useful to break up the question by discussing RICO's effects in several broad categories of criminal cases.

A. *Government Corruption*

Most studies agree, although it may surprise the casual observer, that the single largest category of RICO cases involves the prosecution of government corruption. Those cases generally are formulated by charging, under section 1962(c), that the defendants participated in the conduct of the affairs of a particular government agency through a pattern of bribery, extortion, or mail fraud.¹⁴

Interestingly, these government corruption cases predominantly involve state and local officials. This fact is not because there is more state and local corruption than corruption in the federal government. Federal prosecutors in fact bring lots of bribery cases under the ordi-

14. The courts have held that a defendant can participate in the conduct of the affairs of an enterprise without being an employee or otherwise having an official connection to it. For example, it has been held that a criminal defense attorney may be convicted of participating in the conduct of the affairs of a prosecutor's office. *See United States v. Yonan*, 800 F.2d 164 (7th Cir. 1986), *cert. denied*, 479 U.S. 1055 (1987). Thus, the private citizen who pays the bribe can be charged under this formulation as well as the bribe-taking official. Of course, a group of bribe givers also could be prosecuted as an illicit association of their own, and, particularly if the bribes are adjunct to some other criminal enterprise being conducted by the principal defendants, this may be the preferred structure of the indictment. Note also that just as the bribe giver can be found to have violated RICO by participating in the affairs of the police department through a pattern of bribery, the police officer can be found to have violated RICO by participating in the affairs of the criminal gang through taking the bribes. Because the courts generally have ruled that the double jeopardy clause is not violated by multiple RICO charges if either the pattern of racketeering or the enterprise is different, *see, e.g., United States v. Rusotti*, 717 F.2d 27 (2d Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984), there is no obvious reason why the bribery defendants in this example could not be charged with two sets of substantive RICO violations, and matching RICO conspiracy charges—one for each enterprise in which they participated.

nary statutes prohibiting bribery of federal officers. The higher incidence of local government corruption cases likewise cannot be explained by the notion that local corruption cases are more serious in extent or the size of the bribe and therefore merit particularly severe sanctions. A great many of the RICO charges against state officers do not involve extraordinary levels of corruption and are indistinguishable from cases involving federal officers in which RICO is not used.

The principal reason why so many state and local corruption cases are brought under RICO while federal corruption cases usually are not is simple: while bribery involving federal officers is a federal offense, there is no federal statute that expressly prohibits bribing a state officer. Thus, when the FBI or the United States Attorney develops evidence of corruption of local public officials, the choice has been to turn the evidence over to local prosecutors (who may or may not prosecute vigorously) or to seek to stretch the meaning of federal statutes to cover government corruption.¹⁵ RICO permits the federal prosecution of any but "isolated and sporadic" instances of bribery in violation of state law, provided only that the enterprise affects interstate commerce.¹⁶

One of the most frequent applications of RICO thus has nothing to do with organized crime, provides no special rationale for the application of forfeiture, and often involves relatively lenient sanctions. RICO's value in this area, demonstrated by its frequent use, is principally as a jurisdictional device to bring local bribery offenses within federal jurisdiction.¹⁷

Whether anything is wrong with this is debatable. I certainly would be the last to complain about the extension of federal jurisdiction to cover these cases. The fact is that local prosecutors often lack the means or the will to mount sophisticated investigations of powerful lo-

15. There are three principal jurisdictional devices other than RICO for prosecuting state and local corruption, each of which has its difficulties: (1) the Travel Act, 18 U.S.C. § 1952 (1988), which prohibits traveling interstate or using a facility in interstate commerce to violate state bribery laws—this crime requires proof of interstate activity, which is not always provable; (2) the Hobbs Act, *id.* § 1951, which prohibits affecting interstate commerce by extortion—the difficult distinction between bribery and extortion under color of official right often make this a difficult option; and (3) the mail and wire fraud statutes, *id.* §§ 1341, 1343, on the theory that the official had defrauded the public of his honest and faithful services—this theory also requires the use of the mails or interstate telephone calls. The Supreme Court held in *McNally v. United States*, 483 U.S. 350 (1987), that this theory did not state a crime under the mail and wire fraud statutes, but Congress has since revived the theory by statutorily overruling *McNally*. See 18 U.S.C. § 1346 (1988).

16. Every state and local government office or agency is somehow involved in interstate commerce.

17. An additional advantage is the generation of newspaper stories about how the diligent feds have uncovered the way in which the local sheriff has "turned his office into a racketeering enterprise for personal profit," which is the usual formula by which the newspapers try to make sense of the language of a RICO indictment.

cal politicians, and federal investigators and prosecutors often can fill the gap. While a respect for federalism may inhibit Congress from explicitly intruding into the supervision of state governments through a direct prohibition of local bribery, it is difficult to see that inhibition as much more than a pious fig leaf. Given RICO and the post-*McNally* mail fraud statute, corrupt state officials routinely are subject to federal prosecution. Aggressive pursuit of those cases seems to bring federal prosecutors political popularity rather than local resentment. One wonders, therefore, whether there is any legal or political reason at all why federal laws against bribing local officials must take such a contrived and awkward form.

There are two questions about using RICO to do the gap filling, rather than simply passing a statute that provides for federal criminal jurisdiction over some or all cases of local corruption. One is political. Whether federal intervention into local political affairs in this way is or is not desirable is an important question about which reasonable people could disagree. The sweeping extension of federal jurisdiction into policing local government effected by RICO never has been debated by Congress because it was an unforeseen result of the broad language of RICO rather than a considered policy choice. It is also possible that a federal anticorruption statute sensibly could restrict federal jurisdiction to certain types of state offices, rather than making a federal case of every attempt to fix a parking ticket. A specific bribery law would require Congress to face these issues.

The second question is one of fairness. RICO carries severe and undifferentiated penalties. The decision to prosecute under RICO rather than under some other state or federal theory allows the prosecutor to obtain forfeiture remedies that otherwise would be unavailable under other statutes. Furthermore, the sentencing judge has no discretion over these forfeitures. The prison terms available under RICO are, of course, far in excess of the maximum terms for most state bribery offenses, and under the federal sentencing guidelines, conviction under RICO adds an additional six points to the score that determines the offender's presumptive sentence. Yet, there essentially is nothing in RICO that makes it available only in more serious cases. The distinctive elements of RICO are the enterprise—but any corrupt official by definition obtains his bribes while conducting the affairs of a public office, which qualifies as a RICO enterprise—and the pattern of racketeering—but any two bribes constitute a pattern.¹⁸

18. Indeed, RICO charges have resulted where a defendant paid what could be regarded as a single bribe in multiple installments, making the RICO charge all the more fortuitous. See *United States v. Kaplan*, 886 F.2d 536 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1126 (1990).

Criminal statutes that enhance the penalties for crime should plausibly differentiate between the more and less severe versions of the crime, yet RICO permits the prosecutor to decide to seek a much heavier penalty without proving any substantial aggravating element. The prosecutor's discretion, without the benefit of prior definition by Congress, essentially decides who are the most serious offenders to be prosecuted more rigorously. In a government of laws, not prosecutors, the legislature should try to minimize the extent to which that is possible.

B. *White-Collar Crime*

Most of the hostile attention that criminal RICO has received is the result of its use against white-collar crime, and particularly of its aggressive use by the United States Attorney for the Southern District of New York in cases of securities fraud.¹⁹ There is no area in which the charges and countercharges about the use of RICO are more eagerly hurled.

There are several reasons why RICO is so popular with prosecutors in white-collar cases. First, RICO charges are automatically available in virtually any white-collar criminal indictment. The vast majority of federal cases involving business crime are or can be framed under the mail and wire fraud statutes—statutes which have been called the federal prosecutor's "Stradivarius."²⁰ These laws, which prohibit the use of the mails and interstate telephone communications in aid of a "scheme to defraud"²¹ are almost infinitely adaptable to cover a wide range of financial and business misconduct. But mail and wire fraud, as well as criminal violations of the securities laws, also are predicate offenses of RICO.

By a long-standing peculiarity in the interpretation of these statutes, moreover, each use of the mails or interstate wire facilities in furtherance of a fraudulent scheme constitutes a separate felonious offense. Thus, mailing two letters in furtherance of a single scheme to defraud a single victim constitutes two crimes, not one.

Applying the defining concepts of RICO to the typical financial crime indictment yields the following result: Because the business criminal almost always works for or through a business firm of some kind,

19. The use of RICO against white-collar offenders is hardly a new phenomenon. Frauds of all sorts have been prosecuted under RICO from the beginning. What is new in the most recent wave of RICO cases in New York is less the general strategy of using RICO in white-collar cases than the fact that the defendants or targets have been influential and "respectable" members of the New York financial establishment who have ready access to the financial press to publicize their grievances.

20. See Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 Duq. L. Rev. 771 (1980).

21. See 18 U.S.C. §§ 1341, 1343 (1988).

the enterprise element is easily satisfied, and given the multiplicity of mail or wire communications involved in any substantial financial transaction, any fraudulent scheme is likely to constitute a pattern of racketeering activity.²² Thus, RICO is theoretically available in white-collar cases virtually whenever the Justice Department chooses to use it.

The chief benefit prosecutors receive when they choose to apply RICO is vastly increased penalties. Before Congress raised the fines applicable to various federal crimes in 1984, the maximum fine for mail fraud violations was only 1000 dollars per count, a ridiculously small amount of money for the chief federal statute used in prosecuting multimillion dollar frauds. Even now, RICO forfeitures potentially provide substantially greater financial penalties than even the present increased fines.

Moreover, RICO provides a method of tying up the assets of affluent defendants prior to trial. The provisional remedy provisions of RICO²³ permit a court to enter a restraining order before trial, freezing the defendant's potentially forfeitable assets to assure their availability for forfeiture if the defendant is convicted. Recently, prominent white-collar defense attorneys and the critics of RICO have maintained that this provision of RICO can force substantial financial institutions out of business before they have been convicted of wrongdoing, or can terrify them into guilty pleas in order to avoid the paralyzing effects of RICO remedies.

It is difficult to separate the hype from the reality in these claims. Certain points, however, are clear. First, penalties for business crimes rarely have been adequate to deal with the magnitude of white-collar wrongdoing. Legislatures and judges understandably have sought to reserve scarce prison cells for violent and narcotics offenders. Thus, jail sentences often have been foregone in business crime cases or, where imposed, have been lenient. Further, few offenses carry fines that can match the potential profits in securities and financial misconduct in a trillion-dollar economy. Forfeiture of the profits from such misconduct is an attractive way to key the penalty to the magnitude of the crime.

22. Few mail fraud indictments charge only a single count. The ability of prosecutors and plaintiffs to multiply predicate acts in mail fraud cases led some courts to hold that a RICO pattern requires not just two criminal *acts*, but two separate *schemes*. This view, which had nothing in the text or history of RICO to recommend it and was mostly an expedient to permit dismissal of civil RICO suits believed by courts to be abusive, was rejected by the Supreme Court in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). The Supreme Court left little clear direction about what constitutes a RICO pattern, but most business fraud cases in which criminal prosecution is contemplated seriously will be complex enough that the "relationship plus continuity" standard articulated by the Court will be met easily.

23. 18 U.S.C. § 1963(e) (1988).

It is important to realize, however, that RICO forfeitures are not keyed exclusively to the size of the crime. In addition to forfeiture of the proceeds of the crime, RICO permits forfeiture of the defendant's "interest in" the enterprise.²⁴ As noted above, this is a legacy of the original purpose of RICO, the expulsion of infiltrating racketeers from legitimate businesses.

What makes sense as a tool against infiltrating racketeers, however, becomes an arbitrary wild card in the case of ordinary business people who become involved in fraudulent activities. Suppose, for example, that two executives of a publicly traded corporation engage in a pattern of fraudulent conduct in pursuing the corporation's business. Upon conviction, the two executives are liable to forfeiture of their profits, of course. They also are subject to forfeiture of their "interest in" the enterprise, however, which in this case is any stock they hold in the company. If Defendant *A* has invested his life savings in his company's stock, he will lose it all, even if the amount is disproportionate to the magnitude of the crime.²⁵ Meanwhile, if Defendant *B* has gambled away his fortune, or invested in certificates of deposit, he will lose nothing more to RICO.

The apparently arbitrary and potentially excessive forfeiture remedy is not merely hypothetical. In a recent New York case²⁶ the owner of a chain of gas stations habitually understated his New York State sales tax. The failure to pay the sales tax on gasoline was not even a crime under New York law at the time. Prosecutors nonetheless chose to charge him with RICO violations, because the tax evader committed a series of federal mail fraud violations by mailing in phony returns. The enterprise essentially was his entire gas station empire. Each station was operated by a separate corporation, and other corporations owned the land under each. The result was forfeiture of his interest in the enterprise. Although the defendant's speculation was hardly trivial—he had defrauded the State of over five million dollars in sales taxes over several years—the value of his business was obviously far

24. *Id.* § 1963(a)(2)(A).

25. The only apparent limit on this forfeiture is the cruel and unusual punishment clause of the eighth amendment to the Constitution, which prohibits excessively disproportionate punishment. At least one court has held that the eighth amendment prohibits disproportionate RICO forfeitures. See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). Yet no appellate court actually has voided a RICO forfeiture on this ground. *But see United States v. Regan*, 726 F. Supp. 447 (S.D.N.Y. 1989). The only modern case in which the Supreme Court has found a punishment other than death to be disproportionate to any crime involved a sentence of life imprisonment without parole for a nonviolent recidivist convicted of passing a \$100 bad check. *Solem v. Helm*, 463 U.S. 277 (1983). This does not suggest that RICO defendants can expect much relief.

26. *United States v. Porcelli*, 865 F.2d 1352 (2d Cir.), *cert. denied*, 110 S. Ct. 53 (1989).

greater than the sum of his unpaid taxes.²⁷

At a minimum, any meaningful RICO reform should revise the forfeiture provision to eliminate the forfeiture of the interest in the enterprise, at least for violations of section 1962(c).²⁸ A far more equitable remedy would tie the forfeiture directly to the amount of the proceeds by permitting forfeiture of some multiple of the profits.²⁹ Maintaining a mandatory forfeiture provision that can have entirely arbitrary results is unjustified.³⁰

But are the forfeiture and provisional remedy provisions driving legitimate businesses to plead guilty, or imposing unjustified punishment before trial? Here the RICO critics considerably overstate the case, and may be guilty of special pleading on behalf of wealthy white-collar defendants.

The provisional remedies of RICO have a certain value. If one goal of RICO is to prevent criminals from profiting from their crimes, some method of freezing those profits is desirable to prevent defendants from hiding those profits through fraudulent transfers, or from squandering them in a last preconviction spree. These provisional remedies do not constitute punishment without trial, at least as the Supreme Court currently understands the traditional presumption of innocence. The institution of a criminal charge always has been seen as justifying some restraint on liberty, and recently the Court and Congress have permitted far more drastic curtailments than RICO provisional remedies. If it is constitutional to jail someone pending trial because the trial judge thinks the person is a danger to the community,³¹ the provisions for freeze orders are at least as well justified.

Freeze orders do not necessarily paralyze a business. Trial judges have discretion to enter the sort of provisional order that is necessary to protect the government's interest in eventual forfeiture. In most instances, these orders have permitted the posting of a bond to secure the

27. The defendant also forfeited portions of several other businesses into which the proceeds of his tax evasion had been plowed, to the extent of their participation in the profits. Interestingly, the Second Circuit in *Porcelli* appears to have limited the total amount of the forfeiture according to some sort of disproportionality rule, but the precise nature and origin of the rule are not clear from the court's opinion. See *Porcelli*, 865 F.2d at 1364-67.

28. In violations of §§ 1962(a) and 1962(b), which more closely reflect the initial purpose of RICO to prohibit infiltration of legitimate enterprises by criminals, the creation of the interest by investment of criminal profits or by force or fraud is the essence of the crime, and the forfeiture of that interest is more likely to be proportionate to the magnitude of the crime. See 18 U.S.C. § 1962(a), (b) (1988).

29. Forfeiture only of the amount of the profits obviously is inadequate. Having to give back the proceeds of the crime is a minimum disincentive to criminal activity.

30. Such forfeitures, both civil and criminal, are becoming increasingly common in our law, particularly under the narcotics laws.

31. See *United States v. Salerno*, 481 U.S. 739 (1987).

amount of the forfeiture. These bonds do not tie up a target's entire assets. Moreover, even when a bond is not obtained, and a RICO restraining order is imposed, the order does not literally freeze all of the target's money. In the notorious Princeton/Newport case,³² for example, the order prevented only extraordinary transfers and gave the government access to the company's records.³³ All transactions in the ordinary course of business were permitted.³⁴ If Princeton/Newport was forced out of business by the RICO restraining order, it likely was not because the terms of the order made it impossible to do business. Rather, to the extent that the decision to close up shop was the result of the indictment, that decision should be seen, in a sense, as the normal operation of the market. Other firms surely would be leery of doing business with a financial institution that not only stood accused of extensive fraud, but also stood to lose a substantial portion of its capital and several of its leading figures if the charges were proved. These factors would or should have been just as present had there been no restraining order.

Prosecutors, of course, always should be aware of the devastating impact of bringing criminal charges, even if those charges ultimately are not sustained.³⁵ But these effects frequently are present when criminal charges are brought against defendants whose reputation is important to them. The case is hardly proven that RICO's restraining order provisions radically aggravate this already hard fact of life.

It similarly is not uniquely true of RICO that prosecutors' discretion to choose what criminal charges to pursue, and the possible imposition of interim remedies, can intimidate defendants who might be acquitted into pleading guilty. Try telling an accused street dealer of narcotics about the excessive leverage RICO gives the United States Attorney to "force" guilty pleas from rich and powerful financial institutions, after he has been detained pretrial in lieu of bail in an overcrowded urban jail, offered a guilty plea with a sentence of time served, and confronted with the reality that if he goes to trial he not only risks a much longer sentence, but faces certain confinement until the overcrowded court reaches his case. RICO gives wealthy white-collar defendants, who have the resources to fight the system that most defendants lack, a taste of the hard realities of plea bargaining justice

32. The Princeton/Newport case is a centerpiece of the anti-RICO argument.

33. See *United States v. Regan*, 858 F.2d 115 (2d Cir. 1988).

34. *Id.*

35. Indeed, since this Paper was drafted, the Justice Department has issued widely publicized instructions to prosecutors to consider with particular care the collateral effects of RICO restraining orders on legitimate businesses. See CRIMINAL DIV., U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-110.414 (1989) [hereinafter U.S.A.M.].

as it is experienced every day by less well-heeled defendants.³⁶

It is difficult, moreover, to credit the claims of potential RICO defendants that they pleaded guilty despite genuine innocence. The principal inducement to a guilty plea in any case is the likelihood of conviction, and the expectation that the ultimate penalties after trial, combined with the financial and emotional costs of a trial will far exceed the costs of an immediate settlement. Particularly when the defendant is a corporation rather than a human being facing prison, this decision is a rather cold business calculation. It is doubtful that a company will be willing to pay hundreds of millions of dollars in fines in fear of a case it expects to beat, simply because it is worried about having to post a bond pending the outcome of the trial.

Still, even if RICO restraining orders do not paralyze legitimate businesses, and even if the guilty plea decisions of RICO defendants, like those of every defendant, are based principally on comparing the likelihood of conviction with the amount of guilty plea discount the prosecutor is willing to give, it unquestionably is true that RICO strengthens the hand of prosecutors in the bargaining marketplace by increasing the potential pain of conviction. This strengthening admittedly is subject to abuse. In the ordinary case, the prosecutor's ability to threaten the defendant with enhanced charges is limited by his ability to prove them. Because proof of murder is more difficult than proof of manslaughter, the prosecutor's discretion to choose which charge to bring is controlled somewhat by the fact that if he brings the more serious charge, he will have to prove the additional elements. As we have seen, there usually is nothing extra to prove in white-collar RICO cases. The government thus can threaten to raise the stakes on a particular defendant without a meaningful increase in their burden of proof. As in the political corruption cases, the chief vice of RICO is that it makes enhanced punishments available on the basis of vague and abstract elements that do not in fact reflect enhanced guilt.

In both of these categories of cases, then, the enhancement of the prosecutor's power effected by RICO is not especially troubling: there should be federal jurisdiction in the corruption cases that RICO per-

36. It is, of course, difficult to take much comfort in the operations of RICO by comparing it to the "normal" oppressiveness of the criminal justice system. One is uncomfortably reminded of the Supreme Court's rejection of evidence of racism in the administration of the death penalty in *McCleskey v. Kemp*, 481 U.S. 279 (1987), on the ground that if such arguments were allowed to prevail the whole criminal justice system could be invalidated, *id.* at 314-19. Still, it is important to realize that the claimed excesses of RICO are analogous to other procedures that have become accepted parts of our law. If these features of RICO really are unacceptable, the consequences for the system are broader than most RICO critics realize or intend; if such practices as preventive detention are justified, it is hard to see what is wrong in principle with pretrial RICO restraining orders.

mits to be brought federally, and there should be enhanced penalties, and probably provisional asset-restraining orders, in many white-collar criminal cases. The problem is not so much what RICO does, but the indiscriminate way that RICO does it, with the corresponding increase in prosecutorial discretion to decide when additional penalties will be available without reference to a meaningful statutory standard.

C. *Organized Crime Cases*

Contrary to what one would expect from reading the *Wall Street Journal*, the most radical revision of the ordinary rules of the criminal game effected by RICO is in organized crime cases, not white-collar cases. RICO's most dramatic success story is its use against organized crime, but that success has come by an equally dramatic reshaping of the nature of criminal trials.

The traditional criminal trial focuses on a single criminal incident, defined in terms of a traditional crime based on a particular kind of physical act. A trial for murder, rape, or robbery asks whether one, or occasionally more than one, defendant committed a particular type of action on a single occasion. The rules of evidence generally preclude reference to the defendant's prior record and to his unsavory associations with others with criminal records. Rules of joinder carefully limit the extent to which several unrelated charges, against the same defendant or against others, can be brought together into the same trial. Jurisdiction over the crime, and the venue in which the trial is to be held, are limited by the type of crime and the place where it was committed. The statute of limitations precludes prosecution of crimes that took place long ago, and double jeopardy prevents the cumulation of punishments for the same act. All of these consequences flow in large part from the fact that crimes are defined so that each crime is kept distinct from each other.

These various rules protect the innocent against wrongful conviction by forcing criminal trial juries to focus on the strength of the prosecution's evidence that the defendant committed the single particular crime on trial before them, undistracted by prejudicial evidence that he committed other wrongs, and unconfused by evidence about other crimes committed by codefendants. In return, these rules also can protect organized criminals from having the full scope of the evidence against them exposed to view. If organized crime chiefs can insulate themselves by using others to carry out their unlawful plans, the evidence against them in the case of each particular crime may be weak, even though the cumulative evidence associating them with a series of criminal acts makes plain their involvement in a criminal organization.

RICO totally inverts many of these ordinary rules of criminal trial,

without amending a single one of them, by the simple expedient of redefining many separate physical crimes as a single abstract offense. Because the operation of an enterprise (the criminal gang) through a pattern of racketeering (a succession of separate crimes) is defined as a single offense, rules that confine the nature of a trial by focusing on the individual offense suddenly lose their character. For example:

1. Evidence that a defendant has committed other crimes in the past becomes relevant because those crimes can be charged as part of the pattern of racketeering. Multiple crimes, even crimes very different in their nature or in the time or place of their commission, may be charged against the defendant in a single case.

2. Evidence that a defendant associates with disreputable colleagues is no longer extraneous, prejudicial matter, but is an essential element of the government's proof: in order to prove the existence of the enterprise, the prosecution may be able to demonstrate who the defendant associates with, and what those associates have done, even if the associates are not on trial and their acts are not among the charged predicates for the RICO violation. Indeed, certain evidence that normally would be excluded as irrelevant and prejudicial to the question of whether the defendant committed a particular crime, such as allegations of Mafia membership, can be introduced in RICO trials because the defendant's membership in the criminal enterprise is an element of the offense. Not only will proof of the defendant's involvement be admitted, but expert FBI agents may be permitted to testify at length about the nature and scope of the criminal enterprise.

3. Crimes that ordinarily would not be tried together can be joined. This is true in several respects. If a defendant is charged both with narcotics offenses and bank fraud, courts normally would sever the charges so that the defense of the white-collar charge would not be prejudiced by evidence of involvement in a more nefarious business. If both crimes are alleged as part of a RICO violation because both were allegedly committed in furtherance of a single criminal enterprise, however, the two offenses cannot be severed because they are now part of a single crime.

4. This kind of joinder also is permitted across jurisdictional lines. If the government charged the defendant with murder and a narcotics offense, the two offenses could not be tried together in a federal court because murder is rarely a federal offense. If the crimes allegedly were committed in separate states, they could not be joined in any court because different states would have jurisdiction of the state offenses, and, even if two federal offenses were involved, venue would lie in different federal districts. RICO, however, permits a jury in the same federal district to hear evidence of all the defendant's misdeeds at once. If all of

the defendant's acts are related to an ongoing criminal enterprise, they become part of a single crime, with jurisdiction in the federal court and venue lying wherever any part of the crime was committed.³⁷

5. Mass trials of large numbers of defendants charged with participating in the same RICO enterprise become not only possible, but expected. A defendant charged with RICO conspiracy for participating in some minor, nonviolent ventures of the enterprise may be forced to sit through a trial lasting many months in which that person is mentioned only during a few days of testimony, while the more repugnant misdeeds of numerous codefendants are related at length. A severance is not required because all the defendants are participants, in their separate ways, in a single crime.

6. Defendants may be forced to defend themselves against accusations that they committed a crime years earlier. While the statute of limitations may bar punishment for that crime itself, because RICO is a single crime, as long as the pattern of racketeering is alleged to have continued to within five years of the date of indictment, predicate acts that took place long ago may be charged as part of the same offense.³⁸

In addition to the examples above, the defendant in an organized crime trial may be disadvantaged further by another feature of the RICO remedy structure. Aspects of the RICO forfeiture scheme may make it impossible for the defendant to be represented by private counsel.

Under RICO, forfeitable interests vest in the government and the asset becomes forfeitable at the time the violation is committed, not at the time of conviction.³⁹ A drug dealer's profits, for example, belong to the government from the moment the profits are made. If the drug dealer buys a Mercedes-Benz, the car is bought with the government's money. Not only is the Mercedes forfeitable,⁴⁰ but the government also can recover the money itself from the car dealer, unless the dealer demonstrates that "at the time of the purchase [he] was reasonably without cause to believe that the property was subject to forfeiture."⁴¹

37. In a RICO case involving Croatian nationalist terrorists, a jury in a New York federal court convicted defendants of RICO violations based on crimes that took place in Chicago, Los Angeles, Canada, South America, and Europe. No offenses other than RICO were included in the case, apparently because none of the defendants had committed any specific federal crime in New York. See *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

38. 18 U.S.C. § 1961(5) (1988). The only limit is that crimes may not be charged as part of the same pattern if there is more than a ten-year gap between acts of racketeering. *Id.* Theoretically, a RICO pattern is possible in which a defendant committed one crime four years ago, and another nine years before that, and another nine years before that, and so on.

39. *Id.* § 1963(c).

40. It is "property . . . derived from . . . racketeering [proceeds]." *Id.* § 1963(a)(3).

41. *Id.* § 1963(c).

Perhaps the car dealer can show that he had no reason to suspect he was being paid with tainted funds. A criminal defense attorney asked to represent someone indicted under RICO will have a harder time, however. How can the defense attorney be "reasonably without cause to believe" his client's money is forfeitable when the indictment on which the client needs defense seeks forfeiture of all his assets as the product of racketeering activity?⁴² Unless the defendant has assets from some unquestionably legitimate source, any fee the defendant pays his lawyer could be reclaimed by the government after trial.⁴³

The Supreme Court recently held that the posttrial recapture of tainted funds is indeed the consequence of the forfeiture provisions of RICO and the parallel narcotics forfeiture statutes, and that the statutes do not violate the sixth amendment right to counsel, because there is no right to use the proceeds of crime to hire a lawyer.⁴⁴ As with most apparently startling consequences of RICO, the Court's statutory holding seems inescapable under the language of RICO.

The constitutional question is closer.⁴⁵ Regardless of whether there is a constitutional violation, there is at least an appearance of unfairness in preventing a defendant from using funds in his own defense before it has been proved that the money is not the defendant's. It is not quite the same as the money found in the sack of the bank robber caught red-handed, after all. Whether the money in question is forfeita-

42. This problem, of course, is less threatening to white-collar defendants who generally have substantial assets that come from their legitimate activities. That is not inevitably the case, however. The RICO indictment of participants in the New York City Parking Violations Bureau scandal, for example, sought forfeiture, among other things, of the city salary of at least one defendant, apparently on the theory that it was a fruit of the crime because he would not have been given the job had he not been a participant in the corruption plot. In such a case, it is difficult to see where the defendant could come up with untainted assets to pay counsel. *See generally* United States v. Regan, 726 F. Supp. 447 (S.D.N.Y. 1989) (forfeiture sought of salaries of Princeton/Newport defendants).

43. Moreover, it should be noted that if a restraining order is in place, the defendant lacks access to funds to pay the fee in the first place.

44. *See* Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989); United States v. Monsanto, 109 S. Ct. 2657 (1989).

45. The issues are well canvassed in the Supreme Court opinions and in the voluminous literature on attorney's fee forfeiture. It should be no surprise that of all the many controversies over RICO, the one that directly affects lawyers' pocketbooks probably has generated the most commentary. I would add only that the most interesting claim of unconstitutionality is the argument that sounds not in the rights of the individual defendant, but in the structural impact of fee forfeiture on the balance of forces between the defense bar and the prosecutors. Most will see this as a policy argument against the wisdom of the statute because our constitutional tradition favors interpretations of the Bill of Rights in terms of individual rights. The argument that some constitutional liberties demand structural protection, however, is not alien to American constitutionalism; the Framers of the original Constitution thought that liberty was better protected by creating governmental forms rather than through a Bill of Rights. We might profit by exploring further the possibility that provisions of the Bill of Rights also guarantee not only individual but aggregate fairness in procedural systems.

ble is likely to be a hotly contested issue at trial. In any case, unlike the proceeds of larceny, which belong to the victim, forfeitable property only "belongs" to the government in a highly artificial sense. The money is forfeited not to return it to its real owner, but as punishment for the crime of which the defendant has yet to be found guilty.

Nor is it necessary to forfeit attorney's fees in order to deprive the defendant of the fruits of crime. Assuming that the fee transaction is not a sham designed to place assets formally beyond the government's reach, the defendant is being deprived of the fruits of his crime—expensive criminal defense lawyers, unlike expensive cars or diamonds, generally are not regarded as desirable luxury goods for which people are willing to commit crimes. If the government cannot object to the greater chance of acquittal that might result from the employment of better lawyers, it is hard to see why allowing the funds to be used in improving the quality of the trial is equivalent to permitting defendants to enjoy the fruits of crime.

Once again, however, the most troubling aspect of potential attorney's fee forfeiture is not necessarily the fairness or unfairness in the abstract of what RICO theoretically permits. As the Justice Department frequently has pointed out, it has not engaged in across-the-board efforts to take RICO to its limits and insist on examination and possible forfeiture of attorney's fees in all or most cases. To the contrary, actual efforts to forfeit fees are infrequent. The very restraint of the Justice Department, however, again highlights the essential difficulty with RICO: the statute makes fairness depend not on the law, but on the restraint of prosecutors in using the law. The open-ended nature of RICO seems to permit the government to decide whether to try defendants under the normal rules, or under new rules highly advantageous to the prosecution. We should fear both the possibility that prosecutorial restraint will wear away over time, as the once startling attributes of RICO prosecutions become familiar and accepted, and the uncertainty of the standards used by prosecutors today in deciding exceptions to the general policy. If fee forfeiture is rare, what distinguishes the cases in which prosecutors seek forfeiture from the general run of cases in which they do not?

Whether such a radical revision of the normal rules of criminal procedure and evidence is a necessary part of the fight against organized crime is a controversial question, and is too broad to address in detail here.⁴⁶ Although I believe I am in a minority among lawyers or scholars of criminal law, I would say that the effects of RICO on organized crime prosecutions are justified by the difficulty of prosecuting major criminal

46. I have addressed this issue at some length in a previous article. See Lynch, *supra* note 2.

enterprises under the traditional rules, even though the benefits come at a significant price to the fairness of trials, particularly to marginal defendants in multidefendant cases.⁴⁷

RICO, however, is not tailored to apply only in those cases of structured organized criminal groups for which these radical measures are claimed to be necessary. Because RICO was not drafted with the focused goal of defining and punishing membership in an organized crime group, it not only applies to the other sorts of crimes discussed above, but also permits prosecution under the "Mafia rules" of defendants whose criminal "organizations" are much less formidable, and indeed hardly are distinguishable from the shabby criminal careers followed by free-lance offenders.⁴⁸ In numerous RICO prosecutions of "illicit enterprises," the only continuing structure of the "criminal organization" is the presence of the principal defendant and, perhaps, the government informer who is the chief witness at trial, in a series of crimes that are loosely connected.⁴⁹ It is doubtful whether the normal rules need to be suspended to deal with such offenders.

D. Summary

Defining the uses and abuses of RICO is difficult, because the statute is so broad and amorphous that its advantages and problems are constantly shifting, depending on the context in which it is used. The forfeiture remedy, for example, seems arbitrary and abusive in certain applications in the white-collar context, but functions fairly smoothly in the context of criminal organizations or political corruption, when the defendants usually do not have widely varying financial "interest[s] in" the charged enterprises, and the chief item of forfeiture is the proceeds of the crime. On the other hand, the problem of attorney's fee forfeiture is mostly a phenomenon of the use of RICO against criminal enterprises, for it is mostly there that defendants lack substantial untainted assets. The inversion of the normal rules of criminal procedure that enhance the risk of unjust convictions in the organized crime context is rarely a problem in business crime or corruption cases. In those cases the multiple crimes forming the pattern usually are more closely re-

47. See *United States v. Casamento*, 887 F.2d 1141 (2d Cir. 1989) (affirming the "Pizza Connection" convictions); Comm. on Crim. Advocacy, Ass'n of the Bar of the City of New York, *Mega-trials*, in 2 WHITE COLLAR CRIME REP. 1 (1988).

48. For an example of a proposed statute that was drafted carefully to define and punish membership in an organized crime, see Nat'l Comm'n on Reform of Fed. Criminal Laws, Study Draft of a New Federal Criminal Code § 1005 (1970) (commonly referred to as the Brown Commission).

49. See, e.g., *United States v. Elliott*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). For a discussion of *Elliott*, see generally Lynch, *supra* note 2.

lated, probably would be tried together under normal evidentiary and procedural rules, and present less chance of prejudice from the proof of distantly related, more repugnant crimes committed by codefendants.

The advantages of RICO are equally various. The jurisdictional advantages of RICO in permitting federal investigation and prosecution of corrupt local officials are a minor factor in business fraud cases in which federal jurisdiction is the norm in any case. On the other hand, the enhancement of otherwise inadequate penalties is less of a necessity in the corruption cases, in which jail sentences are common and massive financial penalties usually are not needed, than in business and securities fraud cases. Moreover, the creative presentation of broad ranging criminal activities that makes RICO so potent a weapon against otherwise invulnerable organized crime chieftains rarely is necessary in white-collar cases.

This same variousness that makes RICO advantageous, however, is the principal, inescapable vice of RICO. Its vague terms, which make it potentially applicable in such a wide variety of completely different situations and which allow prosecutors to invoke it at will in cases that are no more serious or threatening than ordinary criminal behavior, make RICO a dangerous instrument. Many of RICO's uses reveal problems or weaknesses in the federal criminal code that would need to be remedied if RICO were modified or repealed. Setting aside a few disturbing cases, moreover, RICO has not been abused by federal prosecutors. In those rare instances when RICO has been abused, the victims of the abuse are usually guilty of crimes, so that it is hard to muster great public sympathy for procedural abuses or unfair prosecutorial plea bargaining tactics. Accordingly, there is little outcry over criminal RICO.

It is not enough, however, to say that prosecutors have not abused RICO, or that they generally have chosen those severe cases that merit invoking this powerful weapon. If we are to have a government of law, Congress must take the responsibility of rationally defining cases in which federal jurisdiction is appropriate, crimes for which penalties should be increased, cases in which degrees of guilt should be specified and punishment enhanced, and, most of all, those cases, if any, in which carefully devised procedural rules for the protection of the innocent should be altered or suspended. It is irresponsible to leave it to prosecutors to decide these matters on a case by case basis applying an abstract and amorphous offense.

IV. WHAT CIVIL RICO DOES

In addition to permitting criminal prosecution of violators, RICO permits "[a]ny person injured in his business or property" by a violation of the statute to sue the offender civilly and recover treble damages

and attorney's fees.⁵⁰ As private plaintiffs have discovered the potential benefits of this statute, RICO civil suits have increased dramatically, with more than one thousand new cases filed every year.⁵¹

If one genuinely believes that RICO defines a serious form of criminal conduct, it would be difficult to quarrel with the sweep of RICO's civil remedy. Why shouldn't victims of criminal acts—let alone victims of especially serious, organized crime offenses—be authorized to recover damages in federal court? And if extraordinary remedies such as treble damages and attorney's fees are ever appropriate, would they not be particularly appropriate in cases in which the defendant had committed not merely a civil wrong, but a "pattern of racketeering acts?" Crime victims should be able to recover damages, and, in cases in which the criminal justice system is unable to act for one reason or another, the availability of civil remedies will attract civil plaintiffs as "private attorneys general" to enforce the law on their own behalf.⁵² So, what could be the problem with civil RICO?

One problem is that civil lawsuits are not a particularly effective response to most kinds of crime, and particularly to the most serious sorts of violent crime. If the Godfather threatens to break your legs if you fail to pay your debts to a loanshark, it seems unlikely that your immediate response is to file a lawsuit. Organized criminals who earn profits through violence and intimidation may be too frightening for a private citizen to attack through the courts. Nor is that the only reason why civil RICO suits against mobsters are rare. Ordinary citizens and their civil attorneys find it hard to collect evidence against defendants who are difficult for the United States Department of Justice to investigate and bring to trial. Even should a successful suit be maintained, who can expect to find the assets of criminals whose whole career is devoted to maintaining power and wealth without having any traceable income? It is no surprise, then, that private lawsuits against violent criminals or members of organized crime do not account for the boom in civil RICO suits.

According to one study, allegations of business or securities fraud

50. 18 U.S.C. § 1964(c) (1988).

51. The actual number of civil RICO cases filed every year is a matter of some dispute. The most commonly cited statistics derive from a form filled out by plaintiffs' attorneys at the time a suit is filed. Because the characterization of the suit on the form is a subjective decision by the plaintiff's attorney, the figures may substantially undercount the number of suits. Anecdotal reports from judges frequently give much higher estimates of the number of cases including causes of action under RICO.

52. Just as professional soldiers may find a volunteer militia a less-than-desirable supplement to the regular troops, the enlistment of private attorneys general to help enforce criminal laws may not be greeted by professional prosecutors as a significant benefit. See Lynch, *How Useful Is Civil RICO to the Enforcement of Criminal Law?*, 35 VILL. L. REV. (forthcoming 1990).

account for the vast bulk of the RICO explosion.⁵³ These cases, which are regarded by most judges and commentators as cases of "garden variety commercial disputes," comprise nearly three-quarters of all reported RICO cases.⁵⁴

The reasons why civil plaintiffs invoke RICO are parallel to those that attract federal prosecutors. One reason is jurisdictional. If you have a contract dispute with a customer or supplier, or a claim that you were cheated in a real estate transaction, your ordinary recourse will be to state courts. Absent diversity of citizenship, there will be no federal jurisdiction. In most commercial centers, however, the state courts are clogged and inefficient. In many parts of the country, and certainly in New York, lawyers generally prefer to litigate in federal court. This preference for federal court is due to the lower caseloads, the availability of the courts' attention, the modern rules of procedure, and the judges' enhanced reputations. If a claim can be recast as a RICO claim, federal jurisdiction will be available, both for the RICO claim itself and, through the doctrine of pendent jurisdiction, over more conventional causes of action that may be asserted as well.

Just as prosecutors are attracted by the higher penalties and plea bargaining leverage RICO gives them over criminal defendants, civil plaintiffs are attracted to the treble damages and attorney's fees that are available under RICO but not under more traditional legal theories. Many attorneys have remarked that if a client has a legitimate claim that can be cast in RICO terms, it is virtually malpractice not to add a RICO cause of action to the complaint. A lawyer would be hard pressed to prove that she represented her client zealously if she failed to take advantage of a provision that provides three times the payoff, and, unlike ordinary litigation, permits recovery of the costs of pursuing the suit. Furthermore, framing the suit as a RICO claim labels the defendant a racketeer—terminology that increases the settlement pressure on defendants worried about the reputational damage of extended and possibly unsuccessful defense of a lawsuit.⁵⁵

Of course, RICO's attractive incentives to plaintiffs would not matter if RICO's benefits were available only in a carefully defined category

53. Jost, *Racketeering Law Comes Under Attack*, 1989 EDITORIAL RES. REP. 134, 141 (citing statistics compiled by the staff of the ABA Task Force on Civil RICO).

54. *Id.*

55. I personally believe that this common view is an oversimplification. Whether it is in a client's interest to add a RICO count to a complaint is in fact a more complex question. Increased motion practice with its ensuing delays and costs, judicial hostility to civil RICO, enhanced intransigence from defendants incensed at being branded racketeers, and generally increased complexity of litigation all are disadvantages that should be considered before a complaint is drafted to include RICO. At least when the RICO claim is doubtful, it may be more trouble than it proves ultimately to be worth.

of cases. Although plaintiffs might wish to take advantage of the attractive remedies, they could not do so unless they legitimately could allege that the specified violation had been committed. Once again, though, the sprawling shapelessness of RICO creates the problem, making it relatively easy for plaintiffs to formulate a RICO cause of action.

Because mail fraud and securities fraud are predicate crimes for a RICO violation, it is easy to convert a business dispute into a pseudo-criminal charge. There is little, if any, substantive difference between the elements of civil and criminal securities law violations. To the extent that the criminal violation requires a more stringent showing of intentional wrongdoing, the lesser civil burden of proof significantly mitigates the difficulty. Thus, virtually any litigation in which a plaintiff alleges a violation of the securities laws can be recast as a claim that criminal acts have occurred. The enterprise and pattern elements necessary to turn the securities claim into a RICO violation are also easy to allege: because all securities law violations are committed in the course of conducting the affairs of some business enterprise or other, the enterprise element is automatic, and the pattern requirement is satisfied if more than one technical violation can be charged.⁵⁶

Creating a RICO complaint is not difficult outside of the securities area either. An aggrieved party can describe most kinds of commercial dispute as some species of fraud, and, therefore, given the ubiquity of the mails and interstate wire communications, as mail or wire fraud. Once again, escalating the claim of criminal fraud into a RICO claim is easy.

56. The search for limitations on RICO in the "pattern" requirement now should be recognized to have failed. Courts dissatisfied with the ease of creating "patterns of racketeering" have sought long and hard to limit the meaning of that term. In particular, the patent injustice of making RICO violations out of multiple instances of mail fraud when the only multiplicity is in the number of letters mailed has led some courts to hold that a RICO "pattern" must include proof not of multiple acts of mail fraud but of multiple fraudulent schemes. The Supreme Court's rejection of this effort was well founded. See *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893 (1989). The "multiple scheme" qualification is virtually impossible to square with the language of the statute, which makes each "act . . . indictable under" the mail fraud statute a separate act of racketeering. 18 U.S.C. § 1961(1)(B) (1988). Moreover, the "multiple scheme" requirement is itself vague. Furthermore, the multiple scheme rule would rule out of the statute's coverage classic RICO violations. A defendant who sets out to deceive thousands of consumers through a pattern of fraud is indeed conducting his business through an extensive pattern of fraudulent acts, precisely *because* the massive fraud is part of a single scheme. The efforts to elaborate on the meaning of "pattern" have only spawned further litigation, as plaintiffs and defendants battle over the proper interpretation of a bundle of confusing and contradictory precedents. The real problem is that the concept of pattern itself has little content. A rather simple instruction that juries should not find a pattern where the conduct was merely isolated or sporadic seems far more helpful than all of the judicial efforts to define a pattern. Judicial resistance to adopting such a straightforward rule stems more from judges' desire for a means of disposing cases at the motion to dismiss or summary judgment stage than from analysis of the statute.

Winning all these lawsuits is another matter, though. Defenders of civil RICO make much of the fact that the courts reject the most obviously meritless RICO claims. This claim, however, obscures the reality of litigation, both for courts and for litigants. Sorting through the complicated issues that RICO cases present clearly adds significantly to the workload of an overburdened judicial system. Even dismissing a complicated lawsuit is a significant operation that requires significant judicial resources. And prevailing on a particular claim is not always the objective for all litigants. Most lawsuits are settled, and adding to the plaintiff's bargaining position even a small chance of tripling the recovery can shift significant resources toward plaintiffs.

Many plaintiffs, indeed, have meritorious demands, and our system of protracted litigation provides significant advantages for defendants, especially those with deep pockets. There is much to be said for the proposition that plaintiffs with legitimate grievances are undercompensated by our system of litigation, and an appealing case can be made that an enhanced civil remedy for the victims of crime is desirable. Yet, a serious attempt to strengthen the hands of deserving plaintiffs requires careful analysis of what sort of claims present genuine problems of undercompensation, and what solutions are available to eliminate obstacles to legitimate recovery in those cases, without concurrently enhancing the ability of plaintiffs with frivolous claims to coerce settlement of nuisance lawsuits. It is questionable whether randomly bolstering the bargaining position of those plaintiffs who can meet the rather arbitrary pleading requirements of civil RICO is a particularly desirable way to redress whatever imbalances may exist.

The journalistic debate on civil RICO is replete with descriptions of situations in which RICO has benefited meritorious cases, and equally many in which plaintiffs have brought frivolous cases into the federal courts, or have even won excessive settlements or verdicts, in part because of RICO. Consumer groups claim that RICO has been or could be used as a valuable weapon against consumer fraud, and civil libertarians counterclaim that it has been or could be used to intimidate demonstrators.

As with similar claims on the criminal side, however, it is wise to look beyond the specific applications to the basic concepts of RICO. A law that strengthens the hand of plaintiffs in a generalized and somewhat random way, like one that similarly strengthens prosecutors, surely will be capable of valuable applications when plaintiffs with meritorious claims hold an otherwise weak bargaining position. Such a law also will be subject to occasional abuse. The question is whether the law has been drafted to single out categories of plaintiffs who ought to be strengthened, or whether the law's effects are substantially random.

The defenders of civil RICO are by and large correct that the horror stories about RICO are exaggerated: the most ridiculous examples of wild RICO claims are cases that have been dismissed by the courts. But the critics, I think, are more fundamentally correct. If over seventy percent of the civil RICO cases are essentially ordinary business disputes in which no prosecutor would dream of charging criminal violations, there is little justification for continuing a civil remedy as broad as the present law contains.

It is worth emphasizing yet again, however, that the only difference between civil RICO and criminal RICO is the greater restraint and the more limited resources of prosecutors. Every civil RICO claim that survives a motion to dismiss by definition charges the defendant with a criminal violation of RICO. If the civil remedy is excessive, then so is the definition of the crime.

V. WHAT PENDING RICO REFORM BILLS DO

In two words, not enough. The bills under study in congressional committees address only the civil remedy of RICO and ignore the basic conceptual flaws in the statute. With respect to civil RICO, furthermore, the reform efforts tend to introduce additional complications into an already overly complex statute by adding Rube Goldberg-like ad hoc correctives to deal with what their proponents see as abuse of the statute. Two proposals deserve scrutiny.

A. *House Bill 1046*

The first of these proposals is House Bill 1046, the so-called RICO Reform Act of 1989, introduced by Representative Rick Boucher of Virginia and initially supported by a wide range of anti-RICO organizations. House Bill 1046 ignores the basic conceptual scheme of RICO and modifies criminal RICO only by expanding it to include a number of additional predicate offenses to the definition of "racketeering acts" in 18 U.S.C. section 1961(1).⁵⁷ On the civil side, House Bill 1046 further complicates the statute by defining a variety of distinct categories of civil RICO suits, with each category carrying a somewhat different package of remedies.

The principal thrust of the bill is to restrict sharply civil RICO suits by private plaintiffs. Civil RICO suits by state and local governments are permitted to continue more or less unchanged. States and municipalities injured in their business or property by violations of RICO are entitled to bring civil RICO suits exactly as under the present

57. H.R. 1046, 101st Cong., 1st Sess. § 2 (1989).

statute, with exactly the same consequences as at present: upon proof of the violation, the plaintiff "shall recover" treble damages and the costs of the action, including attorney's fees.⁵⁸ The only modification in the statute is that the chief legal officer of the jurisdiction must authorize the suit, apparently to impose additional discipline and accountability for the bringing of RICO actions.⁵⁹

For most private civil RICO plaintiffs, however, attorney's fees and treble damages would be eliminated. Anyone injured in his business or property by a RICO violation would be entitled to actual damages.⁶⁰ What additional remedies would be available, however, depends on which of a bewildering series of classifications apply to the plaintiff, the defendant, and the nature of the claim. If the defendant already has been convicted of a felony based on the conduct that is the subject of the suit, the plaintiff, as under the present statute, will recover attorney's fees and treble damages.⁶¹ If the plaintiff suffers "serious" bodily injury "by reason of a crime of violence" that is part of a RICO violation, he would be entitled to attorney's fees, but would not automatically receive treble damages. Punitive damages up to twice the actual damages would be recoverable if the plaintiff proved by clear and convincing evidence that the defendant's actions were malicious.⁶² In cases of business fraud, House Bill 1046 would limit recovery for most corporate plaintiffs to actual damages, and preclude them from recovering costs or attorney's fees in RICO cases based on most predicate racketeering acts.⁶³ Natural persons and certain favored classes of corporate entities,⁶⁴ however, would be able to recover attorney's fees and, if mal-

58. *Id.* § 4 (proposed 18 U.S.C. § 1964(c)(1)(A)).

59. *Id.* (proposed 18 U.S.C. § 1964(c)(1)(B)).

60. *Id.* (proposed 18 U.S.C. § 1964(c)(2)(A)).

61. *Id.* (proposed 18 U.S.C. § 1964(c)(5)).

62. *Id.* (proposed 18 U.S.C. § 1964(c)(3)). It is not entirely clear what situations the drafters had in mind in which someone who caused serious bodily injury by a crime of violence did not do so maliciously.

The provision for personal injury actions is actually an expansion of civil RICO, which currently permits recovery only for injuries to one's "business or property." 18 U.S.C. § 1964(c) (1988). Conceptually, the expansion is a logical cure for a RICO anomaly: the worst crimes of the most violent racketeers are essentially the only crimes that do not give rise to civil RICO liability. Practically, however, the cause of action is unlikely to be of widespread utility: mobsters who commit violent crimes do not make ideal defendants in personal injury lawsuits—they usually lack respect for law, attachable assets, and liability insurance.

63. H.R. 1046, *supra* note 57, § 2 (proposed 18 U.S.C. § 1964(c)(2)).

64. Examples of these favored classes are tax-exempt organizations, pension funds, investment companies, *id.* (proposed 18 U.S.C. § 1964(c)(2)(B)(ii)(I)), and local special purpose government entities, *id.* (proposed 18 U.S.C. § 1964(c)(2)(B)(i)), which do not get the same full-fledged RICO action available to general purpose local governments under proposed 18 U.S.C. § 1964(c)(1), *id.*

ice is proved, discretionary punitive damages⁶⁵ in cases of insider trading.⁶⁶ Individual plaintiffs, but not corporate entities, could obtain the same enhanced remedies for commercial violations not based on the securities and commodities laws.⁶⁷

These provisions are ridiculous. The provision or elimination of enhanced remedies in various categories of cases correlates more closely with political considerations than with any conceivable theory of civil remedies. The retention of civil RICO for governments, for example, presumably is rationalized by the bill's sponsors on the ground that governments are expected to exercise greater restraint and selectivity in filing suits. A more cynical eye, however, might see this provision as intended to pacify a major bloc of support for the present structure of civil RICO and remove them from opposition to the reform package.

At any rate, the proposed distinction between governmental and other RICO actions at the level of remedy is distinctly odd. One might well believe that governmental officials are less likely than private plaintiffs to file frivolous civil RICO suits, or that the meritorious ones they file are more likely to reflect a serious public interest in criminal law enforcement. This belief, however, argues for confining the cause of action to public officers, not for limiting the remedies of those private plaintiffs who *do* demonstrate a valid claim. There is no compensatory rationale for providing that state and local governments injured by racketeering acts should routinely collect treble damages, while private individuals injured by the same acts should be either disqualified from such damages, or enabled to collect them only on proof of malice by clear and convincing evidence. The provision of treble damages to governments, moreover, is inconsistent with the original "private attorney general" rationale for such relief: it should not be necessary to use financial incentives to induce the *public* attorney general to bring suits to vindicate the public interest.

House Bill 1046's other categories are equally difficult to explain in terms of the plaintiff-victim's need for enhanced remedies, but respond well to political analysis of the clout of defendant-offenders. Why should a plaintiff injured by a convicted racketeer automatically get treble damages, while a plaintiff who has to carry the entire burden of proof himself, establishing identical facts, get a lesser recovery? Both plaintiffs are equally injured and should be entitled to equal damages, and the plaintiff who has not had the benefit of the public prosecutor's

65. H.R. 1046 permits discretionary punitive damages up to twice actual damages if malice is proved, in contrast to the automatic treble damages provided by the present law. *Id.* (proposed 18 U.S.C. § 1964(c)(3)(D)).

66. *Id.* (proposed 18 U.S.C. § 1964(c)(2)(B)(ii)).

67. *Id.* (proposed 18 U.S.C. § 1964(c)(2)(B)(iii)).

efforts needs a greater incentive to sue because her suit will be riskier and will cost far more, and under current federal law the victim of a convicted culprit already may have received restitution as part of the offender's sentence. The defendant who already has been convicted is not a good candidate for the sympathies of Congress, however, and powerful corporations and other respectable folk who have been on the receiving end of civil RICO suits presumably feel that remedies limited to convicts will be unlikely to fall upon them.⁶⁸

Finally, the limitation of private civil fraud suits is an equally obvious compromise. The idea here is to eliminate the incentive for filing RICO suits in cases involving "garden variety commercial disputes." But then, why not simply eliminate civil RICO in cases of mail, wire, and securities fraud? Why should natural persons and a few favored classes of entities get to file certain suits but not others?

There is little reason to think that natural persons file fewer frivolous suits than corporations, or that not-for-profit corporations injured by patterns of criminal behavior deserve more compensation than business corporations injured by the same acts. Populist sympathy for the little guy injured by the big corporation, however, could create a potent political rallying cry for opponents of the bill. Leaving some enhanced remedies intact for the small investor eliminates a few of the deficiencies that opponents might parade. Meanwhile, the securities industry is otherwise protected against RICO end-runs around limitations on private actions under the securities laws.

There are, perhaps, some nonpolitical justifications for the classifications in House Bill 1046. Many of its provisions are explicable as an effort to discourage the filing of RICO actions by reducing the incentives to file those suits in all but the few cases in which some government official already has certified the violation. Adoption of the bill undoubtedly would reduce the volume of civil RICO litigation. Substantively, the bill makes highly dubious distinctions, reducing or eliminating recovery in cases in which violations have been proved. Still, if one assumes that very few meritorious actions are actually filed, reducing the recovery in those few cases would be a small injustice and would have the beneficial effect of reducing the incentives to those with dubious claims to pursue the potential payoff. But if this is the purpose, why not approach the goal more directly by permitting only the government, or private plaintiffs who have received approval from the Justice

68. The expansion of RICO remedies for victims of violent crime, *see supra* note 62 and accompanying text, is explicable in similar terms. Legislation that can be depicted as adding remedies against violent crime, however ineffectual it might be, generates little opposition. Blue-collar criminals have fewer lobbyists than their white-collar cousins.

Department, to bring RICO civil actions?

B. *The Hughes Bill*

The approach Congressman William J. Hughes outlined in his presentation at this Symposium is a more direct and promising attack on civil RICO abuse.⁶⁹ The most significant operative part of the proposal would provide a "judicial gatekeeper" to civil RICO remedies. Rather than the elaborate gerry-built categories of House Bill 1046, the Hughes proposal would provide a simple and direct mechanism: judges would be instructed to dismiss all RICO suits unless they found that there was a public interest rationale for casting the action as a RICO suit.⁷⁰

The basic concept of the Hughes proposal is attractive. If civil RICO is intended to provide enhanced compensation for extraordinary degrees of wrongdoing and to enlist private attorneys general in the war on serious crime, why not limit the remedy to those cases in which a civil suit can be certified as actually serving those interests? If the statute is so broadly drawn that it can be adapted to cover situations in which its strong medicine is unnecessary or even toxic, and is tolerable on the criminal side only with the exercise of heroic prosecutorial restraint, why not impose a similar discipline of discretionary public approval—in this case exercised by the judge—on the civil side as well?

The attraction seems ultimately superficial, and the approach of the Hughes proposal appears to be a desperate effort to make the best of a bad situation, rather than a desirable approach to legislation. In civil as in criminal legislation, it is not right to create unmanageable statutes that combine all manner of incommensurate acts, and then rely on the discretion of judges or other officials, applying the vaguest standards of the public interest as they individually view it, to utilize the remedies only when they are appropriate. The job of Congress is to decide on the kinds of cases that merit special treatment, not to inject a wild card into the action and then caution that it should be used only on rare occasions when a judge thinks it a good idea to throw some extra weight on the plaintiff's side.

Given the general judicial hostility to civil RICO claims, moreover, the likely effect of the Hughes proposal is a dramatic reduction in civil RICO litigation because district judges who believe that the overwhelm-

69. See Hughes, *RICO Reform: How Much Is Needed*, 43 VAND. L. REV. 639 (1990).

70. Draft bills in circulation formulate this requirement by reference to such concepts as the need for enhanced compensation due to the magnitude of the injury and the need to deter criminal conduct. As in H.R. 1046, actions predicated on criminal conduct for which the defendant already has been convicted always are permitted.

ing majority of civil RICO suits serve no public good are empowered to put the power of dismissal behind their opinions. Legislation that holds out the elaborate promise of remedies in defined situations, and then covertly takes back the promise by giving hostile judges the power to eviscerate the statutory scheme, is not responsible legislation.

Both House Bill 1046 and the Hughes bill are in essence efforts to apply extremely elaborate band-aids to a deeply flawed statute. Importing still further dubious distinctions into an already arbitrary statute, in the manner of House Bill 1046, is hardly the way to restore sense to the law. Likewise, the resort to judicial discretion, in the manner of the Hughes proposal, is no more desirable on the civil side than the resort to prosecutorial discretion is a solution to the overbreadth of criminal RICO.

VI. WHAT SHOULD BE DONE, AND WHY IT WON'T BE

RICO does not define a specific category of criminal conduct that should be subject to special criminal or civil remedies. It is a creative effort to devise new weapons against crime but ultimately fails to define the situations in which those weapons should be deployed. In light of its failure, I propose a more radical solution: repeal RICO altogether. This solution is only desirable, however, if further criminal law reform is undertaken to preserve the benefits that RICO has made available. This would require a package of bills, including:

1. making bribery of state or local government officials whose actions affect interstate commerce a federal crime;
2. making forfeiture of three times any proceeds of the crime a presumptive sentence for all crimes, with a specified portion of the funds thus raised earmarked for crime victims' compensation;
3. increasing the penalties for a variety of under-sanctioned business and labor crimes;
4. making it a crime to belong to, and a more serious crime to be a leader of, an organized crime group.⁷¹ On the civil side as well, there probably is enough experience under RICO to permit a beginning toward identifying cases in which existing remedies for fraud or other misconduct are inadequate.

This radical reform is all but impossible to imagine. As Professor Craig Bradley reminds us, no federal criminal statute adopted with the avowed purpose of attacking organized crime has ever been repealed or even limited.⁷² Given the current political realities of public anxiety

71. These suggestions, and others, are elaborated and defended in Lynch, *supra* note 2, at 971-84.

72. See Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213

about crime and congressional anxiety about negative campaigning, the prospects for limitation, let alone repeal, of the basic RICO structure are nil. No member of Congress wants to face an opponent's television commercials charging that she voted to cut back federal laws against racketeering. Significantly, neither of the proposals under review makes any important change in the basic structure of criminal RICO: House Bill 1046 changes criminal RICO only by adding predicate offenses, and the Hughes proposal modifies criminal RICO only by codifying the very judicial glosses that have proved unable to provide clear limits to the reach of the statute, and that Justice Antonin Scalia appears to regard as vague and incomprehensible.⁷³ Moreover, Congress has proved completely incapable of engaging in integrated analysis of the criminal code. A complex package of statutory reforms that targets specific legal problems—as opposed to an election-year amalgam of miscellaneous sentence enhancements and get-tough panaceas masquerading as a “comprehensive crime bill”—seems to be well beyond the capacity of the Congress of the 1980s. There is little reason to be optimistic that the 1990s will bode better for sophisticated criminal code reform.

RICO has been valuable in demonstrating the value of certain kinds of prosecutive strategies. The statute as a whole, however, is ill-defined. Modifying its civil remedies, as the proposed bills would do, would mollify some critics, and, if it succeeded in reducing the volume of civil RICO litigation, would reduce the opposition to RICO of overburdened federal judges. These are desirable goals, and if they could be accomplished with some simplicity and fairness, as the Hughes proposal does more successfully than House Bill 1046, it would be worth doing. Even so, tinkering with the civil remedies will not solve the basic conceptual problems of the statute. Politics may be the art of the possible, but it is the business of academic criticism to point out where the politically possible falls short of the ideally desirable, or even the intellectually respectable. RICO, as it stands or as modified by the proposed reforms, fails the test.

(1984).

73. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 109 S. Ct. 2893, 2909 (1989) (Scalia, J., concurring).

