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Dual Construction of RICO: The Road Not Taken in Reves

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DUAL CONSTRUCTION OF RICO: THE ROAD NOT TAKEN IN *REVES*

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INTRODUCTION

RICO is an easy statute to love or hate; it is not an easy statute to figure out.¹ Its intricate interplay of criminal and civil provisions has created a jurisprudence in which “out-come determinative legal standards remain shrouded in uncertainty.”² On almost every substantive issue, one circuit’s

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1. “RICO” stands for “Racketeering Influenced and Corrupt Organizations,” which is the heading of title IX of Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968). Cf. Samuel A. Alito, Jr., *Racketeering Made Simple(r)*, in *THE RICO RACKET* 1-14 (Gary L. McDowell ed., 1989); L. Gordon Crovitz, *RICO: The Legalized Extortion and Shakedown Racket*, in *THE RICO RACKET*, *supra*, at 14-31.

2. Gregory P. Joseph, *Circuits In Disarray on Six Key Issues*, NAT’L L.J., Oct. 26, 1992, at 17.

decision receives another's derision. Nor has the Supreme Court been able to help. Although it has taken a consistently expansionist approach to RICO, constantly giving broad readings to RICO's terms and repeatedly rejecting lower court efforts to narrow the statute's scope, this has not reduced circuit court conflict.³

On March 3, 1993, however, the Court abruptly departed from its expansionist method to accept a narrow reading of RICO liability in *Reves v. Ernst & Young*.⁴ While the decision itself may be salutary, the grounds upon which it rests are not. The Court's reliance on word-chopping simply does not provide lower courts adequate guidance to navigate through the forest of thorny RICO issues that remain.⁵ Judge Mikva of the D.C. Circuit captured the essence of the problem when, questioning his colleagues' attempt to narrow RICO's scope similarly to the Supreme Court's narrowing in *Reves*, he asked "*Why is one element of the statute properly deemed broad while another read narrowly?*"⁶ The Supreme Court did not answer this question in *Reves*. This Article tries.

This Article develops a rationale for the decision reached in *Reves* that may help resolve other issues that arise because of the interplay between RICO's civil and criminal provisions. My thesis is that RICO should be interpreted narrowly in some cases and broadly in others, depending on the nature of the issue before the court. The suggested method of interpretation does no more than recognize and apply the fact that RICO has both a remedial and punitive purpose to it. These dual purposes support the use of a dual construction doctrine to resolve statutory ambiguity and answer Judge Mikva's question. The thesis is supported by logic, policy, legislative history, and over 100 years of state and federal court precedent.

Section I will briefly set out RICO's structure, examine how and why RICO has been so broadly interpreted, and explain the profound effect such indiscriminate expansionist interpretation has had on private civil litigation. Section II will present *Reves* as a case in point and show how the *Reves* opinion departs from the approach of previous decisions without articulating a principled basis for doing so. Section III will outline and defend my thesis that the dual construction doctrine provides a principled basis for statutory interpretation that will also help reduce the perceived abuse of private civil RICO.

3. *E.g.*, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251 (1989) (Scalia, J., concurring) (criticizing Court's broad interpretation for having "created a kaleidoscope of circuit positions."); 1 *MATHEWS ET AL., CIVIL RICO LITIGATION* 1-16 (2d ed. 1992) ("The variations between the positions taken by the courts on issues arising under the statute are usually so fundamental and widespread that it takes a Supreme Court decision to resolve them. But RICO issues, like heads of the beast Hydra, proliferate from these decisions.").

4. 113 S. Ct. 1163 (1993).

5. *See e.g.*, Joseph, *supra* note 2, at 17 (identifying statute of limitations issues, investment-use injury, mens rea requirements, availability of punitive damages, and need for economic motivation as unresolved questions).

6. *Yellow Bus v. Drivers Local Union 639*, 913 F.2d 948, 957 (D.C. Cir. 1990) (Mikva, J., concurring) (emphasis added).

SECTION I

A. *RICO Basics*

RICO is codified among the criminal laws of the United States, in 18 U.S.C. section 1961 *et seq.* Roughly speaking, it creates four separate crimes in section 1962, each defined in terms of how something called a “pattern of racketeering activity” relates to something else called an “enterprise.” Section 1962(a) prohibits the investment of proceeds from a pattern of racketeering activity into an enterprise. Section 1962(b) prohibits acquiring or maintaining an interest in an enterprise by a pattern of racketeering activity. Section 1962(c) prohibits conducting the affairs of an enterprise through a pattern of racketeering activity. Finally, section 1962(d) prohibits conspiracy to commit any of the above three crimes.

The terms used in creating the section 1962 crimes are defined (somewhat) in section 1961. The clearest term, “racketeering activity,” is simply the violation of any of a laundry list of various crimes—also called predicate acts—catalogued in section 1961(1). For example, murder is on the list but adultery is not; mail fraud is there, but violation of the Migratory Bird Treaty Act is absent. No actual prior conviction of predicate acts is necessary; it suffices to act in a manner that is “chargeable” or “indictable.”⁷

The statute does not say what a “pattern” is, but says that it “requires at least two acts of racketeering activity.”⁸ Nor does the statute define “enterprise” except to say that it “includes” all individuals and legal entities as well as “any union or group of individuals associated in fact although not a legal entity.”⁹

The same provisions and terms that form the basis of criminal liability also form the basis for civil suits via section 1964(c), a provision added at the last moment by the House, with little discussion in the House and no discussion in the Senate.¹⁰ It reads, in full:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.

Thus, as this cursory introduction to RICO’s basic structure demonstrates, the same key terms and relationships created by section 1962 will require application in both the civil context, where nonfederal plaintiffs may sue, and in the criminal context, whenever the federal government chooses to prosecute.

7. 18 U.S.C. § 1961(1) (1988).

8. *Id.* § 1961(5).

9. *Id.* § 1961(4).

10. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 507 (1985) (Marshall, J., dissenting).

B. *The Expansion of RICO*

RICO was intended to strike a new balance of power between organized crime and the government in a specific way.¹¹ However, the statute, both as written and as interpreted, goes far beyond that intent. Through what Gerald Lynch convincingly shows to be a "logic of expansion," the language Congress chose to implement its (relatively) narrowly defined objective—rooting out the Mafia and like organizations from the channels of legitimate commerce—has ended up defining and severely punishing almost any non-random series of predicate acts, some of which are arguably not criminal at all.¹²

1. As Written

It is generally acknowledged that the authors of RICO and its predecessor bills wanted to create a specialized tool for prosecutors to combat a monster called "Organized Crime."¹³ The special tool was to enable prosecutors to root out the monster's perceived rising influence over, and infiltration of, legitimate business and governmental enterprises.¹⁴ Such infiltration subverted democratic processes and resulted in corrupt and racketeer-influenced organizations gaining an unfair competitive advantage over legitimate businesses.¹⁵ Moreover, the monster was outstripping the sanctions and remedies then available to the government, most notably the mail and wire fraud statutes.¹⁶ While some prosecutors could play those statutes like a Stradivarius, their puny penalties allowed Organized Crime's top brass to tune them out when conducting business. The monster kept dodging the bullet, throwing the government curves, and devouring more and more legitimate businesses and unions faster than the government could cook up new ways to use the mail and wire fraud statutes against them.¹⁷

11. I take much of my interpretive structure from Gerald Lynch's excellent article *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987) [hereinafter *RICO*], from Marshall's powerful dissent in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985), and from Judge Oake's thoughtful panel opinion in *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482 (2d Cir. 1984).

12. *RICO*, *supra* note 11, at 662-64.

13. See generally the preface to the Organized Crime Control Act, 116 CONG. REC. 602 (1970), quoted in Crovitz, *supra* note 1.

14. Lynch demonstrates that the Congressional purpose was limited to rooting out Organized Crime's infiltration of legitimate organizations, *RICO*, *supra* note 11, at 673-80, refuting the contention of Blakey and Gettings that RICO was specifically intended to attack criminal enterprises. See G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

15. Crovitz, *supra* note 1.

16. 18 U.S.C. § 1341 (Supp. IV 1992).

17. Cf. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980) ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love.").

The essential drafting difficulty was finding a constitutional method of defining "Organized Crime." The drafters deliberately chose not to explicitly outlaw membership in organized criminal syndicates, such as the Mafia, because of the perceived constitutional problems of making "status" a crime and of defining just what constituted an "organized criminal syndicate."¹⁸ Instead, "in an attempt to ensure the constitutionality of the statute, Congress made [its] central proscription the use of a 'pattern of racketeering activities' in connection with an 'enterprise.'"¹⁹ In other words, unable to define what were "organized criminal syndicates," and then outlaw membership in them, Congress turned to an *operational* definition of "Organized Crime," and tried to get at the criminal syndicate through its activity.

The operational definition, however, is much broader than necessary to capture either Congressional intent or mafioso. This was recognized by the drafters:

It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.²⁰

What was not recognized by the drafters, at least explicitly, was that while neither they nor the prosecutors who would implement the criminal provisions had much interest in pursuing commercial activity offenses committed by persons outside organized crime,²¹ civil plaintiffs would have a great deal of interest in doing so. And the private civil remedies provision, thrown in as an after-thought, provided both encouragement and a means to express that interest in court.

Though a logical response to a legitimate drafting difficulty, the operational definition put the "potent" in the statute's potential to reach far beyond "Organized Crime" to mere "organized criminals"—those who commit the predicate acts in such a way as to constitute a "pattern"—and from there to organized businessmen. Even though the record clearly shows that Congress intended to accomplish no more than "stamp[] out the organized crime parasites preying upon our society,"²² there is no record of how Congress expected its statute to be limited to that objective.

18. See, e.g., Task Force on Civil RICO of the Section of Corporation, Banking and Business Law of the American Bar Association, REPORT OF THE AD HOC RICO TASK FORCE 71 (1985) [hereinafter Task Force on Civil RICO].

19. *Id.*

20. 116 CONG. REC. 18,940 (1970) (remarks of Sen. McClellan), *quoted in* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989).

21. See also Task Force on Civil RICO, *supra* note 18, at 70-71 ("The reach of the statute beyond traditional mobster and racketeer activity and comparable ongoing structured criminal enterprises, was intended to be incidental and only to the extent necessary to maintain the constitutionality of a statute aimed primarily at organized crime.") (footnote omitted).

22. Remarks of Sen. McClellan, 115 CONG. REC. 9,568 (1969), *quoted in* RICO, *supra* note 11, at 680 n.97.

2. As Interpreted

The Congressional wish for a far-reaching RICO has been the Supreme Court's command. The Court's interpretation of certain key terms and its rejections of proposed limitations on RICO have fully realized RICO's extraordinarily broad potential.

First, *United States v. Turkette*,²³ a criminal case, established that the term "enterprise," as defined by section 1961, includes entities wholly engaged in criminal activity. For example, a group of people who work together to buy property, fraudulently over-insure it, and then burn it to collect the insurance, constitute an "enterprise" that could, in violation of section 1962(c), be conducted through a pattern of racketeering activity.²⁴ In so deciding, the Court rejected the narrower possibility that the term "enterprise" meant merely legitimate enterprises and not criminal ones.

Second, *Sedima, S.P.R.L. v. Imrex Co.*,²⁵ a private civil case, overturned a circuit court's attempt to narrow RICO's application. *Sedima* concerned the meaning of section 1964(c)'s grant of a private civil remedy to any person harmed "by reason of a violation of" section 1962. While expressing concern over "the consequences of an unbridled reading of the statute,"²⁶ the Court nonetheless rejected two potential limiting constructions: (1) that the phrase required a prior criminal conviction and (2) that the statute compensated only "racketeering injury," that is, damages caused by the "pattern" of racketeering activity itself, as distinct from the harms caused by the underlying predicate acts that constituted the racketeering activity.

Finally, in *H.J. Inc. v. Northwestern Bell Telephone Co.*,²⁷ another private civil RICO case, the Court borrowed a phrase from the legislative history to define the term "pattern" as "continuity plus relationship" which it held meant (1) the predicate acts must constitute or threaten long-term criminal activity (more than "a few weeks or months")²⁸ and (2) the predicate acts must be related to each other, either by having the same or similar purposes, results, participants, victims, or methods of commission, or by having any other relationship that shows that they "are not isolated events."²⁹ This is pretty broad. Basically, the Court warns that committing two predicate acts in a non-random fashion during a period of more than a few months may result in RICO violations.

To some, this is also pretty vague. Justice Scalia, for example, sharply criticized the majority's "continuity plus relationship" test as a "talismatic phrase" that was "about as helpful . . . as 'life is a fountain'"³⁰ in

23. 452 U.S. 576 (1981).

24. *United States v. Turkette*, 452 U.S. 576, 580-87 (1981).

25. 473 U.S. 479 (1985).

26. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985).

27. 492 U.S. 229 (1989).

28. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989).

29. *Id.* at 240 (quoting the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1001(a), § 3575(e), 84 Stat. 922, 950 (repealed 1984)).

30. *Id.* at 252.

determining what conduct RICO reaches, and bluntly suggested that “pattern” was unconstitutionally vague.³¹ However, most courts appear to have concluded that “this may be broad, but it is not vague,”³² almost every court to consider the issue has upheld its constitutionality.³³

As in *Turkette* and *Sedima*, the Court in *H.J.* deliberately declined to narrow the “pattern” element of RICO. It rejected the lower court’s narrower interpretation of “pattern” as meaning two or more “schemes,” concluding that “pattern” was “a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.”³⁴

3. The Logic of Expansion

The logic behind this expansionist jurisprudence can be traced through each of the above opinions. A presumption based on the statute’s structure and legislative history becomes a rule of construction based on a liberal interpretation clause, which is then applied to both civil and criminal cases alike. The steps add up to a reasonable and logically consistent approach.

The *Turkette* Court read the language and history of the statute to create a presumption that sections 1961 and 1962 must be read broadly. Because the term under consideration (enterprise) had not been explicitly defined by Congress, the Court’s search for the “plain” meaning of the term necessarily involved an analysis of the purpose and structure of the statute. The Court eventually settled on a broad meaning because “neither the language nor structure of RICO limits [RICO’s] application to ‘legitimate enterprises.’”³⁵ Six pages of the opinion are devoted to demonstrating how

31. *Id.* at 255-56.

32. *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973). Although Judge Pierce was commenting on the “participate . . . in the conduct of the affairs of the enterprise” language, and not the “pattern” requirement, his comment seems equally apropos here.

33. Courts have rejected both facial challenges and, more commonly, because defendants rarely have standing to assert facial challenges, as-applied challenges, both by organized crime entities and other types of entities. See *United States v. Eisenberg*, 773 F. Supp. 662, 728-731 (D.N.J. 1991) (rejecting both facial and as applied challenges brought by non-organized crime entity brokerage firm). The *Eisenberg* court collected the cases, concluding that “courts . . . have uniformly rejected the challenges, with one exception.” *Id.* at 731. See also *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990), where the court rejected the vagueness challenge, holding that as applied, the particular defendant was put sufficiently on notice that multiple acts of murder and extortion would subject him to RICO penalties. The one exception is *Firestone v. Galbreath*, 747 F. Supp. 1556, 1581 (S.D. Ohio 1990) (dismissing civil RICO count as unconstitutional application and finding RICO to be unconstitutional on its face), *aff’d on other grounds*, 976 F.2d 279 (6th Cir. 1992). The Sixth Circuit, however, chided the district judge for doing so, holding that dismissal of the RICO counts did not require any constitutional judgments and emphasizing that “we expressly distance ourselves from the district court’s holding in that respect.” *Firestone v. Galbreath*, 976 F.2d 279, 286 (6th Cir. 1992).

34. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237 (1989).

35. *United States v. Turkette*, 452 U.S. 576, 587 (1981).

the expansive definition of "enterprise" was enabled by the legislative history, even though not expressly addressed by it.³⁶ The opinion is full of phrases such as: "In view of the purposes and goals of the Act, as well as the language of the statute, *we are unpersuaded* that Congress nevertheless confined the reach of the law to . . . *only* the infiltration of legitimate business."³⁷ In short, when confronted with more than one reasonable definition of a term, the Court used its expansionist presumption, derived from its reading of legislative history, to put the burden on those who favored the narrower definition to *prove* that the narrower definition was specifically contemplated by Congress.

What was a presumption in *Turkette* for interpreting sections 1961 and 1962 became a rule in *Sedima* for interpreting section 1964. In *Sedima* the Court added RICO's liberal construction clause to its list of reasons for interpreting section 1964 expansively because that clause provides that RICO "shall be liberally construed to effectuate its remedial purposes."³⁸ The Court went again to the legislative history and, as in *Turkette*, found that the issue before the Court had not been "anticipated" by Congress.³⁹ Despite that, the Court chose the "*less restrictive reading*" of section 1964, because of the "general principles surrounding this statute," because of "Congress' self-consciously expansive language and overall approach," (citing *Turkette*) and mostly because of the "express admonition" contained in the liberal construction clause.⁴⁰

The liberal construction rule presumed in *Turkette* and announced in *Sedima* has been applied equally in both civil and criminal contexts.⁴¹ Although the *Sedima* opinion suggests at one point that the criminal sections—section 1962 (defining the four new crimes) and section 1961 (defining the terms used in section 1962)—could be strictly construed while the civil section—section 1964—at issue in *Sedima* could be liberally construed,⁴²

36. *Id.* at 588-93.

37. *Id.* at 590 (first emphasis added). Other examples in the Court's opinion of its expansionist presumption are: "Considering this statement of the Act's broad purposes, the construction of RICO suggested by respondent and the court below is unacceptable." *Id.* at 589. "The language of the statute . . . reveals that Congress [intended a broad] definition of the word 'enterprise,' and *we are unconvinced* by anything in the legislative history that this definition should be given less than its full effect." *Id.* at 593 (emphasis supplied). "But [Congress] did nothing to indicate that an enterprise . . . was not covered by RICO if the purpose of the enterprise was exclusively criminal." *Id.* at 581.

38. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

39. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985).

40. *Id.* at 497-98 (emphasis added).

41. See, e.g., *Russello v. United States*, 464 U.S. 16, 21 (1983), in which the Court supported its broad interpretation of RICO in a criminal case by observing that "terms and concepts of breadth" were "the pattern of the RICO statute." The Court also applied the liberal construction clause in this criminal context, noting that, so far as it knew, "this is the only substantive federal criminal statute that contains such a directive." *Id.* at 27.

42. *Sedima*, 473 U.S. at 491-92 n.10.

the Court has never used that distinction. *Sedima* itself states the rule categorically: "RICO is to be read broadly."⁴³

The final logical step, of course, has been to use civil cases as precedent for criminal and vice versa. Just as the Court makes no distinction between civil and criminal interpretations of RICO, so the Court uses a mix-and-match approach to precedent. For example, the *Sedima* court cited the *Turkette* decision for the proposition that Congress "wanted to reach both 'legitimate' and 'illegitimate' enterprises."⁴⁴ As demonstrated above, Congress was not that specific.⁴⁵ It is in this fashion that the Court itself expands Congressional intent. The Court has also claimed that the established broad precedents compel it to continue its expansive readings. For example, the Court built its holding in *H.J.* upon *Sedima's* broad base, explaining at one point that "[i]t would be counterproductive and a mismeasure of congressional intent now to adopt a narrow construction of the statute's pattern element that would require proof of an organized crime nexus."⁴⁶

For these reasons, the Court has steadily constructed and followed the expansionist road. While doing so may have well effectuated the obvious ambition of the statute's drafters, such expansion has also worked a disturbing transformation in private litigation that Congress never expressly considered during the last-minute, rushed addition of section 1964(c)'s private civil remedy.

C. Problems Created by the Interplay of Civil and Criminal RICO

The chief "abuse" of RICO complained of by courts and commentators is that thousands of civil plaintiffs have abandoned traditional state law and common-law fraud remedies for the glittering allure of RICO treble damages and attorney fees awards, when there is no reason to believe that the former remedies were inadequate.⁴⁷ Through RICO, civil plaintiffs seek extraordinary remedies for ordinary business disputes through the fortuity that commission of the same predicate acts set out in section 1962(c) may result in either criminal or civil liability. Three features of RICO contribute to this phenomenon.

First, commission of mail and wire fraud is defined as "racketeering activity." The range of activity that may constitute mail and wire fraud is so great that "[a]n aggrieved party can describe most kinds of commercial dispute as some species of fraud, and, therefore, given the ubiquity of the

43. *Id.* at 497.

44. *Id.* at 499.

45. This distinction may be best appreciated by parents of young children who often use the same trick of equating parental silence with parental blessing. Thus, because the parents may clearly want their child to eat "dinner" but neglect to define precisely what they mean by "dinner," the child will claim that the parents "wanted" him to eat the package of Oreos.

46. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989).

47. See generally Norman Abrams, *A New Proposal For Limiting Private Civil RICO*, 37 UCLA L. REV. 1, 4 (1989) (stating that approximately 1000 RICO cases are filed each year).

mails and interstate wire communications, as mail or wire fraud."⁴⁸ Indeed, one study has found that almost forty-five percent of all private civil RICO actions ever filed have alleged the "racketeering activity" to be what would otherwise have been common-law fraud.⁴⁹

Prior to RICO, mail and wire fraud were exclusively criminal acts and did not create private causes of action.⁵⁰ Although in theory it is not difficult to prosecute mail and wire fraud cases, in practice two constraints have limited federal prosecutors from doing so. First, as repeat players before a single court, prosecutors have an incentive to voluntarily police their behavior in order to create and maintain a good reputation. Second, limited resources discourage potential abuse. While reliance on prosecutorial discretion may appear odd to some, judges have explicitly acknowledged their belief that the "prudent use of prosecutorial discretion"⁵¹ has reserved use of those statutes to especially pernicious or novel types of fraud.⁵² One commentator implies that judicial confidence in prosecutors and the desire to allow them as wide a latitude as possible to combat new forms of fraud has contributed to the expansive judicial interpretations of the mail and wire fraud statutes since 1909.⁵³

In contrast, private litigants lack the incentives to refrain from stretching the statutes to their considerable limits; neither they nor their attorneys may appear often before any one court, and the prospect of treble damages and attorney's fees ameliorates a large part of the resources problem. The result has been a flood of lawsuits attempting to turn "garden variety" civil fraud cases into RICO cash crops,⁵⁴ as plaintiff lawyers go "theory shopping" simply to obtain the treble damage award.⁵⁵ Although courts can dismiss either a civil or criminal RICO charge as unconstitutional as applied to a

48. Gerald E. Lynch, *A Conceptual, Practical, and Political Guide To RICO Reform*, 43 VAND. L. REV. 769, 795 (1990).

49. MATHEWS ET AL., *supra* note 3, at 1-3. Securities fraud presents a similar problem to mail and wire fraud. Lynch, *supra* note 48, at 795. When you add in the common-law fraud and securities fraud cases together, over 75% of private civil RICO cases are properly characterized as ordinary business disputes.

50. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 501 (1985) (Marshall, J., dissenting).

51. *Id.* at 502.

52. *Id.* at 502-03. See generally Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980). It is interesting that in 1984 both the majority and dissent in *Sedima* complain about the extensive use of the mail fraud statutes in civil RICO cases. See *Sedima*, 473 U.S. at 500, 501. Two terms later, in *McNally v. United States*, 483 U.S. 350 (1987), the Court gave what appears to be its first restrictive interpretation of the mail and wire fraud statutes, only to have Congress legislatively reinsert what the Court had judicially, if not judiciously, taken out. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (codified as amended at 18 U.S.C. § 1346 (1988)).

53. Rakoff, *supra* note 52, at 772 (stating that mail fraud statutes have "been characterized as the 'first line of defense' against virtually every new area of fraud to develop in the United States in the past century.>").

54. See cases collected in MATHEWS ET AL., *supra* note 3, at 1-23 n.46.

55. Robert K. Rasmussen, *Introductory Remarks and a Comment on Civil RICO's Remedial Provisions*, 43 VAND. L. REV. 623, 629 (1990).

particular defendant, few courts are willing to narrow RICO's reach on the civil side when to do so would clearly go against congressional intent on the criminal side.⁵⁶ In sum, as Justice (then Judge) Kennedy explained:

[t]he potential range of . . . the federal mail and wire fraud laws is vast, made so in part by expansive judicial interpretation. . . . The reach of those statutes exists against a backdrop of prosecutorial discretion, however, discretion which, if sensitively exercise, operates as a check to the improvident exertion of federal power. No such check operates in the civil realm. A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of . . . [RICO]. . . .⁵⁷

The second feature is similar to the first. In addition to the crimes listed in section 1961 being applied equally broadly to private civil and criminal RICO, the terms in section 1962 are given the same expansive reading in both civil and criminal contexts. For example, what constitutes a "pattern" of racketeering activity sufficient to prosecute also satisfies the "pattern" requirement for civil damage suit. As with mail and wire fraud, the Justice Department has instituted strict procedures to implement a policy of selective and uniform enforcement of RICO.⁵⁸ But there is no coherent policy behind the myriad of private suits filed each year; they are limited only by the plaintiff attorney's imagination.

The third feature is confusion of precedent: the civil RICO cases are expanding "the criminal law of fraud into areas and factual contexts where that body of law has not previously been found."⁵⁹ Under the current interpretive view, some serious criminal precedent is being built by civil litigation.⁶⁰ Many agree with Professor Abrams that "[t]here is something unseemly in the phenomenon of courts creating in civil cases a kind of expanded criminal law that prosecutors themselves are not willing to enforce."⁶¹

Thus, the "abuse" of RICO consists of civil plaintiffs' requesting its extraordinary remedies for ordinary damages whereas at least prosecutorial

56. Note that the only court to hold RICO unconstitutional did so in a *civil* case. *Firestone v. Galbreath*, 747 F. Supp. 1556 (S.D. Ohio 1990), *aff'd on other grounds*, 976 F.2d 279 (6th Cir. 1992); see *supra* note 33 for a list of criminal cases upholding RICO as constitutional.

57. *Schreiber Distrib. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J., concurring).

58. See, e.g., U.S. Attorneys' Manual, Chap. Title 9, Chapter 110, §§ 9-110.100 *et seq.* (July 1, 1992). The Manual sets out detailed provisions for when and how RICO prosecutions may be brought and articulates a policy that "a RICO count which merely duplicates the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud, wire fraud, gambling or controlled substances case[], will not be added to an indictment unless it serves some special RICO purpose as enumerated herein." *Id.* § 9-110.200.

59. Abrams, *supra* note 47, at 11.

60. For example, both *Sedima* and *H.J.* were civil cases brought by private parties.

61. Abrams, *supra* note 47, at 11.

discretion more or less confines RICO's criminal applications to extraordinary crimes.⁶² The problem is the inability of courts to limit the private civil side without also limiting the criminal side. As Professor Lynch sums it up:

The defenders of civil RICO are by and large correct that 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 . . . 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.⁶³

Federal courts, especially district courts, have not been blind to this abuse; their hostility to private civil RICO is well documented.⁶⁴ But the Supreme Court has given the lower courts precious little help in finding restraints in the statute itself.⁶⁵ For example, though it is true that under some circumstances the "enterprise" must be different from the defendant "person," this is hardly a meaningful constraint. It is not difficult, with a little imagination, to find an "enterprise" once one targets the defendant.⁶⁶

62. *But see* Crovitz, *supra* note 1, at 20-26 (delivering powerful critique of how former U.S. Attorney for Manhattan, Rudolph Giuliani, abused RICO in his investigation and prosecution of Drexel Burnham Lambert by using statute against small tax firm simply to coerce firm's partners to testify against Drexel).

63. Lynch, *supra* note 48, at 797.

64. *See, e.g.,* MATHEWS ET AL., *supra* note 3, at 1-22 n.45 (listing examples). Judge Winter of the Second Circuit expressed the frustration of the private civil RICO circus in his Oliver Wendell Holmes Lecture at Harvard, October 13, 1992, noting that "[C]ourts presently tend to scrutinize civil RICO claims with far more skepticism than they scrutinize criminal RICO charges." Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 961 (1993).

65. Courts constrain would-be RICO plaintiffs other than through the statute itself. For example, courts regularly sustain motions to dismiss under FED. R. CIV. P. 9, which governs the failure to plead fraud with particularity. *See, e.g.,* Bennet v. Berg, 685 F.2d 1053, 1062-63 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361, *cert denied*, 464 U.S. 1008 (1983); Morin v. Trupin, 747 F. Supp. 1051 (S.D.N.Y. 1990), *dismissed in part*, 778 F. Supp. 711 (S.D.N.Y. 1991). And commentators note that "the consequence of this hostility is that civil RICO plaintiffs can count on heightened scrutiny of their claims." MATHEWS ET AL., *supra* note 3, at 1-26.

66. *See, e.g.,* Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349, 1358 (3d Cir.

Likewise, as a way of putting some teeth into the pattern requirement, one *could* read *H.J.* as approving attempts to stress the “continuity” prong of the test.⁶⁷ And some lower courts have been doing exactly that.⁶⁸ However, even a strict continuity requirement would not prevent the section 1962(c) RICO “abuse” so often complained of: the transformation of ordinary business disputes (literally) into federal cases.⁶⁹ The *Reves* case itself provides a good example of this abuse, as well as the general problems that could result from an unrestricted private civil RICO remedy.

SECTION II

Until the Supreme Court decided the *Reves* case, there was considerable confusion over the reach of section 1962(c), which reads:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.⁷⁰

Recall that the essence of a RICO violation is the *relationship* between the alleged predicate acts and the alleged enterprise. Judge Pierce put it best in *U.S. v. Stofsky*: “Set forth, then, on the face of [the statute] is a *necessary connection* between the person who would commit the enumerated predicate acts and the enterprise, and between the acts and that person's participation in the operations of the enterprise.”⁷¹

1987) (setting out chart of plaintiff's six alternative theories of liability). *See generally* DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO ¶ 7.02 at 7-22.3 (1992) (“Shifting enterprise allegations for the sole purpose of targeting specific civil defendants adds to the increasingly surreal image afflicting RICO. . . .”); *id.* ¶ 3.05 at 3-42.

67. *E.g.*, “Congress intended . . . that RICO reach activities that amount to or threaten *long-term* criminal activity.” *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243 n.4 (1989); “Congress was concerned in RICO with *long-term* criminal conduct.” *Id.* at 242; “A party . . . may demonstrate continuity . . . by proving a series of related predicates extending over a *substantial period of time*.” *Id.*; “the threat of continuity is sufficiently established where the predicates [form part of] a *long-term* association that exists for criminal purposes.” (this is the “organized crime nexus” which the court declines to require later in the opinion). *Id.* at 242-43 (all emphasis supplied). Judge Fairchild pointed out in December 1990 that “the Seventh Circuit has decided several [civil] cases since *H.J. Inc.* and has in each case concluded that the necessary continuity was absent.” *Hartz v. Friedman*, 919 F.2d 469, 472 (7th Cir. 1990). *Hartz* joined the list.

68. *See, e.g.*, *HMK Corp. v. Walsey*, 828 F.2d 1071 (4th Cir. 1987) (holding that span of four years was insufficient to show “continuity” in mixed commercial and political context of zoning decision because those kinds of decisions simply take that long), *cert. denied*, 484 U.S. 1009 (1988).

69. *See infra* Section III.

70. 18 U.S.C. § 1962(c) (1988).

71. *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) (emphasis supplied).

The open question, before *Reves*, was how tight the second “necessary connection,” or nexus, described in *Stafsky* must be.⁷² Specifically, the question was the meaning of the phrase “to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs.”⁷³

The plaintiff’s bar typically sought to use section 1962(c) to place liability on law firms and accounting firms who provided advice and services to an “enterprise” that was itself engaged in racketeering activity.⁷⁴ The argument was that the services provided by these firms constituted participation in the conduct of the enterprise’s affairs. As a practical matter, because accountants and attorneys routinely involve themselves with the operations of their corporate clients, often serving as secretaries or other officers, the potential expansion of RICO liability to even their ordinary services presents a serious problem.⁷⁵ The facts of *Reves* provide an example.

A. *The Facts and Issue in Reves*

Reves was a private civil RICO action filed against an accounting firm that had provided services to the Farmer’s Cooperative of Arkansas and Oklahoma, Inc. (Co-op). The Co-op was run by a Board of Directors (Board) elected by the members at an annual meeting. It financed its operations chiefly through demand notes which it promoted to its (mostly farmer) membership as a safe, secure “Investment Program.”⁷⁶

Through the machinations of its general manager, the Co-op became the owner of a gasohol plant (Plant) that was losing money hand over fist. When it came time to prepare financial statements for Fiscal Year 1981, a

72. For an example of how each nexus Judge Pierce describes receives separate analysis in one case, see the first panel decision in *Yellow Bus Lines, Inc. v. Local Union 639*, 839 F.2d 782, 794 (D.C. Cir.), *cert. denied*, 488 U.S. 926 (1988), *vacated*, 492 U.S. 914 (1989). The respondent in *Reves* also captures the idea quite nicely in this passage:

[T]he most difficult interpretative problems . . . involv[e] outsiders who act independently of a legitimate enterprise; the knotty issue in such cases is determining at what point the activities . . . become sufficiently connected to the enterprise that it is reasonable to treat the outsiders as participating in the conduct of the enterprise’s affairs.

Respondent’s Brief, at 29, *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993) (No. 91-886).

73. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1166 (1993).

74. See, e.g., *Blake v. Dierdorff*, 856 F.2d 1365 (9th Cir. 1988) (involving complaint against outside attorney alleging that outside attorney had stake in enterprise Savings and Loan institution, held position of influence, and reviewed institution’s misleading reports and releases to public, was sufficient to state RICO claim); *Odesser v. Continental Bank*, 676 F. Supp. 1305 (E.D. Pa. 1987) (involving complaint by founder of company of attorney’s involvement in inter-company struggle for control sufficient to state claim under RICO).

75. Jay K. Wright, *Why Are Professionals Worried About RICO?* 65 NOTRE DAME L. REV. 983, 984 (1990) (arguing that RICO has “exacerbate[d]” tendencies in the law to expose professionals to “enormous, potentially indeterminate damages wholly disproportionate to the professional’s undertaking or conduct”).

76. The facts are taken from the circuit court’s opinion, *Arthur Young & Co. v. Reves*, 937 F.2d 1310 (8th Cir. 1991), *aff’d sub nom. Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993).

proper valuation of the Plant would have resulted in the Co-op showing a negative net worth that would likely have provoked a run on the Co-op's notes. In preparing the financial statements, the outside Auditor improperly over-valued the asset so as to show a positive net worth for the Co-op.⁷⁷ The Auditor did include a warning in the financial statements about the Plant's continued operation and likewise did issue a qualified opinion, but did not disclose the improper overvaluation to the Board.⁷⁸

The Board condensed the financial statements into a misleading form (chiefly by leaving off the qualifying notes relevant to the Plant), which the Auditor presented to the membership at the 1982 annual meeting without disclosing either the Auditor's qualified opinion or improper valuation. A similar series of events occurred the following year.

Despite these and other efforts, the Co-op went bankrupt. Plaintiffs, being the class of noteholders who bought demand notes between the date of the Co-op's acquisition of the Plant and the date of bankruptcy, filed suit against, among others, the Auditor. Although this cannot be characterized as anything more than an ordinary fraud case for which there are already state and federal penalties, the lure of RICO was irresistible.⁷⁹

The plaintiffs alleged that the Auditor violated section 1962(c) because it had induced continued investment in the Co-op by concealing the proper valuation of the Plant from the membership. There was no dispute that the Auditor committed a "pattern" of "racketeering activity," that the Co-op was an "enterprise," or that the Auditor was "employed by or associated with" the Co-op. Rather, the question presented was whether the Auditor "participate[d], directly or indirectly, in the conduct of such enterprise's affairs."⁸⁰

77. Because the Co-op's auditors changed names several times during the relevant time-period, from Russell Brown & Company to Arthur Young to Ernst & Young, and because those who performed the auditing functions were partners in the firms, I will simply refer to them as the "Auditor." If the auditing had been done by employees, that would raise the issue of whether it is appropriate to impute liability to the corporations. Cf. Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 ST. JOHN'S L. REV. 725 (1990). Lacovara and Nicoli's very interesting article might contain a better formulation of the "participation" test than any circuit has yet come up with. But it is not quite on point, I think, with the issues raised by *Reves* where a partnership, which is not named as both defendant and enterprise, is threatened with civil liability for the actions of one of its principals.

78. That the valuation was improper was not disputed in the case. The note to the Co-op's financial statements showed that the gasohol plant lost \$1.2 million that year, and warned that those losses "cast doubt on the recovery of the co-op of its investment." The relevant note on the Auditor's qualified opinion stated that the Auditor had "some doubt" about the recoverability of the plant. The Auditor presented both the financials it had prepared and the opinion it had rendered on them to the Co-op's Board of Directors (Board), but did not tell the Board it had improperly overvalued the plant.

79. Indeed, given RICO's easy availability, plaintiffs' lawyers might have been subject to sanctions for failing to advocate zealously their clients' case if they had *not* used RICO.

80. 18 U.S.C. § 1962(c) (1988). The "racketeering" activity was commission of mail fraud (the mailing of the misleading condensed financials) and securities fraud (inducing the

The Eighth Circuit decided there must be a tight nexus, holding that civil liability "ordinarily will require some participation in the operation or management of the enterprise itself" by the defendant.⁸¹ It then affirmed the summary judgment granted by the district court, holding that the Auditor's actions "in no way rise to the level of participation in the management or operation of the Co-op."⁸²

This "operation or management" test was a minority position among the circuits. Although the District of Columbia Circuit had adopted a more restrictive "control" test, the four other circuits which had addressed the issue had accepted more attenuated connections as sufficient to incur liability.⁸³

The *Reves* issue illustrates the difficulties presented to the lower courts by the Supreme Court's incessant expansiveness. When confronted with the same issue, the District of Columbia Circuit buttressed its narrow reading of the statute by invoking the rule of lenity—ambiguous penal statutes should be construed narrowly—even though it was deciding a *civil* case, because "violations of section 1962(c) can lead to criminal as well as civil penalties."⁸⁴ As Judge Mikva noted in his concurrence, invoking the rule of lenity was "discomfiting" in a civil case, "to which the lenity rule is normally inapplicable," and all the more so because it went completely

purchase of demand notes through the concealment of the true value of the plant). *Reves*, 937 F.2d at 1321. The "pattern" consisted of the performance of the racketeering activity at two annual meetings.

81. *Arthur Young & Co. v. Reves*, 937 F.2d 1310, 1321 (8th Cir. 1991), *aff'd sub nom.*, *Reves v. Ernst & Young*, 113 S. Ct. 1163 (1993). This is basically how both the respondent and petitioner put the question in their Supreme Court briefs (though with different slants). By this decision, the Eighth Circuit continued its traditional restrictive reading of RICO (it was the circuit which developed the "multiple scheme" requirement reversed in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989)). Here, it bucked the clear weight of authority and blessed as doctrine eight-year-old dicta from its en banc decision in *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir.), *cert. denied*, 464 U.S. 1008 (1983).

82. *Reves*, 937 F.2d at 1324.

83. See *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948, 954 (D.C. Cir. 1990) (en banc) ("The crucial question is not whether a person is an insider or an outsider, but whether and to what extent that person controls the course of the enterprise's business."), *cert. denied*, 111 S. Ct. 2839 (1991). The Second Circuit, in *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981), opined that the proper nexus was shown whenever the defendant was able to commit the predicate offenses "solely by virtue of his . . . involvement in or control over the affairs of the enterprise," or "the predicate offenses are related to the activities of that enterprise." *Id.* at 54. This test was also used by the Ninth Circuit. See *United States v. Yarbrough*, 852 F.2d 1522, 1544 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988). A slightly more restrictive view was taken by the Fifth Circuit that basically substituted an "and" for *Scotto's* "or." *United States v. Cauble*, 706 F.2d 1322, 1332-33 (5th Cir. 1983) (predicate acts must both (1) be related to enterprise's affairs and (2) be enabled by defendant's association with enterprise), *cert. denied*, 465 U.S. 1005 (1984). Finally, the Eleventh Circuit, in *Bank of America v. Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), decided that the only nexus required was "the performance of activities necessary or helpful to the operation of the enterprise." *Id.* at 970.

84. *Yellow Bus*, 913 F.2d at 955.

against the text, the legislative history, and the Supreme Court's consistently expansive interpretation of RICO.⁸⁵ Judge Mikva then asked the question which is central to this article: why should one element of RICO be read narrowly when others are read broadly? The Supreme Court's opinion in *Reves* does nothing to answer that question.

B. The Supreme Court Opinion in *Reves*

1. Exercising Judicial Fiat

Justice Blackmun's opinion, for a six member majority, affirmed both the Eighth Circuit's "operation or management" test and the court's application of the test to the facts. The holding rested upon a micro-analysis of section 1962(c)'s language.⁸⁶ The Court insisted that the "narrow question" was the meaning of the statutory phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs[.]"⁸⁷ The Court found the answer in the "plain meaning" rule of statutory construction, stating the rule this way:

If the statutory language is unambiguous, in the absence of a "clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."⁸⁸

The Court relied on *Webster's Third New International Dictionary* and *Black's Law Dictionary* to assert that the words "conduct" and "participate" are unambiguous. The Court then looked for "clearly expressed legislative intent" contrary to the asserted "plain meaning" and found none. It also dismissed Congress's liberal construction provision as inapplicable because it "only serves as an aid for resolving an ambiguity,"⁸⁹ and defended its decision as consistent with the overall structure of RICO. A closer examination of these analytical moves reveals the essentially arbitrary nature of the Court's rationale.

Eager to avoid the liberal construction clause, the Court attempted to place its decision on the "plain meaning" of the words in the disputed provision.⁹⁰ Specifically, the Court decided that since the *verb* "conduct"

85. *Id.* at 957.

86. The holding comes in Section III of the opinion. Sections I and II describe the facts and proceedings below, Sections IV and V consider supplementary issues of legislative history, liberal interpretation, and the overall statutory scheme. Section VI applies the stated test to the facts.

87. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1169 (1993).

88. *Id.*

89. *Id.* at 1172 (quote marks omitted).

90. The Court invoked the legislative history and the statutory scheme as mere supports for, not the bases of, its decision. It asserted that the operation or management test "finds further support in the legislative history of § 1962," *Reves*, 113 S. Ct. at 1170, but demonstrates only that members of Congress understood § 1962(c) to apply to participation in the operation or management, which the Court conceded "does not necessarily mean that they understood § 1962(c) to be limited to the operation or management of an enterprise." *Id.* at 1172 (emphasis

means "lead, run, manage, or direct,"⁹¹ the *noun* form must be given the same meaning, thereby becoming a limiting term. The Court emphasized that liability attaches not to mere participation in the affairs, but participation in the "conduct" of the affairs. It then decided that since "conduct" has a restrictive meaning, so must "participate," because a liberal reading of the *verb* "participate" would nullify the already decided-upon restrictive meaning of the *noun* "conduct."

The Court's analysis is deficient in several respects. First, the Court gave no principled reason why the verb form of "conduct" should constrain the meaning of the noun form and not vice versa. In a kind of verbal judo, Justice Souter's dissent demonstrated that the broad meaning of the noun "conduct" could be read to expand the meaning of the verb.⁹² He persuasively argued that the Court cannot base its interpretation on "plain meaning" but must use judicial rules of statutory construction.

Second, the Court's definition of "participate" is completely tautological. The Court's analysis began with a decision to interpret the word "conduct" narrowly in its verb form, then use that narrow definition to control the interpretation of the noun "conduct," and *then* use that narrow definition of the noun "conduct" to restrict the meaning of the verb "participate." But, since the very broad verb "participate" appears in front of the noun "conduct," it also "seems reasonable" to either (1) give each version of "conduct" a different meaning or (2) use the broad meaning of "participate" to require that the noun "conduct" also be broadly construed and use the meaning of the noun to control the meaning of the verb.

Third, to the extent that the term "participate" refers to the *degree* of activity required to incur liability, not the *level* of the enterprise's organizational structure at which the activity takes place, its meaning may be entirely divorced from the meaning of "conduct." One may have a tenuous connection to high-level activities (such as Board meetings or management decisions) or a close connection to low-level activities. This distinction was raised in oral arguments when the Court pressed the government on the question of whether the statute would reach company ditch-diggers or secretaries who may participate in the racketeering activity (by burying bodies or destroying records, for example).⁹³ The Court decided that the

added). The Court devoted the rest of the opinion to defending its announced narrow interpretation. *See id.* (stating that liberal construction clause "does not require rejection of the . . . test."); *id.* at 1173 (asserting that liability is "not limited to upper management" and is also not limited to "insiders" in that "outsiders may be liable . . . if they are 'associated with' an enterprise and . . . participate in the operation or management of the enterprise itself").

91. *Id.* at 1169.

92. *See id.* at 1174 ("[E]ven when 'conduct' is used as a verb, '[t]he notion of direction or leadership is often obscured or lost; e.g., an investigation is *conducted* by all those who take part in it.") (quoting 3 OXFORD ENGLISH DICTIONARY 691 (2d ed. 1989) (emphasis in original)).

93. 16 RICO L. Rep. 905, 917-18 (Nov. 1992).

answer to that question was beyond the scope of the case.⁹⁴ Therefore, the Court's view of the proper definition of "participate" should similarly be viewed as dicta only.

Finally, it seems especially inappropriate to attempt to construe the *relationship* between the alleged predicate acts and the enterprise by the dictionary definition of the word "conduct." It is not the *word*, but the concept of the statute that needs definition. And that seems to call for a more sophisticated interpretation than available from *Webster's*.

In sum, whatever the meaning of section 1962(c) is, it is not plain. The Court's pretense otherwise is little more than an exercise of judicial fiat.

2. Reversing the Course of Precedent

A more troubling aspect of the *Reves* opinion is that the Court's descent into word-chopping takes it far afield from its previous interpretive approach without marking any new interpretive trails for lower courts to follow. For example, the *Turkette* Court decided that, given "the purposes and goals of the Act, as well as the language of the statute,"⁹⁵ it would presume that the terms of the statute should be given their broadest reading, unless there was "some positive sign"⁹⁶ that Congress intended otherwise. The *Reves* Court reversed this presumption. As shown above, both broad and narrow interpretations of the disputed language are reasonably available. Yet the *Reves* Court essentially ignored the *Turkette* approach, presuming the more restrictive interpretation and placing upon the advocates of the liberal view the burden of disproving the presumption.

Likewise, the *Reves* Court insisted that RICO's liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended."⁹⁷ This is news. Both *Sedima* and *Turkette* clearly stand for precisely the opposite proposition, both in their actual decisions and in the language used to reach those decisions. While explicitly admitting that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors,"⁹⁸ the *Sedima* Court nonetheless maintained that "all of the Act's provisions" should be read in the "spirit" that RICO was "an aggressive initiative to supplement old remedies *and develop new methods* for fighting crime,"⁹⁹ and explicitly approved the statutes application "in situations not expressly anticipated by Congress."¹⁰⁰ The *Reves* Court did not explain why the dramatic expansion of RICO sanctioned by the *Sedima* Court was acceptable, but the requested expansion of RICO in *Reves* was denied.

94. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 n.9 (1993).

95. *United States v. Turkette*, 452 U.S. 576, 590 (1981).

96. *Id.* at 593.

97. *Reves*, 113 S. Ct. at 1172.

98. *Sedima, S.P.R.L. v. Imrex Co.*, 423 U.S. 479, 500 (1985).

99. *Id.* at 498 (emphasis added).

100. *Id.* at 499 (quoting *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984)).

Finally, by requiring a civil RICO defendant to participate in the operation or management of the RICO enterprise, the *Reves* Court suggested, in more dicta, that section 1962(c) is qualitatively different from sections 1962(a) and (b) because sections 1962(a) and (b) address "infiltration of legitimate organizations by 'outsiders'" whereas section 1962(c) is "limited to persons 'employed by or associated with' an enterprise."¹⁰¹ But lower courts have built substantial precedent precisely on the idea that section 1962(c) applies equally to "outsiders" as well as "insiders."¹⁰² By failing to address this precedent and adopting a macro view of the statute arguably departing from it, the *Reves* Court again leaves lower courts wondering which way to go.

Dissenting in *Sedima*, Justice Powell glumly predicted that "the Court seems to mandate that all future courts read the entire statute broadly."¹⁰³ *Reves* proves him wrong, but the decision is no cause for joy. The concern articulated by Judge Mikva is not addressed by the Court's opinion in *Reves*: why should RICO be interpreted narrowly in *this* case but not in others?

SECTION III

I offer a principled basis for the decision in *Reves* which may also resolve other interpretive problems: because the statute is partly punitive

101. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1173 (1993) (quoting § 1962(c)).

102. Much of the precedent arises from the Operation Greylord cases in the Seventh Circuit. *See, e.g.*, *United States v. Roth*, 860 F.2d 1382, 1390 (7th Cir. 1988) (lawyer who bribed judge associated with enterprise court); *United States v. Yonan*, 800 F.2d 164, 167 (7th Cir. 1986) (lawyer who bribed States' Attorney associated with enterprise office), *cert. denied*, 479 U.S. 1055 (1987); *see also* *United States v. Bright*, 630 F.2d 804, 830 (5th Cir. 1980) (bail bondsman bribing magistrate and paying kickbacks to sheriff was associated with enterprise sheriff's office); *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977) (magistrate who accepts bribes from bonding company was associated with enterprise bonding company). *See also* cases cited in *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 839 F.2d 782, 793-94 (D.C. Cir.) (Mikva, J. for the panel), *cert. denied*, 488 U.S. 926 (1988), *vacated*, 492 U.S. 914 (1989).

Indeed, the *Reves* Court's decision could be read as approval of the theory used by the overruled district judge in *Yonan*, who held that to be "associated with" an enterprise, one had to be "associated with the enterprise as such, not merely with some other individual who is 'employed by or associated with' the enterprise but is off on a frolic and detour of his or her own." *United States v. Yonan*, 623 F. Supp. 881, 885 (N.D. Ill. 1985), *rev'd*, 800 F.2d 164 (7th Cir. 1986).

103. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 529 (1985). The lower courts have not hesitated to use the "operation or management" test announced in *Reves* to throw out civil RICO counts. *See, e.g.*, *Baumer v. Pachi*, 8 F.3d 1341 (9th Cir. 1993) (upholding trial court's dismissal under FED. R. Crv. P. 12(b)(6) of RICO count against defendant attorney who provided legal services to RICO enterprise to help it commit and then cover up state securities fraud; attorney did not participate in management or operation of scheme such as to expose him to RICO liability); *Stone v. Kirk*, 8 F.3d 1079 (6th Cir. 1993) (overturning RICO § 1962(c) jury verdict against defendant CPA; CPA did not participate in management or operation of RICO enterprise engaged in abusive tax shelter scheme merely by his concededly criminal activities as salesman for enterprise).

and partly remedial, it should be subject to a dual interpretation. Courts should not hesitate to interpret the same language strictly in some cases and liberally in others. Unfortunately, the structure of the statute precludes a simple application of this principle. Dual construction here would have to operate at two levels. First, the statute should be strictly construed when plaintiffs are private parties as compared to when the government prosecutes the action—a kind of reverse rule of lenity. Second, in private civil RICO cases, the liability provisions of sections 1961 and 1962 generally should be given narrow scope, whereas the remedial provision of section 1964(c) normally should be given broad scope.¹⁰⁴

This interpretive approach takes its initial inspiration from Justice Powell's dissent in *Sedima* where he asserted that

[i]t is neither necessary to the Court's decision, *nor in my view correct*, to read the civil RICO provisions so expansively. We ruled in *Turkette* and *Russello* that the statute must be read broadly and construed liberally to effectuate its remedial purposes, but like the legislative history to which the Court alludes, it is clear we were referring there to RICO's *criminal* provisions. It does not necessarily follow that the same principles apply to RICO's private civil provisions.¹⁰⁵

Justice Powell's remarks have been called "perverse" and "a classic example of result-oriented jurisprudence."¹⁰⁶ However, as the following discussion shows, they do not deserve such a casually brutal dismissal. To the contrary, they contain the seeds of a principled interpretive approach to RICO based on recognized canons of statutory construction that would be completely harmonious with RICO's liberal construction clause.

A. *The Case for Dual Interpretation*

As seen above, RICO is structured so that the same predicate acts defined in sections 1961 and 1962 form the basis of both civil and criminal liability. This structure is not unique, either at the federal or state level. A familiar federal example is the Internal Revenue Code (IRC), where the same predicate act, a willful submission of a false or fraudulent tax return

104. Clearly, the dual construction proposal is sound on policy grounds to the extent it reduces the civil RICO caseload. Civil RICO cases are out of control. *See* DOUGLAS E. ABRAMS, *THE LAW OF CIVIL RICO* §§ 1.1, 1.2 (1991). Available doctrinal constraints (such as the pattern requirement) simply do not keep garden variety commercial cases from choking federal courts' civil caseload. *See supra* text accompanying notes 64-69. There is no reason to believe that state law and non-RICO federal statutes do not sufficiently vindicate rights absent RICO. In short, curbing civil RICO would be a "good thing." Naturally, these are the reasons that Congress should curb civil RICO. Because courts should not base decisions on these types of reasons, I put them aside. While policy provides a motivation for looking for applicable canons of construction, it does not provide the basis for it.

105. *Sedima*, 473 U.S. at 529 (emphasis under "criminal" in original, other added).

106. DAVID B. SMITH & TERRANCE G. REED, *CIVIL RICO* ¶ 1.02, at 1-13 n.13 (1992).

“may subject a taxpayer not only to criminal penalties under sections 7206 and 7207 of the Code, but, as well, to a civil penalty, under section 6653(b), of 50% of the underpayment.”¹⁰⁷ Likewise, several states have enacted laws under which acting in the capacity of a real estate broker or salesperson without being so licensed is the basis both for criminal liability and for civil recovery from a state fund by those who have lost money in reliance on the wrongdoer.¹⁰⁸

Experience with these and other statutes demonstrates that when the same statute serves two distinct purposes, courts apply a dual interpretation.¹⁰⁹ To be sure, the courts normally construe the remedial part of the statute (usually the civil) more liberally than the penal (usually the criminal).¹¹⁰ But the important point, for now, is that the *same* words which are interpreted strictly in one context are interpreted liberally in another because of the different purposes of the statute.

1. Statutes That Are Both Civil and Criminal

Examples abound in which a court has given a liberal interpretation to a statute in a civil case when the same statute has been, or would be, applied narrowly in a criminal case. Each of the following five examples involves a statutory scheme like RICO, in which the same predicate acts form the basis for civil or criminal liability. The first two examples draw from federal statutes; the last three examples demonstrate that state courts have also adopted dual interpretations of statutes with a RICO-type structure.

First, in *Laffey v. Northwest Airlines, Inc.*,¹¹¹ the issue was whether the term “willful” in a civil provision of the Fair Labor Standards Act,¹¹² had the same meaning as the same term used in a criminal provision.¹¹³ The defendant contended that the term “willful” meant the same thing in both provisions: bad purpose or evil intent. The court instead adopted a less strict definition of the term for its use in civil cases.

107. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 308 (1978); *see also Helvering v. Mitchell*, 303 U.S. 391 (1938) (holding that acquittal of criminal charges for fraudulent deductions and willful failure to report income is no bar to civil assessment of 50% additional tax). Compare IRC § 6672 (1988) (civil) with IRC § 7202 (1988) (criminal) (imposing their respective penalties upon exact same predicate act by any person required to collect, account for, and pay over any tax (such as excise taxes or withholding) who “willfully fails to collect or truthfully account for and pay over” such tax).

108. *See infra* notes 118-23 and accompanying text for a discussion of *Moeller v. Colorado Real Estate Commission*; *see also Mary M. Cheh, Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1336-37 (1991).

109. *See generally* SUTHERLAND, STATUTORY CONSTRUCTION § 60.04 (5th ed. 1990).

110. *See, e.g., Nuclear Corp. of Am. v. Hale*, 355 F. Supp. 193, 197 (N.D. Tex. 1973) (refusing to infer in civil recovery provision of Texas materialman statute requirement to prove fraudulent intent contained in statute's misdemeanor provision).

111. 567 F.2d 429 (D.C. Cir. 1976).

112. 29 U.S.C. § 216(d) (1988).

113. *Id.* § 216(a).

[Defendant] contends that “willful” in the suit-limitation provision takes on the interpretation given the same word in the criminal provision. . . . We do not agree that the criminal construction is to be imparted into the civil provision simply because both provisions are part of the same statute. The purposes of the two sections are entirely different; one punishes as criminal certain specified conduct while the other subserves a policy to which punishment is entirely foreign.¹¹⁴

Second, the term “willfully” has been construed to place an easier burden of production upon the government in civil than in criminal tax cases. For example, in *Domanus v. United States*,¹¹⁵ the appellant had been assessed a civil penalty under section 6672 for 100% of the tax owed for willfully failing to withhold employee social security and income taxes. He was found liable for the penalty under a definition of “willfully” as “voluntary, conscious and intentional—as opposed to accidental—decisions not to remit funds properly withheld to the Government.”¹¹⁶ The taxpayer argued that the government should be required to prove “willfully” according to its settled definition in section 7202, the mirror-image criminal counterpart to section 6672: an intentional violation of a known legal duty. The court held that Congress had evidenced an intent that criminal tax statutes, but not civil, be excepted from the usual rule that ignorance of the law is no excuse. Therefore, the term “willfully” had been interpreted strictly against the government in criminal cases. However, “the special definition of ‘willfully’ for criminal tax statutes is not required in applying civil tax statutes,” because the purpose of the civil remedies was to allow “the United States the ability to collect wayward trust fund taxes.”¹¹⁷ In effect, the different purposes attendant to the civil and criminal parts of the statute warranted different interpretations of the same term.

Third, turning from federal to state statutes, the same Colorado statutory provision¹¹⁸ defines who is a “real estate broker” and “real estate salesmen” both for determining criminal sanctions¹¹⁹ and for determining if someone injured by a wrongdoer acting in the capacity of a real estate broker or salesperson is entitled to recover from the state compensation

114. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 461-62 n.230 (D.C. Cir. 1976). *But cf.* *U.S. v. Charnay*, 537 F.2d 341, 348 (9th Cir. 1976) (refusing to give different interpretations to civil and criminal 10b-5 cases). The *Charney* court did not apply different standards because “the primary difference between criminal and civil prosecutions under the securities laws is the burden of proof required for a verdict,” and therefore “there is no reasonable basis for holding that some different interpretation of Rule 10b-5 should apply to a criminal action than in a civil action.” *Id.* (citations omitted).

115. 961 F.2d 1323 (7th Cir. 1992).

116. *Domanus v. United States*, 961 F.2d 1323, 1324 (7th Cir. 1992) (quoting *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970)).

117. *Id.* at 1326.

118. COLO. REV. STAT. § 12-61-101 (1973).

119. *Id.* § 12-71-119.

fund.¹²⁰ Although the Colorado Supreme Court had interpreted this provision narrowly in criminal cases,¹²¹ the same court adopted an expansive interpretation of the *same* language for plaintiffs seeking recovery from the fund in *Moeller v. Colorado Real Estate Commission*,¹²² explaining that "in this case . . . a person is not being punished for unlawfully conducting business as a real estate broker without a license."¹²³

Fourth, under Missouri law the same statutory section defines a "pyramid scheme" for both civil and criminal actions.¹²⁴ Yet the Missouri courts have demonstrated their willingness to construe that section differently in criminal and civil cases. Thus, in *State ex rel. Ashcroft v. Wahl*,¹²⁵ the state sought to enjoin defendants from running a pyramid scheme and expressly stipulated that it would not prosecute the defendants criminally.¹²⁶ The court explicitly adopted a liberal interpretation to find that the defendant's activities came within the scope of the statute only after noting that "what the state is seeking is the remedial remedies of the chapter, and not the penal portions."¹²⁷

Finally, the South Carolina Supreme Court has held that

It is by no means new in our law to hold that statutes of a double aspect (penal and remedial) may be given a liberal construction in the civil courts when applied remedially, and yet be strictly construed in the criminal courts, when one is prosecuted in the latter for a violation.¹²⁸

*Newsom v. F.W. Poe Mfg. Co.*¹²⁹ provides an example of how that court has applied the dual construction doctrine. There, the statute at issue required only the posting of a notice that children under fourteen were not to clean moving machinery. It did not expressly forbid children from actually

120. *Id.* § 12-61-302.

121. *E.g.*, *Cary v. Borden Co.*, 386 P.2d 585, 587 (Colo. 1963).

122. 759 P.2d 697 (Colo. 1988).

123. *Moeller v. Colorado Real Estate Comm'n*, 759 P.2d 697, 701 n.2 (Colo. 1988).

124. Mo. REV. STAT. § 407.400 (1978). A typical pyramid scheme is a chain letter with five names listed and instructions for the recipient to send some amount of money to the first named person, strike off that person's name, put the recipient's name as the fifth on the list, and send the letter out to ten people, with the promise that when the recipient rises to the top of the list, the money will come rolling in from those just joining, who form the base of the pyramid.

125. 600 S.W.2d 175 (Mo. Ct. App. 1980).

126. *State ex rel. Ashcroft v. Wahl*, 600 S.W.2d 175, 180 (Mo. Ct. App. 1988) ("[A]lthough § 407.420 provides that a willful violation of § 407.405 shall constitute a felony, any possibility of a criminal charge has been abandoned by the state pursuant to its open-court stipulation.').

127. *Id.* at 180-81.

128. *McKenzie v. Peoples Baking Co.*, 31 S.E.2d 154, 155 (S.C. 1944). The court held that in a personal injury action the state's Pure Food Statute would be liberally construed to bring a piece of steel found in a cake under the definition of "ingredient," even though the "statute has a criminal side and if the defendant were resisting a prosecution for its violation, strict construction [of that term] might be in order." *Id.*

129. 86 S.E. 195 (S.C. 1915).

cleaning. In a personal injury action, the court used the principle of dual construction to justify a liberal reading in the civil context, stating:

The remedy must [not] be destroyed by the penalty, if practicable. We are now on the civil side of the court. . . . The Legislature must not be held to require a false notice to be posted, but to have intended by that act to make the act of cleaning moving machinery . . . by children under 14 years of age, unlawful. If [the shop foreman] were indicted for the offense, the penal feature might fail.¹³⁰

2. Statutes That Are Civil Only

Because the principle behind the canon of dual construction is that the same statute may have different purposes in different contexts, dual construction has not been limited to distinguishing criminal from civil applications. Courts have applied the principle to statutes which have no criminal application at all, but which are nevertheless viewed as both penal and remedial in nature. Courts broadly construe such statutes when to do so would extend the remedy but narrowly construe the statutes as to liability.¹³¹ I offer two examples.

a. Gambling Statutes

Consider, for example, the South Carolina laws on gambling. Section 6308 of the 1942 South Carolina Code provided that any person who "at any time or sitting" lost more than fifty dollars could sue for recovery within three months.¹³² The next section, 6309, provided that if the loser did not file suit within the period, then "it shall be lawful for any person to sue for and recover such loss, and treble the value thereof, against the winner" if the suit was brought within the year.

In *Francis v. Mauldin*,¹³³ Francis sued Mauldin on a note and Mauldin counter-claimed under section 6308, pleading that the amount due under the note had been lost on a certain date "in a gambling or dice game." Francis demurred, asserting that the pleading failed to state a cause of action because it did not properly allege "at any time or sitting." In support

130. *Newsom v. F.W. Poe Mfg. Co.*, 86 S.E. 195, 198 (S.C. 1915). The word "not" appears to have been left out of the reported decision. Later cases which have quoted the same language also insert "not." See *McKenzie*, 31 S.E.2d at 155.

131. See, e.g., *City of Madison v. Hyland, Hall & Co.*, 243 N.W.2d 422 (Wis. 1976) (holding that term "persons" in provision of state antitrust statute granting standing to sue for treble damages includes city and county under liberal construction); *State v. Hodges*, 305 S.E.2d 278, 284 n.2 (W. Va. 1983) (noting that in criminal prosecution for carrying firearms without license, State bears burden of persuasion to prove absence of license, but in civil case burden of persuasion rests on defendant to show license).

132. *Francis v. Mauldin*, 55 S.E.2d 337, 339 (S.C. 1949) (quoting § 6308 of 1942 South Carolina Code).

133. 55 S.E.2d 337 (S.C. 1949).

of his demurrer, Francis cited an earlier case where the Court had held that pleading a gambling loss on a certain date "by playing at faro" did not properly allege "at any time or sitting."¹³⁴

The *Francis* Court refused to apply the precedent because the former case "involved an action under the penal section of the Code [6309]," so that "the court gave to the allegation 'playing at faro' a rigid construction," and concluding "we do not think this holding is controlling in the case before us."¹³⁵ Other states have made the same distinction with respect to similar statutes.¹³⁶

b. Director Liability Statutes

Statutes making directors and officers of corporations personally liable for *all* the debts of the corporation for breaches of duty such as failure to file corporate reports or filing false reports also have been construed according to whether their application in a case is seen as penal or remedial. The Supreme Court recognized the difference over 100 years ago:

As the statute imposes a burdensome liability on the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed. But as it gives a civil remedy, at the private suit of the creditor only, and measured by the amount of his debt, it is as to him clearly remedial.¹³⁷

The Colorado Supreme Court relied on that distinction to liberally construe that state's director liability statute so as to extend its remedy to a creditor's assignee.¹³⁸ The Oklahoma Supreme Court followed suit as to extending the availability of the statute,¹³⁹ but later construed the same statute strictly when called upon to determine a director's liability.¹⁴⁰ In the later case, the court was presented with a corporate director who knew that an illegal distribution of dividends was to be made, planned to be at the Board of Directors' meeting in which it was made but did not make the meeting, was one of the beneficiaries of the distribution, and accepted the

134. *Id.* at 339.

135. *Id.*

136. For more examples of the same distinction between the penal and remedial aspect of gambling statutes, see cases collected in *Huntington v. Attrill*, 146 U.S. 657, 667 (1892) ("A statute giving the right to recover back money lost at gaming and, if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer.").

137. *Huntington v. Attrill*, 146 U.S. 657, 676 (1892).

138. *Credit Men's Adjustment Co. v. Vickery*, 161 P. 297, 298 (Col. 1916) ("In some respects the statute is penal, while in others it is remedial in character; penal in its nature as to the directors for the purpose of determining their liability, and to be strictly construed. When the liability is clearly shown, it is remedial in character as to creditors and to be liberally construed in its enforcement.").

139. *Colcord v. Granzow*, 278 P. 654 (Okla. 1928).

140. *Watkinson v. Adams*, 103 P.2d 498 (Okla. 1940).

illegal dividend. The statute made liable those directors "under whom the [violation] may have happened," but excepted "those . . . who were not present when the same did happen."¹⁴¹ While acknowledging a previous liberal interpretation of the statute, the Oklahoma court held that since it was now presented with a question of liability, the statute had to be strictly construed: "the Legislature has exempted the absent director and it is not for this court, by judicial interpretation, to impose limitations upon the express exemption of such a penal statute."¹⁴² Again, the Court was construing the same language of the same provision of the same statute liberally in one instance and narrowly in another.

B. Applying the Doctrine of Dual Construction to RICO

The above review of cases clearly demonstrates that the doctrine of dual construction applies whenever a statute has dual purposes, one of which requires a broad interpretation and one of which requires a narrow interpretation. RICO is such a statute. Its legislative history clearly reveals that its provisions applicable to government actions and those granting the private civil action, while pegged to the same predicate acts and defined by the same language, nonetheless have distinct purposes. Moreover, like the director liability statutes, RICO's private civil provision itself contains both a penal and remedial aspect. Therefore, the doctrine of dual construction applies at two levels.

At the first level, the doctrine would separate private party cases from cases where the government prosecutes either a criminal or civil action. Under this approach, the same language in sections 1961 and 1962 would be read narrowly in the former and broadly in the latter class of cases. Precedent established in one class would not apply to the other.

The legislative history of RICO clearly supports this treatment of RICO. It shows that the "remedial purposes" which Congress can be appropriately held to have intended for the private civil provision are much narrower than the "remedial purposes" which Congress can be found to have intended for the government-related provisions.

RICO was a product of the 1969 Senate, when Senators Hruska and McClellan combined forces to modify Sen. Hruska's bill S.1623¹⁴³ (which itself modified and reassembled two bills Senator Hruska had introduced in the previous session, S.2048 and S.2049) so as to complement Senator McClellan's bill, S.30, the Organized Crime Control Act ("OCCA").¹⁴⁴ The result of their efforts was S.1861, the Corrupt Organizations Act, which was added into S.30 as title IX, captioned "Racketeer Influenced and Corrupt Organizations."¹⁴⁵

141. *Id.* at 499.

142. *Id.* at 500.

143. 115 CONG. REC. 6995 (1969).

144. *Id.* at 769.

145. *Id.* at 9567-71.

Although Senator Hruska's early bill contained a private civil remedies provision, that provision was dropped in the S.1861 version. The deletion was unexplained in the legislative history and committee records.¹⁴⁶ All the Senate debates and reports on the bill that became RICO address only the provisions relating to government action.¹⁴⁷

The private civil remedies provision came from the House, with little recorded discussion and debate.¹⁴⁸ Although it appears Representative Steiger wanted to add a more comprehensive provision, he was unable to do so and the short provision put in was not commented upon in the Conference Report nor by any Senator. The most comprehensive statement of its intent comes from the dissenting committee report in the House, where three congressmen objected to the provision because it was too broad.¹⁴⁹ Justice Marshall summed up the narrow purpose of the civil provisions in *Sedima*:

Congress intended to give to businessmen who might otherwise have had no available remedy a possible way to recover damages for competitive injury, infiltration injury, or other economic injury resulting out of, but wholly distinct from, the predicate acts. Congress fully recognized that racketeers do not engage in predicate acts as *ends in themselves*; instead, racketeers threaten, burn, and murder in order to induce their victim to act in a way that accrues to the economic benefit of the racketeer, as by ceasing to compete, or agreeing to make certain purchases. Congress' concern was not for the direct victims of the racketeers' acts, whom state and federal laws already protected, but for the competitors and investors whose businesses and interests are harmed or destroyed by racketeers. . . . Indeed, that is why Congress provided for recovery only for injury to business or property—that is, commercial injuries—and not for personal, physical or emotional injury.¹⁵⁰

In contrast to the limited purposes of the civil remedies provision, the Senate was driven to draft the criminal provisions very broadly.¹⁵¹ Unable

146. Professor William Blakey, who was then Chief Counsel to the Senate subcommittee at that time, has asserted that the civil provision was dropped in order to avoid "complex legal issues" and "possible political problems," but he does not elaborate on what those were. Blakey & Gettings, *supra* note 14, at 1017-18.

147. *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 489 n.19 (2d Cir. 1984). For example, the Senate version allowed the government to sue for injunctive relief. 18 U.S.C. § 1964(a) gave a broad grant of jurisdiction to district courts to grant equitable relief in RICO cases. Then, 18 U.S.C. § 1964(b) authorized the Attorney General to seek those remedies. Finally, what is now 18 U.S.C. § 1964(d) provided that a criminal conviction shall work to estop the convicted person "from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." (emphasis added). When the private civil remedy was added, it was just plopped in between these provisions with no explanation as to why it was placed between them and not simply appended.

148. See generally 116 CONG. REC. 35,342-43, 35,346 (1970).

149. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 181-96 (1970), reprinted in 1970 U.S.C.C.A.N. 4007, 4076-91.

150. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 519-20 (1985) (Marshall, J., dissenting).

151. See generally *RICO*, *supra* note 11, and Section I of this Article.

to fashion the statute in precise terms without letting what might be significant organized criminal activity through and desiring to destroy as much of the organized crime monster as it could, it was forced, as Justice Marshall noted, to rely on the Government to keep the criminal enforcement targeted appropriately.¹⁵²

Consistent with this view of the legislative history, several circuits have specifically held that the remedies granted to private plaintiffs are not nearly as broad as those granted to the Government.¹⁵³ Neither the Supreme Court nor any circuit court has held otherwise.

Given this history, Congress's prefatory order to read the statute liberally so as to "effectuate its remedial purposes" is best viewed as applicable to the civil remedies created for the government, not private civil plaintiffs. It therefore does no violence to the statute for the courts to construe the statute narrowly in section 1964(c) cases, but liberally in others, as Justice Powell suggested.

I would be remiss if I did not attempt to anticipate and deflect potential objections to my analysis. Here, at least three objections may be raised as to why the dual construction doctrine should not work this way.

First, it may be objected that the cases reviewed above relieved a civil plaintiff of some burden that the government was required to shoulder, and that many of them did so by construing terms which appeared in different sections of the statute. In RICO, the terms appear just once, and what is worse, they are given one statutory definition that makes no distinction between how the term would apply in various contexts.

This objection is wrong in fact and deficient in theory. Several of the cases reviewed above did indeed construe the same terms or section of a statute differently in civil and criminal cases.¹⁵⁴ Moreover, the objection is mere form, devoid of substance. The principle behind the rule remains constant: the same statute may contain different legislative purposes such that it is appropriate to read it as two statutes. This principle logically applies to giving a different interpretation to the same words in a statute, depending upon the nature of the case before the court. All this rule of construction requires for its application is for a court to treat 18 U.S.C. section 1964(c) like the separate statute that it functionally is.

Second, some may object to the disregard of the rule of lenity. It seems counter-intuitive to allow a more expansive construction in criminal cases

152. The Government has, in fact, limited the criminal enforcement, through its United States Attorney's Manual guidelines, *supra* note 58.

153. For example, in *Religious Technology Ctr. v. Wollersheim*, 796 F.2d 1076, 1084 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the court held that the injunctive remedies listed in § 1964(a) were available only to the Government and private plaintiffs were limited to the damage remedies of § 1964(c).

154. See, e.g., the discussion of *Moeller*, *supra* note 122 and accompanying text (real estate compensation fund); *Ashcroft*, *supra* note 125 and accompanying text (pyramid scheme statute); *Newsom*, *supra* note 129 and accompanying text (child labor statute); *Francis*, *supra* note 133 and accompanying text (South Carolina gambling statute); and *Watkinson*, *supra* note 140 and accompanying text (Oklahoma director liability statute).

than civil. The rationale behind the lenity rule, of course, is that criminal sanctions are so severe that "fundamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."¹⁵⁵ Therefore, construing ambiguities against the government is not only fair, but constitutionally required.¹⁵⁶ And indeed, the cases reviewed above use the dual construction doctrine consistently with the rule of lenity, not contrary to it.

There was some speculation in the *Reves* oral argument about the applicability of the rule of lenity.¹⁵⁷ It had recently been applied by the Supreme Court in another civil case precisely because the same acts which gave rise to civil liability also created potential criminal liability.¹⁵⁸ And the *Reves* opinion does note that its decision is consistent with the rule of lenity, thus perhaps fueling more speculation.¹⁵⁹

However, the rule of lenity is not a hard and fast doctrine but only an aid to construction. It can be overborne by Congress's obvious intent.¹⁶⁰ That seems to be Justice Powell's point in *Sedima*: the Court had already decided, in *Turkette* and *Russello*, that RICO's *criminal* provisions required expansive reading when usually criminal provisions are given narrow scope.

Nor has the Supreme Court disregarded the constitutional aspects of the rule of lenity in refusing to apply it to RICO. In *Sedima* the Court rejected a narrow construction of section 1964(c) based on the rationale behind the rule of lenity, refusing to "view the statute as being so close to the constitutional edge."¹⁶¹ A moment's reflection reveals why. The rule of lenity exists to protect defendants against unfair surprise. Since the predicate acts of RICO are all well-defined crimes,¹⁶² courts have had little difficulty in dismissing constitutional challenges on the grounds that the defendants

155. *Dunn v. United States*, 442 U.S. 100, 112 (1979).

156. *See United States v. Thompson Ctr. Arms*, 112 S. Ct. 2102, 2113 (1992) (Stevens, J., dissenting).

157. Justice O'Connor explicitly raised the issue of the applicability of the rule of lenity. 16 RICO L. Rep. at 930.

158. *Thompson Ctr. Arms*, 112 S. Ct. at 2102. The plurality opinion specified that they applied the rule of lenity because the exact same statute and statutory language "has criminal applications that carry no additional requirement of willfulness." *Id.* at 2109.

159. *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1172 n.8 (1993).

160. *Russello v. United States*, 464 U.S. 16, 29 (1983); *see also United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (rejecting criminal defendant's plea to construe narrowly term "facilitate" of Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 853(a)(2), relying on § 853(o) which is carbon copy of RICO liberal construction clause. "The rule of lenity is merely a canon of statutory construction; it is inapplicable, however, when, as here, a clear legislative directive to the contrary exists."); *see also United States v. Wake*, 948 F.2d 1422 (5th Cir. 1991) (liberally interpreting "schoolyard" drug statute as requiring only possession and not specific intent to distribute drugs in prohibited zone).

161. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 492 (1985).

162. Despite the broad scope of the mail and wire fraud statutes, courts have long held that "[t]he elements of the [RICO] predicate offenses are well-defined and established." *United States v. Stofsky*, 409 F. Supp. 609, 612 (S.D.N.Y. 1973).

did not realize that their conduct was criminal.¹⁶³ These cases possibly reflect the government's self-imposed limitation of criminal RICO to the more egregious situations. In the private civil context, however, no institutional restraint exists; due in large part to the open-ended vagueness of the mail and wire fraud statutes, a civil plaintiff might succeed in imposing liability in a situation that would be unfair surprise in the criminal context, thus expanding the scope of possible future constitutional criminal applications. This was the apparent concern of the D.C. Circuit in the *Yellow Bus* case to which Judge Mikva concurred.¹⁶⁴

The rule of lenity, therefore, is of little help in addressing the problems created by RICO. Although it is indeed strange to argue for a narrow construction of sections 1961 and 1962 in private civil cases and not in criminal cases, the issue should be judged not by blind invocation of rules of statutory construction but by a reasoned application of their rationale. Different statutory purposes warrant different statutory interpretations. In the very peculiar case of RICO, that means a narrow construction of the statute for private civil cases brought under section 1964(c).

The most serious objection is that the purposes of the statute may not be sufficiently different to warrant different treatment. It is not clear how different the purposes must be. The *Laffey* court, for example, applied different constructions, in part, because it found that a policy of punishment was "completely foreign" to the purposes behind the civil provision.¹⁶⁵ Yet in RICO, the desire to punish is not exactly foreign to the treble damages award. The close modeling of the RICO provision to the Clayton Act was not coincidental and the urge to model RICO after the anti-trust "private attorney-general" model also points to a punitive purpose.

The first response to this objection is to point out the above legislative history: the private civil provisions were an afterthought, added at the tail-end of the legislative process. The tool Congress fashioned for government prosecutors was meant to destroy Organized Crime, not Ernst & Young. As Senator Hruska's remarks and the House committee minority report clearly indicate, the additional tool Congress created in section 1964(c) for certain private parties was meant to extract compensation for certain types of damage. While the private civil provisions contain a punitive aspect, they clearly have a much narrower purpose than the government-related provisions. They have never worked as an aid to prosecutors.¹⁶⁶ The narrower private civil purpose justifies a narrower private civil interpretation.

163. See, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990) (rejecting vagueness challenge and stating that as applied, this particular defendant was put sufficiently on notice that multiple acts of murder and extortion would subject him to RICO penalties); see also *supra* note 33 (discussing constitutional challenges to RICO statute).

164. *Yellow Bus Lines, Inc. v. Drivers Local Union 639*, 913 F.2d 948 (D.C. Cir. 1990) (en banc).

165. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976).

166. Rasmussen, *supra* note 55, at 633 (noting that RICO has not functioned as private attorney general concept).

The objection also misconceives how the doctrine might apply. While the dual construction doctrine would work to separate private civil actions from government actions, it would not necessarily cease there and construe all issues that arise in the private civil cases narrowly. Rather, it could apply at a second level. As in the director's liability statutes discussed above, the dual construction doctrine could distinguish, within the context of the private civil action, between penal and remedial aspects of RICO. The statute would be narrowly interpreted when the issue concerns the liability of the defendant and liberally construed when the issue involves the availability of the remedy to the plaintiff. This application would have the virtue of being in complete accord with the Congressional command that the statute be "liberally interpreted to effectuate its remedial purposes," to the extent that clause applies to section 1964. It only adds the logical converse that the statute should be conservatively interpreted to restrict its penal purposes. Just as the "remedy must not be destroyed by the penalty,"¹⁶⁷ so should the penalty not be exacerbated by the remedy.

One difficulty with this second-level application is that it may be hard to distinguish "liability" issues from "remedial" issues. After all, every extension of liability also helps "effectuate" a remedy and every restriction of remedies also decreases someone's liability. How does one tell the difference?

Although this difficulty is real, let me suggest one solution. One must view the doctrine as a compromise, an exercise in line-drawing. Consider how the issues arise. Plaintiff files suit. Defendant objects. Objections based on reasons other than on the merits of the allegations will most likely be best evaluated under a liberal construction of the statute. For example, if the objection is one of standing, or statute of limitations, or assignment of a claim, or some other procedural argument, the statute should be interpreted broadly so as to allow potential plaintiffs the opportunity to claim a remedy. However, for objections that go to the merits of the case—such as an objection that the behavior engaged in or alleged to have been engaged in is not within the scope of the statute—a narrow construction will probably be best. Under this approach, sections 1961 and 1962 would usually be narrowly construed in private civil RICO cases because these issues almost always directly concern the liability of the defendants. Likewise, issues arising under section 1964(c) would normally be liberally decided, because they almost always concern the ability of certain plaintiffs to seek the remedy.

Finally, it should not be forgotten that the dual construction doctrine is merely a statutory rule of construction. Though I maintain that it is the best rule to use with RICO, courts should use it *only* when confronted by two reasonable constructions of the statute; obviously the plain meaning of the statute or other rules of construction may obviate its use.

167. *Newsom v. F.W. Poe Mfg. Co.*, 86 S.E. 195, 198 (S.C. 1915).

C. *Applying the Doctrine of Dual Construction to the Cases*

Applying the construction doctrine to several RICO scenarios demonstrates how it might work in practice. First, the proposed doctrine leads to the same result as the Supreme Court arrived at in *Reves*, but not on the implausible basis that section 1962(c) is “unambiguous.” Justice Souter was entirely correct that the provision is subject to more than one reasonable construction. However, he was incorrect in looking no further than the “liberal construction” clause for a tiebreaker. A liberal construction in *Reves* would expand liability. Under the dual construction doctrine, given the choice between two reasonable constructions of section 1962(c), a liability provision, the Court should use the more restrictive one in the private civil context. However, if this had been a criminal case, or a suit brought by the government for injunctive relief, then the liberal construction should be adopted. Under my proposed model, *Reves* provides no precedent for any future criminal section 1962(c) case.

Likewise, the Court was correct in *Turkette* and *Russello* to broadly construe sections 1961 and 1962 because the government brought those cases and therefore the clear intent of Congress to write as broad a criminal statute as the constitution would allow must be given full effect. However, their interpretations would not necessarily provide precedent for private civil cases. Recall that the *Turkette* court, in the criminal context, put the burden on those who advocated a narrow interpretation to prove a limiting intent in the legislative history, while the *Reves* court reversed the burden in a civil case. While the term “enterprise” may include wholly illegitimate entities for criminal purposes, the term may not have such a broad reach for civil purposes.¹⁶⁸

168. In this regard, consider *National Organization for Women (NOW) v. Scheidler*, 114 S. Ct. 798 (1994), where plaintiffs sued a coalition of antiabortion groups called the Pro-Life Action Network (PLAN) under § 1962(c), alleging that the defendants were operating the enterprise PLAN through a pattern of racketeering activity. The trial court dismissed the RICO allegations under FED. R. Crv. P. 12(b)(6) on the ground, *inter alia*, that plaintiffs had failed to allege that the enterprise PLAN had any “profit generating purpose.” *NOW v. Scheidler*, 765 F. Supp. 937, 943 (N.D. Ill. 1991). Although affirmed by the court of appeals, *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), a unanimous Supreme Court reversed, holding that no allegations of economic motive on the part of either the enterprise or defendants were required. The Court rested its holding on the ground that “[w]e believe the statutory language is unambiguous.” *NOW*, 114 S. Ct. at 806. “Nowhere is either § 1962(c), or in the RICO definitions in § 1961, is there any indication that an economic motive is required.” *Id.* at 804. The Court refused to apply the rule of lenity because “[w]e simply do not think there is an ambiguity here which would suffice to invoke the rule of lenity.” *Id.* at 806. Presumably, then, the Court would not consider the term “enterprise” sufficiently ambiguous to use any other statutory rule of construction, including the dual construction rule.

Like the *Turkette* case, which the *NOW* opinion explicitly invokes in support of its decisional method, the Court ultimately rests its decision on the presumption of expansion. “The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” *Id.* at 806 (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985), which in turn was quoting *Haroco, Inc. v. American*

Third, the dual construction doctrine suggests that *Sedima*, another civil case, was also rightly decided in the same way *Reves* was rightly decided: because it was construing the reach of section 1964(c), the remedy provision. However, the *H.J.* decision's broad reading of the section 1962 term "pattern" was incorrect in that case's civil context, though it might be correct in a case brought by the government.

Fourth, the doctrine possibly solves some currently contested RICO issues. For example, the circuits are considered split on the question of whether the treble damages are punitive.¹⁶⁹ But this Article's analysis suggests that this is the wrong question and under the dual construction approach what appear to be contradictory opinions harmonize. As to the plaintiff, damages are remedial. Thus, in *Faircloth v. Finesod*,¹⁷⁰ the Fourth Circuit held that private civil RICO claims do not abate upon the death of the injured party because the "primary" purpose of the civil provisions was remedial.¹⁷¹ This was clearly a proper holding because it effectuated the remedial purposes of the statute. It concerned the availability of section 1964(c) to a class of potential plaintiffs. It is very much consistent with the director liability cases and with the real estate compensation fund cases, discussed above.

The Fourth Circuit's intuition that "civil RICO is a square peg, and squeeze it as we may, it will never comfortably fit in the round holes of the remedy/penalty dichotomy,"¹⁷² is well illustrated by the Third Circuit's opinion in *Genty v. Resolution Trust Corp.*¹⁷³ There, the court refused to allow a civil RICO count against a New Jersey township for the acts of its agents, by applying the general rule that punitive damages will not lie against a municipal corporation.¹⁷⁴ Again, this appears a proper holding because it recognizes that, as to the defendant, treble damages are punitive, and therefore narrowly construes defendant liability.

Nat'l Bank & Trust Co. of Chicago, 747 F.2d 382, 398 (7th Cir. 1984)). Thus, to this Court, Congressional silence equals expansion. This appears inconsistent with the *Reves* court's view, given in the text *supra* at note 97.

If one takes the equally reasonable view that Congressional silence in the statute on the issue demonstrates nothing more than silence, then rules of statutory construction would apply. Because this is a civil case and the issue is one of liability, then under the dual construction approach, the presumption should be for the narrower of the possible interpretations and the burden should be upon the plaintiffs to prove the propriety of a broad reading, either from statutory language, structure, or history. This latter decisional method may lead to the same outcome in the case, but it would be more sensitive to the complexity of the statute. Likewise, reliance on *Turkette*, a criminal case, would not be allowed in this civil context. Thus, while the term "enterprise" might well require an economic motive for private plaintiffs in civil actions, such a requirement would not impede the federal government from using RICO to prosecute, say, the World Trade Center bombers.

169. Gregory P. Joseph, *Circuits In Disarray on Six Key Issues*, NAT'L L.J., Oct. 26, 1992, at 17, 22.

170. 938 F.2d 513 (4th Cir. 1991).

171. *Faircloth v. Finesod*, 938 F.2d 513, 518 (4th Cir. 1991).

172. *Id.*

173. 937 F.2d 899 (3d Cir. 1991).

174. *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 910-11 (3d Cir. 1991).

Finally, my suggested approach would partly address the concern raised among several commentators that civil RICO defendants should be allowed certain constitutional procedural protections.¹⁷⁵ As Norman Abrams succinctly put it: "it is important to keep in mind that private civil RICO involves direct enforcement in *civil* proceedings of the *criminal* law."¹⁷⁶ By severing criminal precedents from civil, a dual interpretive approach would somewhat counterbalance defendants' lesser procedural protections with stricter construction of liability. It would end the disturbing prospect of civil cases providing precedent for criminal convictions. At the same time, Professor Abrams's pithy reminder is not the entire story: as a mechanism for the "victim" of the "crime" to extract compensation from the defendant, civil RICO is remedial. Granting a RICO defendant the panoply of criminal procedural protections ignores that aspect of the statute; the dual construction doctrine does not.

In sum, the dual construction doctrine would be a principled way to express the almost universal intuition of the lower federal courts that private civil RICO should be restrained, without simultaneously reducing the statute's criminal scope and without violating Congress's liberal construction clause.¹⁷⁷

CONCLUSION

Reading RICO requires one to face the fact that Congress drafted a vague statute and has evidenced little inclination to clarify it. Although the Court in *Reves* indicated that it was ready to depart from the expansionist road built by *Turkette*, *Sedima*, and *H.J.*, it did not move in any promising direction. To deal with RICO's abundant ambiguities, courts should adopt a doctrine of dual construction, resolving the ambiguities according to a different and more restrictive standard in private civil cases than in cases

175. See, e.g., Joan Meier, *The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests*, 70 WASH. U. L.Q. 85 (1992); Note, *Civil RICO is a Misnomer: The Need For Criminal Procedural Protections in Actions Under 18 U.S.C. § 1964*, 100 HARV. L. REV. 1288 (1987).

176. Abrams, *supra* note 47, at 5. Professor Abrams does not, at least in this article, advocate criminal procedural protections for defendants. Rather, his faith in prosecutorial discretion is so great that he proposes a statutory "system of prosecutorial review of private civil RICO complaints. Under the proposed system, before a complaint can be pursued, it must be approved by the office of criminal prosecution under the suggested standard." *Id.* at 8. Nothing in his article, however, suggests that Professor Abrams would be opposed to criminal procedural protections.

177. Having a criminal statute of greater scope than its civil counterpart is far from a novel concept in the law. An examination of the U.S. Code quickly shows that it is nothing new for Congress to create a criminal statute which does not also provide the equivalent civil remedy. For example, until RICO, although the mail and wire fraud statutes gave the government extensive prosecutorial powers, they did not provide any private right of action at all. Furthermore, in other contexts, RICO itself has been held to grant the government, but not private plaintiffs, certain powers. See *supra* note 153 and accompanying text.

where the government is either plaintiff or prosecutor. *Reves* thus represents a missed opportunity—a road not taken.