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ARTICLES

TIME-BARS: RICO-CRIMINAL AND CIVIL-FEDERAL AND STATE

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* William J. and Dorothy K. Professor of Law Emeritus, Notre Dame Law School; A.B. 1957, University of Notre Dame; J.D. 1960, Notre Dame Law School. Professor Blakey was the Chief Counsel of the Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969–1970 when Congress processed the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). *Compare* Kosak v. United States, 465 U.S. 848, 856–57 & n.13 (1984) (Marshall, J.) ("[I]t is significant that the apparent draftsman of the crucial portion [of the statute so construed it, and] it seems to us senseless to ignore entirely the views of its draftsman."), *with* Banque Worms v. Luis A. Duque Pena E Hijos, Ltda, 652 F. Supp. 770, 772 n.4 (S.D.N.Y. 1986) (Goettel, J.) ("The rather broad draftsmanship of RICO has resulted in its expansive application. A professor who served as a draftsman for the bill has stated that this broad application is what *he* intended. There is no indication, however, that the Congress which passed the bill was adopting *his* intentions." (citation omitted)). Courts are not so reluctant to accept the writings of other professor-draftsmen. *See, e.g.*, Sanders v. John Nuveen & Co., 619 F.2d 1222, 1226 (7th Cir. 1980); Woolf v. S.D. Cohn & Co., 515 F.2d 591, 605 n.6 (5th Cir. 1975), *vacated*, 426 U.S. 944 (1976); Vohs v. Dickson, 495 F.2d 607, 619 n.3 (5th Cir. 1974); Lanza v. Drexel & Co., 479 F.2d 1277, 1296 n.52 (2d Cir. 1973); Klein v. Computer Devices, Inc., 591 F. Supp. 270, 277 (S.D.N.Y. 1984) (Goettel, J.); S.E.C. v. Lowe, 556 F. Supp. 1359, 1363 (E.D.N.Y. 1983), *rev'd*, 725 F.2d 892 (2d Cir. 1984), *rev'd*, 472 U.S. 181 (1985); *In re* N.Y.C. Mun. Sec. Litig., 507 F. Supp. 169, 175 (S.D.N.Y. 1980) (citing James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29 (1959)). The difference may lie, not so much in the source of the opinion, but in its content; it ought to rest on the character of the reasons supporting the opinion (or not).

This is the point at which an author must acknowledge the assistance he or she has received from his or her students and others. In this instance, my job is more complicated than the usual simple expression of appreciation. In 1979, I was a professor of law and the director of the Cornell Institute on Organized Crime, which in the summer of 1979 prepared a set of volumes on RICO. I asked Mark Flanagan

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(Virginia, 1981), one of the students working for the Institute, to prepare a draft of an essay on RICO and the statute of limitations. He soon returned and explained the topic was too large for one person. Eventually, I asked Michael S. Smith (Cornell 1981) and Bryan E. Pastuszenski (Cornell 1981) to help Mark; it resulted in the publication by them of *The Statute of Limitation in a Civil RICO Suit for Treble Damages*, *in* 1 CORNELL INSTITUTE ON ORGANIZED CRIME: MATERIALS ON RICO 974 (G. Robert Blakey ed., 1980) [hereinafter MATERIALS]. In turn, Bryan interested the law review in the topic, and it asked Mitchell A. Lowenthal (Cornell 1981) and Mark E. Greenwald (Cornell 1981) to work with him on the topic; their joint effort resulted in the publication of Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statute of Limitations*, 65 CORNELL L. REV. 1011 (1980) [hereinafter *Cornell Limitations Project*], an unprecedented ninety-four-page student essay, an essay well worth studying on the topic. *See infra* note 150 for my use of the Special Project. I also owe a special debt of gratitude to Kevin W. Goering (Cornell 1981) for his insightful and enlightening *The Character of Treble Damages: Conflict Between a Hybrid Mode of Recovery and Jurisprudence of Labels,* in MATERIALS, *supra*, at 428. Cornell professor, colleague, and enduring friend, Kevin M. Clermont, the current Robert D. Ziff Professor of Law, also helped me that summer. He continued to guide me afterwards, unselfishly with his time, in my efforts to get my mind around these issues. Since then, I have also been ably assisted by, in particular, Carli McNeill (Notre Dame 2011) and in cite checking, Shepardizing, and finding obscure references, by Monica Bordas (Notre Dame 2012), William McClintock (Notre Dame 2014), Kevin Murphy (Notre Dame 2014), Grace Fox (Notre Dame 2014), and the staff of the Notre Dame Law School library, especially Patti Ogden. To each of them, I owe more than I can ever repay.

"There is an appointed time for everything."[1]

"Ripeness is all."[2]

"Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. . . . [They] find their justification in necessity and convenience rather than in logic."[3]

INTRODUCTION

Most people can easily enough grasp the basic idea behind time-bars.[4] The enterprise[5] of law has as its purpose "justice,"[6] whether

1 *Eccl.* 3:1.

2 WILLIAM SHAKESPEARE, KING LEAR, act 5, sc. 2. (Dover Thrift Study ed.).

3 Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313–14 (1945) (Jackson, J.).

4 "Time-bars" here taken broadly include any legal mechanism using the passage of time to impact the outcome of bringing a matter to adjudication. They include **statutes of limitations**, whether criminal or civil. 18 U.S.C. § 3281 (2006) ("An indictment for any offense punishable by death may be found at any time without limitation."); § 3282(a) ("In general.—Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."); 15 U.S.C. §15b (2006) (limiting civil antitrust claims to a four-year period). They include **laches**, a well-established equitable doctrine that functions as an equitable time-bar focusing one side's legitimate reliance on another side's inaction; if invoked, it bars long-dormant claims for equitable relief. *See, e.g.*, Badger v. Badger, 69 U.S. (2 Wall.) 87, 94 (1865) ("[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." (citation omitted)). They also include laws that claims possessed by a person were **limited to the life of the offender**. *See* United States v. Daniel, 47 U.S. (6 How.) 11, 14 (1848) (holding that action of trespass on the case does not survive death of defendant, the Court stated, "the action ar[ose] *ex delicto*"). Similarly, they include laws permitting claims surviving death. For example, in *Faircloth v. Finesod*, the Fourth Circuit held that a RICO claim for $4.3 million survived the death of the plaintiff. 938 F.2d 513, 516–18 (4th Cir. 1991) ("At common law, tort claims did not survive the death of the plaintiff or defendant. . . . In short, 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. Nonetheless, we must fit it as best we can. Construing it liberally, as Congress directed, we think that civil RICO claims should survive. Certainly, the primary purpose of the private right of action created by RICO is remedial. . . . In addition, . . . murder is a RICO predicate act, and it would certainly be anomalous if a cause of action based on death did not survive the death of the would-be plaintiff. We cannot conclude that Congress ignored the brutal history of organized crime by providing a defense to criminals who have the foresight to kill their victims. We hold that civil RICO claims do not abate upon the death of the injured party."). We falsify legal

history, when, as we often do, read modern distinctions back into legal history. That said, in Roman law, which did not reflect from its earliest times, our modern distinctions, hardly an eternal verity, between "crime" and "tort," civil actions, brought *ex delicto*, for multiple damages (e.g., theft, robbery with violence, outrage, and wrongful damage to property) did not survive against the offending party, but they did for an heir of the offended party. G. Inst. 4.112–13 (F. de Zulueta trans., 1946) (addressing survival); *id.* at 6.189–215 (discussing the scope of delicts for multiple damages). In all probability, these early civil actions for multiple damages, which preceded and remained after the formulation of comparable criminal offenses, Dig. 47.2.93 (Ulpian, Edict 37) (providing for either a criminal or a civil action), partially reflected "compensation" for the loss of property and partially "compensation" for what the law later called more generally "outrage" (*iniuria*) for its taking. For the separate delict of "outrage" or *iniuria*, see G. Inst., *supra*, at 3.220–25; J. Andrew Borkowski, Textbook on Roman Law 321, 322–28 (1994). The offended person had to bring his *delict* for *iniuria* within a year. *Id.* at 326. Beyond that period, the Roman law thought the argument for "outrage" specious. Gaius wrote in the fifth century A.D.; for a description of his background and status in Roman law, including that of a major source for Justinian's Code, see *id.* at 44. They include notions of **prescription**, that is, that after a period of holding property, the right to hold the property is not subject to later legal challenges. In Roman law, for example, the Twelve Tables, supposedly a codification of the customary law of the Roman people around the year 451 B.C., provided in Table VI.3: "A prescriptive title arises after two year's possession in the case of realty; after one year's possession, in the case of other property." William A. Hunter, Introduction to Roman Law 62–63 (1921). Prescription rested in a desire "to obviate the ownership of things being uncertain for too long . . . ." G. Inst., *supra*, at 2.44. On the other hand, prescription reflected numerous exceptions under the law at that time. Hunter, *supra*, at 63–64 (noting that good faith takers had protection; among the items not included were things stolen, taken by violence, or in bad faith). Modern historians no longer credit these mythic stories about the writing of the Tables resulting from controversies between the patricians and the plebeians, in which the plebeians demanded a written law, so that they might know what it was. *See* Alan Watson, The Law of the Ancient Romans 10–14 (1970) (expressing skepticism about the traditional stories, particularly that the Greeks had a hand in the codification, as no records exist of any embassy to Greece in Greek records, and the Romans of the time had little knowledge of the Mediterranean outside of Italy). Earlier, and classic, examinations of ancient law uncritically relied on the stories. *See, e.g.*, Henry Summer Maine, Ancient Law 15–16 (Special ed., Legal Classics Library 1982) (accepting the story of the role of the Greeks in the codification, but commenting more accurately that it "mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; . . . the severance of law from morality, and of religion from law, belonging very distinctly to the *later* stages of mental progress"). Nevertheless, the stories unquestionably formed a crucial point in the creation myths of the City, and they are an express part of the Dig. 1.2.24 (Pomponius, Manual) (telling the story of the Twelve Tables). As with the common law, "[i]n early [Roman] law the obligation [of a contract, *ex contractu*] lapsed when the party subject to it died. That remained the general position as regards delictual liability [torts, *ex delicto*] but, as regards contracts, there was a gradual change towards enforcing obligations against the heirs of a deceased party." Borkowski, *supra*, at 242. Thus, the Roman law had little need for comprehensive time-bars, and the first

general statute of limitation did not appear until 424 A.D. RUDOLF SOHM, THE INSTITUTES OF ROMAN LAW 283 (James Crawford Ledlie trans., 3d ed. 1907) ("Emperors Honorius [395 to 423 A.D. in the West] and Theodosius [II 401 to 440 A.D. in the East] . . . moved by obvious considerations of convenience, enacted . . . that all actions should be barred within a certain period [that is, thirty years from the accrual of the right]."). The expiration of the period extinguished the remedy, not the right. *Id.* at 283–84. Not all time-bars stemmed from legislation. Common law time-bars include the rule against perpetuities, the year and a day rule for murder, the presumptions of death after seven years absence, and satisfaction on commercial paper after twenty years of inaction. For example, consider the Duke of Norfolk's Case, [1682] 22 Eng. Rep. 931 at 953, where the famous advocate Sir Orlando Bridgman, to circumvent an eldest son's mental deficiencies, set up an intermediate estate in trust to preserve contingent remainders. In his opinion, Lord Chancellor Nottingham (Heneage Finch) famously responded to the classic objection that it would be impossible to draw a line between here and other obviously undesirable outcomes: "Where will you stop if you do not stop here? I will tell you where I will stop: I will stop where-ever any visible Inconvenience doth appear . . . ." *Id.* at 960. The purpose of the rule against perpetuities (that a contingent interest in land had to vest within twenty-one years and a life in being) was to remedy the social concern with the inalienability of land for extended periods of time. Nottingham held that any future interest is good if based on a contingency that must occur within lives in being, expressly leaving undecided the question of "the utmost Limitation of a Fee upon a Fee." *Id.* at 953. That question remained undecided for 150 years before *Cadell v. Palmer*, 6 Eng. Rep. 956, 975 (H.L. 1833) settled it as a gross term of twenty-one years after a life or lives in being. *See generally, e.g.*, JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) (describing the Rule Against Perpetuities); *see also* Rogers v. Tennessee, 532 U.S. 451, 463 (2001) (holding as constitutional the abrogation of the year and a day common law rule and noting: "[T]he rule is generally believed to date back to the 13th century, when it served as a statute of limitations governing the time in which an individual might initiate a private action for murder known as an 'appeal of death'; that by the 18th century the rule had been extended to the law governing public prosecutions for murder; that the primary and most frequently cited justification for the rule is that 13th century medical science was incapable of establishing causation beyond a reasonable doubt when a great deal of time had elapsed between the injury to the victim and his death; and that, as practically every court recently to have considered the rule has noted, advances in medical and related science have so undermined the usefulness of the rule as to render it without question obsolete."); Cunnius v. Reading Sch. Dist., 198 U.S. 458, 469–71 (1905) (upholding against a Fourteenth Amendment challenge the administration of estate of an absentee, who had been absent for more than seven years and presumed dead, and noting that: "Whilst it may be that under the Roman Law there was no . . . coherent system provided for the administration of the estate of an absentee, it is nevertheless certain that absence, without being heard from for a given length of time, authorized the appointment of a curator to protect and administer an estate. . . . That in the ancient law of France, under varying conditions, the same governmental right was recognized is also undoubted. In the Code Napoleon the subject is especially provided for under a title treating of absence, in which ample provision is made for the administration of the property of the absentee, the law providing for, first, the provisional and ultimately the final distribution of such property in accordance with the restrictions and regulations which the title provides. . . . And it

may not be doubted that the power to deal with the estate of an absentee was recognized and exerted not only by the common law of Germany, but also by the codes of the various States of the continent of Europe. Provisions similar in character to those of the Code Napoleon were incorporated in the Civil Code of Louisiana of 1808 . . . . Under the law of England, . . . a presumption of death arose from an absence of seven years without being heard from, and whilst it is true, as we shall hereafter have occasion to say, that such presumption was not conclusive and was rebuttable, nevertheless the very fact of the presumption occasioned by absence, irrespective of the force of the presumption, was a manifestation of the power to give legal effect to the status arising from absence. . . . [T]he right to regulate the estates of absentees, both in the common and civil law, has ever been recognized as being within the scope of governmental authority, it must follow that the proposition that the State of Pennsylvania was wholly without power to legislate concerning the property of an absentee, is without merit . . . ." (citations omitted)); Bean v. Tonnele, 94 N.Y. 381, 384–85 (1884) ("It was a rule of the common law that the payment of a bond or other specialty, would be presumed after the lapse of twenty years from the time it became due, in the absence of evidence explaining the delay, although there was no statute bar. The rule is said to have begun in courts of equity, but from an early time it has been recognized by courts of law. In this State it was frequently applied prior to any statute provision on the subject, and in connection with other circumstances the presumption was allowed to prevail within the period of twenty years. In respect to simple contracts the same presumption has been applied after the lapse of twenty years. Lord Holt in . . . an action on a bond, speaking of the presumption in that case said, '*a fortiori* upon a note, if it be any considerable sum.' In *Duffield v. Creed*, which was an action brought in 1803, upon a note made in 1782, Lord Ellenborough said, 'If this had been a bond, twenty years would have raised a presumption of payment in which case he would have left the presumption to the jury, and he thought, as this note was unaccounted for, the same rule of presumption ought to apply.' The presumption has been applied to simple contracts in several cases in this country. . . . [M]any of the cases on the presumption arising from lapse of time were referred to, and it was held that the presumption was one of fact and not of law, and that it was for the jury to draw the conclusion upon all the facts and circumstances of the case." (citations omitted)).

5 Seeing law as a "purposeful enterprise" is a crucial insight in the writings of Lon Fuller, but others reflect similar insights. *See* LON L. FULLER, THE MORALITY OF LAW 145–51 (Rev. ed. 1969); ARISTOTLE, Physics *reprinted in* 8 GREAT BOOKS OF THE WESTERN WORLD 271 (Robert Maynard Hutchins ed., 1952) [hereinafter GREAT BOOKS] ("[M]en do not think they know a thing till they have grasped the 'why' of it . . . ."); FRANCIS BACON, NOVUM ORGANUM, *reprinted in* 30 GREAT BOOKS, *supra* (recognizing the utility of the Aristotelian concept of "final cause" or "purpose" in the "intercourse of man with man"); KARL R. POPPER, CONJECTURES AND REFUTATIONS 105–06 n.17 (3d ed. 1965) ("[O]ne might adopt the view that certain *things of our own making*—such as clocks—may well be said to have 'essences', viz. their 'purposes' (and what makes them serve these 'purposes') [, and they] *might* . . . be claimed by some to have an 'essence', even if they deny that natural objects have essences."). Similarly, Judge Learned Hand, a skeptic about objective truth about the nature of things in the natural world, thought that in law "purpose . . . is the surest guide to . . . meaning." Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945); *see* LEARNED HAND, THE SPIRIT OF LIBERTY TOGETHER WITH THE BILL OF RIGHTS 24–29 (3d ed. 1989) (noting skepticism is the teaching of "experience"); *accord* United States v.

criminal[7] or civil.[8] This much is beyond serious dispute. At first glance, a time-bar merely involves two points in time: the time of the event, and the time of the initiation of the legal proceedings looking

Whitridge, 197 U.S. 135, 143 (1905) (Holmes, J.) (explaining that "general purpose is a more important aid . . . than . . . grammar or formal logic" in fixing a meaning in the law).

6 *See, e.g.*, J. INST. 1.1.1 (Thomas Collett Sandars trans., 1917) ("*Justitia est constans et perpetua voluntas jus suum cuique tribuens.* Justice is the constant and perpetual wish to render every one his due."); 2 HENRY DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 167 (Samuel E. Thorne trans., 1968) ("*Est enim corona facere iustitiam et iudicium, et tenere pacem, et sine quibus corona consistere non poterit nec tenere,*" translated as, "For to do justice, [give] judgment and preserve the peace is the crown without which it can neither subsist nor endure."). Bracton, a priest, as were most lawyers of his time, was a leading medieval English jurist; his *De legibus et Consuetudinibus Angliae* is one of the oldest systematic treatises on the common law. The preamble to the United States Constitution says it reflected a desire "to . . . establish Justice." U.S. CONST. pmbl. Nevertheless, defining "justice" as giving every man "his due" is, as Cardozo says, "only cloak[ing]" the "difficulty," "for what is due must be defined." SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 275 (Margaret E. Hall ed., 1947). So saying, Cardozo fruitfully discusses, in broad outlines, the classic views of Plato, Aristotle, Bentham, Mill, and others on "justice." *Id.* at 271–90. Martha C. Nussbaum, however, rightly challenges the classic views for not giving women full recognition as a subject of "justice" in her WOMEN AND HUMAN DEVELOPMENT (2000), and the exclusion of the disabled, the citizens of other nations, and animals from consideration in modern contrarian thought (e.g., John Rawles's "justice as fairness") as subjects of "justice" in her FRONTIERS OF JUSTICE (2006). In brief, our conversations about "justice," continue.

7 FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the *just* determination of every criminal proceeding . . . ." (emphasis added)). Sentencing, too, must reflect, among other considerations, "just deserts." Congress requires federal courts to impose sentences in accordance with the purposes of the criminal law, beginning with just deserts:

> (a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider . . .
> (2) the need for the sentence imposed
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide *just* punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; . . . .

18 U.S.C. § 3553(a)(2)(A)–(D) (2006) (emphasis added).

8 FED. R. CIV. P. 1 ("These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . [and] [t]hey should be construed and administered to secure the *just* . . . determination of every action and proceeding." (emphasis added)).

into the event. Obviously, as these two points in time separate more, the ability of any legal body accurately to resolve disputes about the facts making up the event—a necessary precondition to giving each person his or her due—becomes more problematic. Testimony, or the introduction of other evidence, is the basis for fact-finding in court. Yet, over time, memories fade. Participants and other relevant persons die or become unavailable. Documents are mislaid, lost, or stolen. Physical evidence deteriorates. Ultimately, "justice" between two parties requires truth in fact-finding. At some point, the passage of time itself defeats "justice." This much, too, is beyond serious dispute. Then the lawyers get involved in the bedeviling details.[9] How

9 "[D]oth it not often happen," John Locke once noted, "that a man of an ordinary capacity very well understands a . . . law . . . that he reads, till he consults an expositor, or goes to counsel; who, by that time he hath done explaining . . . makes the words signify either nothing at all, or what he pleases." JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING, *reprinted in* 35 GREAT BOOKS, *supra* note 5, at 294. "Common use regulates the meaning of words pretty well," Locke observed, "for common conversation . . . . " *Id.* at 286. Common usage, however, does not serve so well for more complex matters. Locke commented:

> [I]n the interpretation of laws . . . there is no end; comments beget comments, and explications make new matter for explications; and of limiting, distinguishing, varying the signification of . . . moral words there is no end. These ideas of men's making are, by men still having the same power, multiplied *in infinitum*.

Id. at 287.

Yet, Locke added: "I say not this that I think commentaries needless; but to show how uncertain . . . [moral words] naturally are, even in the mouths of those who had both the intention and the faculty of speaking as clearly as language was capable to express their thoughts." *Id.* Echoing Locke, Edmund Burke observed:

> The more deeply we penetrate into the labyrinth of art[ifical society as opposed to natural society], the further we find ourselves from those ends for which we entered it. This has happened in almost every species of artificial society and in all times. We found, or we thought we found, an inconvenience in having every man the judge of his own cause. Therefore judges were set up, at first, with discretionary powers. But it was soon found a miserable slavery to have our lives and properties precarious, and hanging upon the arbitrary determination of any one man, or set of men. We fled to laws as a remedy for this evil. By these we persuaded ourselves we might know with some certainty upon what ground we stood. But lo! differences arose upon the sense and interpretation of these laws. Thus we were brought back to our old incertitude. . . . In this uncertainty, (uncertain even to the professors, an Egyptian darkness to the rest of mankind) the contending parties felt themselves more effectually ruined by the delay than they could have been by the injustice of any decision. Our inheritances are become a prize for disputation; and disputes and litigation are become an inheritance. . . . The lawyers . . . have erected another reason besides natural reason; and the result has been, another justice besides natural justice. They have so bewil-

do you fix the metric of this far and no farther? When do you start the period? When do you stop the period? Should the law toll the period based on the conduct of the complainant or the respondent? Do these time-bars affect the right or only the remedy, whatever that hoary, Roman distinction means?

The law does not easily answer these questions. The interests[10] involved are complex, and they are at least triangular: the com-

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> dered the world and themselves in unmeaning forms and ceremonies, and so perplexed the plainest matter with metaphysical jargon, that it carries the highest danger to a man out of the profession, to make the least step without their advice and assistance, Thus, by confining to themselves the knowledge of foundation of all mens' lives and properties, they have reduced all mankind to the most abject and servile dependence. . . . In a word, . . . the injustice, delay, puerility, false refinement, and affected mystery of the law are such, that many who live under it come to admire the and envy the expedition, simplicity, and equality of arbitrary judgments.

1 Edmund Burke, *A Vindication of Natural Society* (1756) *reprinted in* THE WORKS OF THE RIGHT HON. EDMOND BURKE 17–18 (Henry Rogers ed. 1837).

10 3 ROSCOE POUND, JURISPRUDENCE (1959) suggests that the general interest in security underlay statutes of limitations, first reflected in the maxim the "safety of the people is the highest law," *id.* at 292, but then developed to add the security of acquisitions and the security of transactions. "In an economically developed society [the statute] takes on two other closely related forms, namely, a social interest of the security of acquisitions and a social interest in the security of transactions." *Id.* at 292–93 (footnote omitted). On the other hand, Lord Mansfield, in the eighteenth century, "under the influence of natural-law ideas," "th[ought] of the statute[s] only as an individual plea which enabled the individual interest of a plaintiff to [cost another his individual] legal security;" thus, he "sought out numerous astute contrivances to get around its most obvious provisions." *Id.* at 293. Modern courts, however, came to see that something more was at stake than individual interests. "[T]itles [should] not be insecure by being open to attack indefinitely . . . ." *Id.* at 294. "[T]ransactions of the past [should] not be subject to inquiry indefinitely . . . ." *Id.* It would "unsettle credit and disturb business and trade." *Id.* In short, the general interest in security warrants statutes of limitations. Thus, from a broader perspective, time-bars were a "wise and beneficial" policy. *See* Gabelli v. SEC, 2013 U.S. LEXIS 1861 *11–*12 (decided Feb. 27, 2013) ("Thus the 'standard rule' [for limitations] is that a claim accrues 'when the plaintiff has a complete and present cause of action.' . . . That rule has governed since the 1830s . . . . This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' . . . Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' . . . They provide 'security and stability to human affairs.' . . . . We have deemed them 'vital to the welfare of society,' . . . and concluded that 'even wrongdoers are entitled to assume that their sins may be forgotten,' . . . ." (citations omitted)); M'Cluny v. Silliman, 28 U.S. (3 Pet.) 270, 278–79 (1830) ("Of late years the courts in England, and in this country, have considered statutes of limi-

plaining party, the responding party, and society itself, represented by the legal body that must resolve the dispute. The interests of the parties, too, may differ in criminal and civil proceedings. Should they differ if one of them is the representative of the sovereign? The questions proliferate and perplex the legal mind. Whatever commentators or courts say of time-bars,[11] the narrow foci of these materials are on the concrete answers given and rationales proffered to these pressing questions for criminal and civil RICO in federal and state proceedings, which necessarily require a consideration of the scope of RICO itself, as time-bars receive significant color and shape from their particular legal context.[12]

I. Racketeer Influenced and Corrupt Organizations Act (RICO)

A. Enactment of RICO

In 1970, Congress enacted the Organized Crime Control Act; Title IX of the 1970 Act is the Racketeer Influenced and Corrupt

tations more favorably than formerly. They . . . tend to the peace and welfare of society. . . . By requiring those who complain of injuries to seek redress . . . within a reasonable time, a salutary vigilance is imposed, and an end is put to litigation."); Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828) ("It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable [sic] light, as an unjust and discreditable defence [sic], it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law . . . to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parole evidence may be offered of confessions, (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate[ ])[,] applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges.").

11 These materials only incidentally discuss other legal mechanisms that function as time-bars.

12 That context is necessary to understanding in law is an old and well-established principle. *See, e.g.*, United States v. Boisdore's Heirs, 49 U.S. (8 How.) 113, 123 (1850) (explaining the "whole context"); *accord* Perrine v. Chesapeake & Del. Canal Co., 50 U.S. (9 How.) 172, 190 (1850) ("The rules for the construction of statutes . . . are familiar and well established . . . . The meaning . . . must be determined from the context . . . ."); Antonin Scalia, A Matter of Interpretation, 135 (Amy Gutmann ed., 1997) ("The principal determinant of meaning is context . . . .").

Organizations Act ("RICO").[13] Congress drafted Title IX to deal with

13 18 U.S.C. §§ 1961–1968 (2006) [hereinafter RICO]. G. Robert Blakey and Kevin P. Roddy collect the best law review commentary on RICO until 1996. *See* G. Robert Blakey & Kevin P. Roddy, *Reflections on* Reves v. Ernest & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1348 n.3 (1996) [hereinafter Blakey & Roddy]. Relevant student articles since then include James M. Evans, Note, *"Don't Throw Me Into The Briar Patch": RICO and Rules of Evidence*, 73 NOTRE DAME L. REV. 433 (1998); Michael J. Gerardi, Note, *The "Person" at Federal Law: A Framework and a RICO Test Suite*, 84 NOTRE DAME L. REV. 2239 (2009); Julie Gunnigle, Note, *"Birds of a Feather" RICO: Trying Partners in Crime Together*, 34 SYRACUSE J. INT'L L. & COM. 41 (2006); Paul Edgar Harold, Note, Quo Vadis, *Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO's Enterprise Provision in Criminal And Civil Cases (With a Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781 (2005); Carli McNeill, Note, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 NOTRE DAME L. REV. 1231 (2010); Stasia Mosesso, Note, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 NOTRE DAME L. REV. 257 (2000); Brian J. Murray, Note, *Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999); Benjamin Rolf, Note, *The "Ends of Justice" Revisited: How to Interpret RICO's Procedural Provision, 18 U.S.C. § 1965*, 80 NOTRE DAME L. REV. 1225 (2005); Melissa A. Rolland, Case Comment, *Forfeiture Wars, the Eighth Amendment's Excessive Fines Clause, and* United States v. Bajakajiam, 74 NOTRE DAME L. REV. 1371 (1999); Adam M. Snyder, Note, *Equitable Remedies in Civil RICO Actions: In Support of Allowing District Courts to Order Disgorgement*, 74 U. CHI. L. REV. 1057 (2007); G. Ryan Snyder, Note, *"Preserving" Civil RICO: How the Model Unfair Trade Practices Act Affects RICO's Private Right of Action under the McCarran-Ferguson Act*, 86 NOTRE DAME L. REV. 1767 (2011). The White-Collar Crime Survey of the *American Criminal Law Review* annually prints a helpful review of RICO jurisprudence. *See, e.g.*, Corey P. Argust et al., *Racketeer Influenced and Corrupt Organizations*, 47 AM. CRIM. L. REV. 961 (2010). Thirty-five states have legislation patterned on RICO. *See* ARIZ. REV. STAT. ANN. §§ 13-2312–13-2315 (2010 & Supp. 2011); CAL. PENAL CODE §§ 186–186.8 (West 1999 & Supp. 2013); COLO. REV. STAT. ANN. §§ 18-17-101–18-17-109 (West 2004 & Supp. 2011); CONN. GEN. STAT. ANN. §§ 53-393–53-403 (West 2007 & Supp. 2012); DEL. CODE. ANN. tit. 11, §§ 1501–1511 (2007); FLA. STAT. ANN. §§ 895.01–.09 (West 2000 & Supp. 2012); GA. CODE ANN. §§ 16-14-1–15 (2011); HAW. REV. STAT. ANN. §§ 842-1–12 (LexisNexis 2007 & Supp. 2011); IDAHO CODE ANN. §§ 18-7801–7805 (2004); IND. CODE ANN. §§ 35-45-6-1–2 (West 2012); IOWA CODE ANN. § 723A.1–.3 (West 2003); MICH. COMP. LAWS ANN. §§ 750.159f–.159x (West 2004 & Supp. 2012); MINN. STAT. Ann. §§ 609.901–.912 (West 2009 & Supp. 2012); MISS. CODE ANN. §§ 97-43-1–11 (West 2011); NEB. REV. STAT. § 28-1351 (Supp. 2010); NEV. REV. STAT. ANN. §§ 207.350–.520 (LexisNexis 2012); N.J. STAT. ANN. §§ 2C:41-1–6.2 (West 2005 & Supp. 2012); N.M. STAT. ANN. §§ 30-42-1–6 (LexisNexis 2004 & Supp. 2011); N.Y. PENAL LAW §§ 460.00–.80 (McKinney 2008 & Supp. 2012); N.C. GEN. STAT. §§ 75D-1–14 (2011); N.D. Cent. Code §§ 12.1-06.1-01–06.1-08 (2012); OHIO REV. CODE ANN. §§ 2923.31–.36 (LexisNexis 2010 & Supp. 2012); OKLA. STAT. ANN. tit. 22, §§ 1401–19 (West 2003 & Supp. 2012); OR. REV. STAT. §§ 166.715– .735 (2011); 18 PA. STAT. ANN. § 911 (West 1998 & Supp. 2012); P.R. LAWS ANN. tit. 25, § 971 (2008); R.I. GEN. LAWS §§ 7-15-1–11 (1999); TENN. CODE ANN. §§ 39-12-201–210 (2010); UTAH CODE ANN. §§ 76-10-1601–1609 (LexisNexis 2008 & Supp. 2011); V.I. CODE ANN. tit. 14,

§§ 600–614 (1996 & Supp. 2011); VA. CODE ANN. § 18.2-512 (2009 & Supp. 2012); WASH. REV. CODE ANN. §§ 9A.82.001–.904 (West 2009 & Supp. 2012); WIS. STAT. ANN. §§ 946.80–.88 (West 2005 & Supp. 2011). Some have statutes considerably more narrow than RICO. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 175/1–/9 (West 2008) (narcotics only); KAN. STAT. ANN. § 21-4401–4410 (2007 & Supp. 2011) (specifying the nature of the threat or promise that must be made to fall under RICO) (repealed 2010); LA. REV. STAT. ANN. §§ 15:1351–56 (2005 & Supp. 2012) (originally applicable only to drug racketeering activity but amended in 1992, 1994, and 1995 to encompass a broader range of predicate acts not related to drug racketeering activity). The best general analysis of these statutes is John E. Floyd's ABA SECTION OF ANTITRUST LAW, RICO STATE BY STATE (John Floyd, ed., 2d. ed. 2011) [hereinafter ABA RICO SUMMARY]. As Floyd notes, some states have also used concepts derived from RICO, such as "pattern" and "enterprise," to target gangs. *Id.* at 9; ARIZ. REV. STAT. ANN. § 13-2321 (2010 & Supp. 2011); ARK. CODE ANN. § 5-74-103 (2005); CAL. PENAL CODE § 186.20 (West 1999); COLO. REV. STAT. Ann. § 18-23-101 (West 2004); DEL. CODE ANN. tit. 11, § 616 (2007); D.C. CODE ANN. § 22-951 (LexisNexis 2010); FLA. STAT. ANN. § 874.01 (West 2000 & Supp. 2012); GA. CODE ANN. § 16-15-1 (2011); IDAHO CODE ANN. § 18-8502 (Supp. 2011); 720 ILL. COMP. STAT. ANN. §§5/33G-3 (West 2012) (The Illinois statute is not only of most recent, but also one of the most sophisticated efforts to adapt the RICO ideas to the prosecution of street gangs); IND. CODE § 35-45-9-1 (2008); MD. CODE ANN., CRIM. LAW § 9-801 (LexisNexis 2012); MISS. CODE ANN. § 97-44-3 (West 2011); MO. ANN. STAT. § 578.421 (West 2011); N.C. GEN. STAT. § 14-50.15 (2011); N.D. CENT. CODE § 12.1-06.2-01 (2012); OHIO REV. CODE ANN. § 2923.41 (LexisNexis 2010); R.I. GEN. LAWS §§ 11-61-2 (2002) (repealed 1997); S.C. CODE ANN. §16-8-210 (West Supp. 2011); S.D. CODIFIED LAWS § 22-10A-1 (2006); UTAH CODE ANN. § 76-9-801 (LexisNexis 2008). Largely unnoticed in the brouhaha over civil RICO and securities fraud on the federal level is the presence in these state racketeering statutes of securities fraud predicates. These state RICO statutes incorporate the predicate acts from 18 U.S.C. § 1961(1) (2006), their own predicate acts, or a combination of the two. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2301(D)(4)(b)(xviii) (2010) (§ 1961(1) and state); CAL. PENAL CODE §186.2(a)(18) (West 1999 & Supp. 2012) (state); COLO. REV. STAT. ANN. § 18-17-103(5)(b)(XIII) (West 2004 & Supp. 2011) (§ 1961(1) and state); CONN. GEN. STAT. ANN. § 53-394(a)(15) (West 2007 & Supp. 2012) (state); DEL. CODE. ANN. tit. 11, § 1502(9)(a) (2007) (§ 1961(1) and state); FLA. STAT. ANN. §§ 895.02(1)(a)(7) & (1)(b) (West 2000 & Supp. 2012) (§ 1961(1) and state); GA. CODE ANN. §§ 16-14-3(9)(A)(xxi) (2011) (§ 1961(1) and state); IDAHO CODE ANN. § 18-7803 (2004) (predicate acts from state law but language, "any act which is chargeable or indictable under the following sections of the Idaho Code or which are equivalent acts chargeable or indictable as equivalent crimes under the laws of any other jurisdiction[,]" leaves ambiguity regarding whether the Idaho Code includes § 1961(1) offenses); IND. CODE § 35-45-6-1(e)(1) (2008 & Supp. 2012) (state); LA. REV. STAT. ANN. § 15:1352(A) (2005 & Supp. 2012) (state); MICH. COMP. LAWS ANN. § 750.159g(g) (West 2004 & Supp. 2012) (§ 1961(1) and state); MISS. CODE ANN. § 97-43-3(a)(2) (West 2011) (state); NEB. REV. STAT. § 28-1354(5)(h) (Supp. 2010) (state); NEV. REV. STAT. ANN. § 207.360(30) (LexisNexis 2012) (state). Federal courts created some confusion by assuming federal securities fraud could be included as predicate act. *See* Brown v. Kinross Gold U.S.A., Inc., 531 F. Supp. 2d 1234 (D. Nev. 2008); *In re* Stratosphere Corp. Sec. Litig., 66 F. Supp. 2d 1182, 1202 (D. Nev. 1999); N.J. STAT. ANN. § 2C:41-1(a)(1)(p) (West 2005 & Supp. 2012)

"enterprise criminality,"[14] that is, "patterns" of –

(1) violence (e.g., murder, robbery, etc.),

(2) the provision of illegal goods and services (e.g., drugs, gambling, prostitution, etc., including undocumented aliens),

(3) corruption in labor or management relations (e.g., bribery, extortion, embezzlement, etc.),

(4) corruption in government (e.g., bribery, extortion, fraud against the government, etc.), and

(5) commercial and other forms of fraud (schemes to defraud, bankruptcy fraud, securities fraud, etc.)

by, through, or against various types of licit or illicit enterprises.[15]

Because Congress found that the sanctions and remedies available to control these offenses were unnecessarily limited in scope and impact, it enacted RICO to provide enhanced criminal and civil sanctions, including fines, imprisonment, forfeiture, injunctions, and treble damage relief for persons injured in their business or property because of a violation of the statute.[16]

B. Organized Crime Myth

Its legislative history "demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an

(§ 1961(1) and state); N.M. STAT. ANN. § 30-42-3(A)(17) (LexisNexis 2004 & Supp. 2011) (state); N.C. GEN. STAT. § 75D-3(c)(2) (2011) (§ 1961(1) and state); N.D. CENT. CODE § 12.1-06.1-01(2)(f)(16) (2012) (state); OHIO REV. CODE ANN. § 2923.31(I)(2)(a) (LexisNexis 2010 & Supp. 2012) (§ 1961(1)); OKLA. STAT. ANN. tit. 22, § 22-1402(10)(x) (West 2003 & Supp. 2012) (state); OR. REV. STAT. § 166.715(6)(b) (2011) (§ 1961(1)); UTAH CODE ANN. § 76-10-1602(4)(iiii) (LexisNexis 2008 & Supp. 2011) (§ 1961(1)); WASH. REV. CODE ANN. § 9A.82.010(4)(v) (West 2009 & Supp. 2012) (state); and WIS. STAT. ANN. § 946.82(4) (West 2005 & Supp. 2011) (§ 1961(1) and state). Finally, while increasingly outdated, the U.S. Department of Justice, Criminal Division, Organized Crime and Racketeering Section, periodically publishes two useful publications: CRIMINAL RICO: 18 U.S.C.§§ 1961–1968, A MANUAL FOR FEDERAL PROSECUTORS (5th ed. Oct. 2009) and CIVIL RICO: A MANUAL FOR FEDERAL ATTORNEYS (Oct. 2007).

14 United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983) (defining "enterprise criminality" as consisting of "all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors" (internal quotation marks omitted)).

15 *See* G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 300–06 (1982) [hereinafter *Civil Fraud Action*] (categorizing diverse predicate acts).

16 *See* Organized Crime Control Act of 1970, Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) ("[T]he sanctions . . . available . . . are unnecessarily limited in scope and impact. . . . [T]his Act . . . provid[es] enhanced sanctions and new remedies . . . .").

assault upon organized crime and its economic roots."[17] The major purpose of RICO was to address the "infiltration of legitimate business by organized crime," but Congress designed the statute to reach both illegitimate and legitimate enterprises.[18] Similar to the antitrust statutes, on which Congress modeled RICO, Congress used in RICO "a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions."[19] "[C]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law."[20] Significantly, "Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways."[21] "The occasion for Congress'[s] action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in its application to organized crime."[22] As the Supreme Court observed, the contention that RICO is limited to "organized crime" "finds no support in the Act's text, and is at odds with the tenor of its legislative history."[23] Nevertheless, RICO is similar to other legislation enacted by Congress as general reform, aimed at a specific target, but not limited to a specific target.[24]

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17 Russello v. United States, 464 U.S. 16, 26 (1983).

18 United States v. Turkette, 452 U.S. 576, 592 n.14 (1981) (quoting *Hearings on Organized Crime Control Before Subcommittee No. 5 of the H. Comm. On the Judiciary*, 91st Cong, 2d Sess., 170 (1970) (Dep't of Justice Comments)).

19 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933), *overruled in part on unrelated issues by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (holding that a corporate subsidiary and its parent act as a single entity and thus cannot conspire with each other for the purposes of the Sherman Act).

20 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987).

21 H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248–49 (1989).

22 Nat'l Org. for Women, Inc. v. Scheidler (*Scheidler I*), 510 U.S. 249, 260 (1994) (quoting *H.J. Inc.*, 492 U.S. at 248) (internal quotation marks omitted); *accord* Sedima, S.P.R.L. v. IMREX Co., 473 U.S. 479, 499 (1985) (explaining RICO is used not just for "mobsters and organized criminals," since legitimate enterprises "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences").

23 *H.J. Inc.*, 492 U.S. at 244.

24 RICO fits well, too, into the traditional pattern of federal legislation aimed at a particular problem, but drafted in all-purpose language. *See, e.g.*, The Civil Rights Act of 1871, April 20, 1871, ch 22, § 1, 17 Stat. 13 (codified, relevant part, in 18 U.S.C. §§ 241–242 (2006) (criminal sanctions) and 42 U.S.C. §§ 1983–88 (2006) (civil sanctions), is illustrative. The aim of the 1871 Act was the night riding of the Klan, but courts may impose its criminal and civil sanctions on "any person" who deprives another of his civil rights; its sponsors aimed the Act at the Klan, but it applies today to police officers anywhere. *See* Monroe v. Pape, 365 U.S. 167, 183 (1961) ("[The

C. *Criminal and Civil Proceedings*

RICO's two-track system of criminal and civil litigation that Congress designed to achieve its remedial purposes fits well into the federal system of justice.[25] RICO's criminal and civil provisions are as follows:

> (1) §1961 of Title 18 sets out RICO's building-block "definitions." They apply in all actions under RICO.
> (2) § 1962 of Title 18 sets out RICO's "standards" of "unlawful" (not "criminal") "conduct."[26] They apply in all actions under RICO.

Civil Rights Act is] cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates."), *overruled on other grounds*, Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see also* Koon v. United States, 518 U.S. 81, 85–88 (1996) (reviewing the prosecution of the Los Angeles police officers under § 242 for the beating of Rodney King). Subsequently, Rodney King obtained $3.8 million dollars in a private settlement of his civil rights claim under § 1983. Charlie LeDuff, *12 Years After the Riots, Rodney King Gets Along*, N.Y. TIMES, Sept. 19, 2004, at N22, *available at* http://www.nytimes.com/2004/09/19/national/19king.html; *see also* Jennifer Medina, *Rodney King Dies at 47; Police Victim Who Asked "Can We All Get Along"*, N.Y. TIMES, (June 17, 2012) http://www.nytimes.com/2012/06/18/us/rodney-king-whose-beating-led-to-la-riots-dead-at-47.html?pagewanted=all (reporting that King drowned in his swimming pool).

25 *See generally* Gerardi, *supra* note 13 (reviewing varying concepts of "person" that defined the scope of perpetrators and victims in several federal statutory schemes that provide for parallel criminal and civil enforcement mechanisms).

26 18 U.S.C. § 1962 (2006), entitled "Prohibited Activities," contains three substantive provisions. Each begins with the phrase "It shall be unlawful . . . ." For example, § 1962(c) provides that it is "unlawful for any person employed by or associated with an enterprise engaged in, or . . . affect[ing] 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 . . . ." Significantly, the words "prohibited" and "unlawful" do not mean "criminal." Separate sections provide for the criminal sanctions (§ 1963) or civil remedies (§ 1964) for a violation of § 1962's standard of "unlawful" conduct. The Court in *Sedima* properly captured the distinction when it referred to § 1962 as, "a failure to adhere to legal requirements." *Sedima*, 473 U.S. at 489. In most situations, the distinction between "criminal" and "unlawful" is a distinction without a difference. In three situations, however, the distinction is material: (1) concurrent state court jurisdiction over civil RICO claims, (2) arbitration of civil RICO claims, or (3) foreign court jurisdiction over civil RICO claims. 18 U.S.C. § 3231 (2006) provides that "district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all *offenses* against the laws of the United States." (emphasis added). If § 1962 reflected "offenses against the United States," jurisdiction over civil RICO claims would be exclusive in the federal courts. They are not. *See* Tafflin v. Levitt, 493 U.S. 455, 464 (1990) (upholding concurrent jurisdiction and stating that "civil RICO claims are not 'offenses against the laws of the United States"'). Similarly, arbitration over civil RICO claims would be impermissible. It is not. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).

(3) §1963 of Title 18 sets out RICO's criminal sanctions for a violation of § 1962.

RICO's criminal sanctions under §1963 require:

- A criminal trial;
- Instituted by the government;
- Through a grand jury indictment; and
- The testing of the government's proof by the standard of "beyond a reasonable doubt."[27]

(4) §1964 of Title 18 sets out RICO's civil sanctions for a violation of § 1962.

RICO's civil remedies under §1964 require:

- A civil trial;
- Instituted;
- Either by the government or a private plaintiff; and
- The testing of either the government's or a private party's proof by the standard of "preponderance of the evidence."[28]

Foreign court jurisdiction over civil RICO claims is a question of the conflict of laws of the particular state, but the general rule is that one state will not enforce the "penal laws" of another state. *See, e.g.*, Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289–90 (1888) (extending the doctrine that the penal laws of a country cannot be enforced by the courts of another country to states). If § 1962 reflected "offenses against the United States," it would be a "penal" law, and a foreign jurisdiction would not enforce it. This issue is unresolved. *See* Andrew E. Kramer, *Russia Presses U.S. Bank Over Money Laundering*, N.Y. TIMES, July 4, 2008, at C3, *available at* http://www.nytimes.com/2008/07/04/business/worldbusiness/04bony.html ("In a novel legal theory on choice of law, the [Russian Customs Committee is] seeking to apply . . . RICO[ ] against the [Bank of New York Mellon] in a Russian court."). The matter settled before the Russian court ruled on the issue of jurisdiction. Gregory L. White, *Russia, BNY Mellon End $22.7 Billion Suit: Settlement for $14 Million in RICO Case Clears the Way for Bank to Open Lending Channels*, WALL ST. J., Oct. 23, 2009, at C2, *available at* http://online.wsj.com/article/SB125619950075000879.html.

That said, the Court sometimes does not follow this precise terminology, as reflected in *Sedima*, but inaccurately refers to § 1962 as "criminal provisions." *See, e.g.*, Hemi Group, LLC v. City of New York, 130 S. Ct. 983, 987 (2010) (plurality opinion) ("Section 1962, in turn, contains RICO's criminal provisions."); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 647 (2008) ("Section 1962 contains RICO's criminal prohibitions."). More often, the Court accurately refers to the structure of RICO comprehensively. *See, e.g.*, Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 453 (2006) ("The Racketeer Influenced and Corrupt Organizations Act (RICO), prohibits certain conduct involving a 'pattern of racketeering activity.' § 1962 (2000 ed.). One of RICO's enforcement mechanisms is a private right of action, available to '[a]ny person injured in his business or property by reason of a violation' of the Act's substantive restrictions. § 1964(c)." (citation omitted)).

27 *In re* Winship, 397 U.S. 358, 364 (1970).

28 *See, e.g.*, *Sedima*, 473 U.S. at 489 ("Section 1962 renders certain conduct 'unlawful;' § 1963 and § 1964 impose consequences, criminal and civil, for 'violations' of § 1962. We should not lightly infer that Congress intended the term to have wholly different meanings in neighboring subsections."); Liquid Air Corp. v. Rogers, 834

D. Liberal Construction

Congress directed that courts liberally construe RICO to achieve its remedial purposes.[29] If RICO's language is plain, it controls.[30] If its language, syntax, or context is ambiguous, courts must give it that construction that would realize its remedial purpose of providing "enhanced sanction and new remedies."[31] Courts must read its lan-

F.2d 1297, 1303 (7th Cir. 1987) (finding that in a private suit, the preponderance of the evidence standard is required); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974) (noting that in a government suit, the preponderance of the evidence standard obtains).

29 Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970) ("The provisions of this title shall be liberally construed to effectuate its remedial purposes."). *See* G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO: Reflections on* Religious Technology Center v. Wollersheim*: Will Civil RICO Be Effective Only Against White Collar Crime?*, 62 NOTRE DAME. L. REV. 526, 532 n. 21 (1987) [hereinafter *Equitable Relief*] (reviewing the history and construction of liberal construction clauses). They also review the history of treble damages and its economic rationale. *Id.* at 531 n.17; *see* G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97, 101–15 (1997) [hereinafter "*Of Characterization*"] (tracing the history of multiple damages through Hebrew, Greek, Roman and early English law and comparing that history with modern economic analysis). The article dispels confusion over the classification of treble damages as necessarily either "actual" or "punitive" damages; they are neither; they are, as a matter of history, "accumulative" damages whose purpose is remedial, not punitive. *See, e.g.*, PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature. In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 151 (1987), we stated that '[b]oth RICO and the Clayton Act are designed *to remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees.' ([e]mphasis added.) And in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241, (1987) we took note of the 'remedial function' of RICO's treble-damages provision.").

30 *See, e.g., Scheidler I,* 510 U.S. 249, 261–62 (1994) (holding that, there, the ambiguity did not support the rule of lenity); H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 249 (1989); United States v. Monsanto, 491 U.S. 600, 606 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 239 (1987); Russello v. United States, 464 U.S. 16, 29 (1983); United States v. Turkette, 452 U.S. 576, 587 n.10 (1981).

31 *See Tafflin*, 493 U.S. at 465; *Sedima*, 473 U.S. at 497–98; *Russello*, 464 U.S. at 27; *Turkette*, 452 U.S. at 587–88, 593. Congress's statement of RICO's remedial purposes is found in its "Statement of Findings and Purpose," Pub. L. No. 91-452, 84 Stat. 922, 922–23 (1970) ("[B]ecause the . . . remedies available . . . are unnecessarily limited in scope and impact. . . . the purpose . . . [is to] provid[e] enhanced sanctions and new remedies . . . ."). This statutory text saying its "purpose" was to provide "enhanced sanctions and new remedies" answers Justice Blackmon's supercilious query in *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (holding that "conduct" means "operation or manage"; "clause [not] help . . . to determine what purposes"). *Reves*, too hardly enhanced RICO's sanctions and remedies: it wrongfully narrowed the focus of the statute. See Justice Souter's dissent. *Id.* at 189 ("Congress has given courts faced with

guage in the same fashion, whatever the character of the suit.[32] The Supreme Court follows this outline.[33]

E. Criminal Enforcement

The criminal enforcement mechanism of RICO provides for imprisonment, fines, and criminal forfeiture.[34] RICO authorized imprisonment of up to twenty years, or life, where the predicate offense authorizes life.[35] In conjunction with other sections of United

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uncertain meaning a clear tiebreaker in RICO's 'liberal construction' clause . . . . [I]n this instance, the 'liberal construction' clause plays its intended part, directing us to recognize the more inclusive definition of the word 'conduct,' free of any restricting element of direction or control. Because the Court of Appeals employed a narrower reading, I would reverse."). Souter's opinion, with its careful reliance on text, is, for that reason, the more persuasive opinion.

32 *See H.J. Inc.*, 492 U.S. at 236 (holding that the pattern "appl[ies] to criminal as well as civil applications of the Act"); *Sedima*, 473 U.S. at 489. The principle is variable. *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 501 n.6 (2000) (noting that the application of conspiracy implicates both criminal "violation" and civil "conspiracy" principles); Klehr v. A.O. Smith Corp., 521 U.S. 179, 188 (1997) (finding that different considerations apply to civil and criminal statutes of limitations).

33 The Supreme Court's principal RICO decisions are: Hemi Group, LLC v. City of New York, 559 U.S. 1 (2010); Boyle v. United States, 556 U.S. 938 (2009); Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639 (2008); Wilkie v. Robbins, 551 U.S. 537 (2007); Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006); *PacifiCare Health Sys., Inc.*, 538 U.S. 401; Scheidler v. Nat'l Org. for Women (*Scheidler II*), 537 U.S. 393 (2003); Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158 (2001); *Beck*, 529 U.S. 494; Rotella v. Wood, 528 U.S. 549 (2000); Humana, Inc. v. Forsyth, 525 U.S. 299 (1999); Salinas v. United States, 522 U.S. 52 (1997); *Klehr*, 521 U.S. 179; United States v. Robertson, 514 U.S. 669 (1995); *Scheidler I*, 510 U.S. 249; Reves v. Ernst & Young, 507 U.S. 170 (1993); Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992); *Tafflin*, 493 U.S. 455; *H.J. Inc.*, 492 U.S. 229; Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989); *Monsanto*, 491 U.S. 600; *Agency Holding Corp.*, 483 U.S. 143; *Shearson/Am. Express Inc.*, 482 U.S. 220; *Sedima*, 473 U.S. 479; *Russello*, 464 U.S. 16; *Turkette*, 452 U.S. 576.

34 18 U.S.C. § 1963(a) (2006).

35 Under § 1963(a), RICO's sentencing guideline level is nineteen (two-and-one-half to three years), or the offense level of the underlying racketeering activity, which includes all offenses that are reasonably foreseeable and are committed in jointly undertaken activity. *See* United States v. Jones, 209 F.3d 991, 996 (7th Cir. 2000) (holding the sentencing court's attribution of one-and-one-half kilograms of cocaine to defendant supported by defendant's participation in drug operation). The presence of "organized crime" in RICO violations is also a ground for an upward departure. United States v. Rainone, 32 F.3d 1203, 1209 (7th Cir. 1994) ("The motivation for and the scope of a statute are often and here different things. . . . Had the guideline range for RICO offenses been set with the Chicago Outfit in mind, it would have greatly overpunished the run of the mill criminal activities that are the routine grist of RICO prosecutions. . . . The Chicago Outfit is the clearest possible example of a gang

operating on such a scale, with such success, [and] over such a long period of time that the danger which it poses to society is not adequately reflected in the guideline range. It is not your average criminal RICO violator."); *see* United States v. Tocco, 200 F.3d 401, 432–36 (6th Cir. 2000) (stating that leadership in organized crime family warrants upward departure in RICO); United States v. Carrozza, 4 F.3d 70, 74 (1st Cir. 1993) (concerning the sentencing of mob boss, Raymond J. Patriarca); *infra* note 98 more generally on the commission prosecution; *accord* United States v. Acuna, 313 F. App'x 283, 286, 297–300 (11th Cir. 2009) (upholding as reasonable life for "enforcer" of the Cuban Mafia, the "Corporation," and upward departure from the guideline range of forty-six-to-fifty-seven months to 188 months sentence for leader; pattern of offenses included murder, arson, gambling and money-laundering; $1.54 billion and $642 million in criminal forfeitures reasonable); United States v. Salerno, 868 F.2d 524, 542–43 (2d Cir. 1989) (upholding multiple sentences of one-hundred years and consecutive twenty year sentences against Eighth Amendment objections for participants in the commission prosecution of the leadership group for the five families of organized crime). Upward enhancement is proper if the predicate offense included other serious offenses (i.e. bribery (abuse of trust) or violence). *See* United States v. Patrick, 248 F.3d 11, 28 (1st Cir. 2001) (showing upward enhancement beyond the normal range for murder); United States v. Bustamante, 45 F.3d 933, 947 (5th Cir. 1995) (showing upward enhancement within the normal range for bribery). Thus, RICO authorizes life terms for murder, but the jury must find special verdicts on the death and its cause. *See* United States v. Fields, 251 F.3d 1041, 1043–46 (D.C. Cir. 2001) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding the term may not be extended beyond authorized range without due process, fact-charging, and finding), to life terms under RICO requires jury separately to find the death and its cause), *rehearing and clarifying*, United States v. Fields, 242 F.3d 393 (D.C. Cir. 2001), *abrogated by* United States v. Booker, 543 U.S. 220 (2005) (stating that mandatory sentencing guidelines are unconstitutional, but upholding the guidelines as discretionary). So, too, fines are subject to the Sixth Amendment. *See* S. Union Co. v. United States, 132 S. Ct. 2344, 2347, 2350–51 (2012) (applying the rule of *Apprendi* to the imposition of criminal fines, because its "core concern" of reserving to the jury the determination of facts that warranted punishment for a specific statutory offense applied whether the sentence was a criminal fine, imprisonment, or death). Historical evidence showed in *Southern Union Co.* that juries routinely found facts that set the maximum amounts of fines. Thus, the trial court improperly made factual findings that increased both the "potential and actual" fine imposed.

In 1970, when Congress enacted RICO, it "revived" for federal criminal law a form of criminal, as opposed to civil, forfeiture. *See* United States v. Horak, 833 F.2d 1235, 1241 (7th Cir. 1987). As Justice Holmes noted, "[u]pon this point a page of history is worth a volume of logic." N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). Common law forfeiture of property is one of the earliest sanctions of Anglo Saxon law. *See generally* James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished At Last?* 62 CORNELL L. REV. 768 (1977) (tracing forfeiture law to its biblical, Greek, and Roman roots, and reviewing its English and early American history). Historians distinguish three types of forfeiture: (1) statutory forfeiture, (2) forfeiture consequent to a conviction and attainder (legal death), and (3) deodand. Typically, the law used statutory forfeitures in England as means of tax collection; the courts mainly enforced them in admiralty by civil information brought in rem against a vessel and its untaxed paid goods, as the owners were beyond the jurisdiction of the court. *See* 3 WILLIAM

BLACKSTONE, COMMENTARIES *262. Under early English law, "felony" included any breach of the feudal engagement. MAX RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 234 (1936). Text writers trace "felony" to the Anglo Saxon "fee" (estate) and "lon" (price). 4 WILLIAM BLACKSTONE, COMMENTARIES *95–96. The courts imposed criminal forfeitures in personam on traitors and felons, who forfeited their personal property to the king and their real property to their immediate lord. *Id.* at *374–81. Under the law of deodand, an instrument of death replaced the slayer's kin as an object of vengeance; at first, the authorities sold it to buy masses for the victim; later, it became part of the king's revenue. *See* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 (1974). How much this common law practice obtained in America is in dispute. *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 163–65, at 116–17, §§ 187–97, at 135–43 (William S. Hein & Co. 5th ed. 1994) (1891). The Constitution forbade bills of attainder. U.S. CONST. art. I, § 9, cl. 3. It also limited forfeiture of estate for treason. *Id.* art. III, § 3, cl. 2. In 1790, Congress itself abolished forfeiture of estate for criminal convictions. Act of Apr. 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (codified as amended at 18 U.S.C. § 3563 (1982)), *repealed by* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1987. *See generally* United States v. Grande, 620 F.2d 1026, 1039 (4th Cir. 1980) (holding forfeiture under RICO constitutional under Article III, as the 1790 statute abolished only common law criminal forfeiture). Following the American Revolution, a variety of statutes imposed forfeitures, some criminal (in personam) and some civil (in rem). Legislative intent determined the form adopted. *See* United States v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398, 399 (1814). The civil in rem/criminal in personam distinction appears in *United States v. Moya-Gomez*, 860 F.2d 706, 721 n.15 (7th Cir. 1988). At the time of the Civil War, the authorities could not use criminal in personam forfeitures because the Southerners were behind military lines and the authorities could not arrest them; as such, they preferred civil in rem forfeitures. *See generally* 2 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 416–17 (Fred B. Rothman & Co. rev. ed. 1987) (1926) (identifying cases concerning forfeiture against Southerners during the Civil War). Following the Civil War, the Court, in *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510 (1921) (discussing forfeiture in light of prohibition), *aff'd by* Bennis v. Michigan, 516 U.S. 442, 453 (1996) (discussing forfeiture for gross indecency), affirmed the general constitutionality under the due process clause of civil in rem forfeiture. Today, the courts do not think of civil in rem forfeitures as punitive under the double jeopardy clause. *See* United States v. Ursery, 518 U.S. 267 (1996). They are, however, like criminal in personam forfeitures, subject to the excessive fines clause. *See* Alexander v. United States, 509 U.S. 544, 558–59 (1993) (discussing forfeitures under RICO); Austin v. United States, 509 U.S. 602, 619–21 (1993) (discussing forfeitures for drug charges). Procedural due process protections, too, apply. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 62 (1993) (holding that due process requires notice and opportunity to be heard before real property seized).

Broadly, criminal forfeiture today is of two types. The first deals with an interest in an enterprise, lawful or unlawful, sometimes referred to as an "inside interest." United States v. Angiulo, 897 F.2d 1169, 1211 (1st Cir. 1990); United States v. Porcelli, 865 F.2d 1352, 1364 (2d Cir. 1989); United States v. Busher, 817 F.2d 1409, 1413 (9th Cir. 1987). The second deals with an interest, not in an enterprise, but otherwise related to specified unlawful activity, sometimes referred to as "interests outside." *Porcelli*, 865 F.2d at 1362–63, 1365. Outside interests include an interest acquired or

maintained in violation of specific statutes, the proceeds of specified unlawful activity, and an interest, not in, but affording a source of influence over, an enterprise. Russello v. United States, 464 U.S. 16, 20–22 (1983) (regarding outside interests under RICO); United States v. Nelson, 851 F.2d 976, 981 (7th Cir. 1988) (regarding a continuing criminal enterprise (CCE)); United States v. McManigal, 708 F.2d 276, 282–83 (7th Cir.) (regarding forfeiture under RICO), *vacated*, 464 U.S. 979 (1983), *aff'd as modified*, 723 F.2d 580 (7th Cir. 1983), *overruled on other grounds by* United States v. Ginsburg, 773 F.2d 798, 802 (7th Cir. 1985) (en banc) (noting that criminal forfeiture "requires [the violator] to forfeit . . . the total amount of the proceeds of his racketeering activity, regardless of whether the specific dollars received from that activity are still in his possession"). "Inside interests" are subject to forfeiture without statutory qualification. *See Horak*, 833 F.2d at 1242–44; *Angiulo*, 897 F.2d at 1211 (following *Horak*); *Porcelli*, 865 F.2d at 1364–65 (following *Horak*). Constitutionally, however, they are subject to a proportionality review by the court under the excessive fine clause. *See Alexander*, 509 U.S. at 557–59; United States v. Corrado, 227 F.3d 543, 552 (6th Cir. 2000) (noting that courts can reduce forfeiture to make it proportional to the seriousness of the offense); United States v. Stern, 858 F.2d 1241, 1250 (7th Cir. 1988) (holding that exclusive use warranted entire forfeiture). "Outside interest" forfeitures are subject to forfeiture under a statutory rule of proportionality. "[A] causal link [must exist] between the property forfeited and the RICO violation." United States v. DeFries, 129 F.3d 1293, 1313 (D.C. Cir. 1997) (articulating a "but for" causality test); *see also Horak*, 833 F.2d at 1242–44 (articulating a but-for test). Assuming the causal relationship exists, courts then analyze the amount forfeited, which is governed by the statutory rule of proportionality. *See* United States v. Gilbert, 244 F.3d 888, 910–11 (11th Cir. 2001) (stating that in personam forfeiture in RICO action reached only defendant's interest, not entire property); United States v. Bankston, 182 F.3d 296, 319 (5th Cir. 1999) (holding that the district court properly disregarded "show" partnership agreement to order forfeiture of property), *rev'd in part sub nom on other grounds*, Cleveland v. United States, 531 U.S. 12 (2000); *Angiulo*, 897 F.2d at 1211; *Porcelli*, 865 F.2d at 1364–65. Criminal forfeitures are mandatory. *See* United States v. Vriner, 921 F.2d 710, 712 (7th Cir. 1991). The decisions split on whether "outside interests" are net or gross. *Compare* United States v. Simmons, 154 F.3d 765, 770 (8th Cir. 1998) (holding "gross receipts of the illegal activity"), *and* United States v. Lizza Indus., 775 F.2d 492, 498 (2d Cir. 1985) (holding that proceeds are based on gross profits, but subject to direct costs), *with* United States v. Masters, 924 F.2d 1362, 1370 (7th Cir. 1991) (holding net), *and* United States v. Jeffers, 532 F.2d 1101, 1116 (7th Cir. 1976) (stating that income "could mean gross receipts or gross income."), *aff'd in part and vacated in part on other grounds*, 432 U.S. 137 (1977). *See also DeFries*, 129 F.3d at 1313–15 (holding that forfeited income is pretax). The forfeiture provisions are comprehensive; they extend to funds that pay for attorneys. *See* Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 626 (1989) ("A defendant has no Sixth Amendment right to spend another person's money for services rendered by an attorney . . . ."); United States v. Monsanto, 491 U.S. 600, 606 (1898). In *Alexander*, the Court also upheld, over First Amendment objections, the forfeiture, under RICO, of the defendant's assets, used in the adult entertainment business, based on a finding that several items sold at several stores were "obscene;" the Court remanded the appeal, however, to consider the claim, under the Excessive Fines Clause of the Eighth Amendment, that an in personam criminal forfeiture, atop a prison term and a fine, was excessive in light, not of the number of items sold, but the extensive crimi-

nal activity conducted by the defendant through his enormous racketeering enterprise over such a substantial period of time. *Alexander*, 509 U.S. 544. Similarly, the Court decided that the Excessive Fines Clause applied to in rem civil forfeitures under other statutes. *Austin*, 509 U.S. at 606–21. On the other hand, the Constitution does not compel an innocent owner defense in an in rem forfeiture. *See Bennis*, 516 U.S. at 446–52 (holding that a wife is not entitled to the innocent owner defense to contest abatement even if she showed she did not know her husband would use the car to violate an indecency law). Nor do civil forfeitures implicate double jeopardy. *See Ursery*, 518 U.S. at 287–88; United States v. Martinez, 228 F.3d 587, 590–91 (5th Cir. 2000) (holding that a spouse does not have a community property interest in assets acquired with proceeds from RICO operation). The government need not trace property subject to criminal forfeiture. *See Masters*, 924 F.2d at 1369 (using joint and several liability); *Nelson*, 851 F.2d at 980–91 (using the net worth theory); *Ginsburg*, 773 F.2d at 801 ("Since RICO forfeiture is a sanction against the individual defendant rather than a judgment against the property itself, 'it follows the defendant as a part of the penalty and thus it does not require that the government trace it, even though the forfeiture is not due until after conviction.'" (quoting United States v. Conner, 752 F.2d 566, 576 (11th Cir. 1985))). While Congress circumscribed criminal forfeitures with the procedural protections of a criminal trial, they are not elements of guilt, but punishment. *See* Libretti v. United States, 516 U.S. 29, 33–34 (1995) (finding an instance of CCE). The indictment must contain notice of the government's intent to seek forfeiture. FED. R. CRIM. P. 32.2(a); *see* United States v. Cauble, 706 F.2d 1322, 1347 (5th Cir. 1983) (noting that under the prior form of the rule, "[b]arebones pleading suffices so long as it puts the defendant on notice that the government seeks forfeiture and identifies the assets subject to forfeiture with sufficient specificity to permit the defendant to marshal evidence in their [sic] defense"). The government may change overly general forfeiture allegations by a bill of particulars. *See* United States v. Grammatikos, 633 F.2d 1013, 1024 (2d Cir. 1980) (deciding such under prior form of rule). If a party timely requests that the jury hear and determine forfeiture, the jury must return a special verdict on the extent of the defendant's interest forfeited. FED. R. CRIM. P. 32.2(b)(5)(A); *see Gilbert*, 244 F.3d at 922 (finding under prior form of rule that without a valid verdict of forfeiture, court cannot enter an order of forfeiture). Circuit courts of appeal split on the right to a jury trial on forfeiture as a statutory right, not a constitutional right. *Compare* United States v. Robinson, 8 F.3d 418, 420 (7th Cir. 1993) (deciding a RICO statutory case), *with* United States v. Garrett, 727 F.2d 1003, 1012 (11th Cir. 1984) (deciding a CCE constitutional case), *aff'd on other grounds*, 471 U.S. 773 (1985), *superseded by statute on other grounds*, Criminal Fine Enforcement Act of 1984, Pub. L. No. 98-596, 98 Stat. 3134, *as recognized in* United States v. Elgersma, 929 F.2d 1538, 1544–45 (11th Cir. 1991). *Libretti* resolved the split. *Libretti*, 516 U.S. at 48–50 (holding that the right to jury in a forfeiture case is a statutory one). Circuit courts split on the bifurcation of the trial between guilt and forfeiture. *Compare* United States v. Feldman, 853 F.2d 648, 662 (9th Cir. 1988) (determining that defendant is entitled to bifurcated proceedings), *with* United States v. Perholtz, 842 F.2d 343, 367–68 (D.C. Cir. 1988) (per curiam) (determining that bifurcation not required). The burden of proof is preponderance, not beyond a reasonable doubt. United States v. Corrado, 227 F.3d 528, 541–42 (2000) (using a preponderance burden); United States v. Simone, 931 F.2d 1186, 1199 (7th Cir. 1991) (using a preponderance burden in a CCE case); *Ginsburg*, 773 F.2d at 807 (using a preponderance burden in a RICO case). *But see* United States v. Farese, 248 F.3d

States Code, Title 18, RICO authorizes fines for RICO violations of up to $250,000 if an individual is convicted,[36] or, alternatively, twice the gain or loss.[37] Further, sentencing courts can order defendants to pay restitution to victims of an offense.[38]

F. Civil Enforcement

The civil enforcement mechanism of RICO provides sanctions of injunctions, treble damages, costs, and attorney fees.[39] The government and private parties may bring civil suits. Private suits "provide a significant supplement to the limited resources available to the Department of Justice" to enforce the law.[40]

As in RICO's model in the antitrust laws,[41] RICO creates "a private enforcement mechanism that . . . deter[s] violators and deprive[s] them of [their illicit proceeds], and . . . provide[s] ample compensation to the victims . . . ."[42] In fact, RICO and the antitrust statutes are well integrated. The antitrust statutes protect against collusion; RICO protects against violence and fraud in the market. Together, they seek a free market characterized by integrity and freedom.[43]

1056, 1061 (11th Cir. 2001) (finding under prior form of rule that reasonable doubt where defendant's guilty plea did not indicate basis for racketeering charge). Under administrative procedure, persons can address petitions for remission or mitigation of forfeiture to the Attorney General. 18 U.S.C. § 1963(g) (2006); 28 C.F.R. §§ 8.10–9.9 (2011).

36 Section 1963(a) provides that violators "shall be fined under this title." Section 3571(b) provides for fines that a court may impose on an individual. 18 U.S.C. § 3571(b) (2006).

37 18 U.S.C. § 3663 (2006).

38 *See id.* §§ 3556, 3663.

39 *Id.* § 1964.

40 Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (discussing private suits as a tool for enforcing antitrust laws).

41 *See* Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258, 267 (1992) ("We have repeatedly observed, see *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 150–151 (1987); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 241 (1987); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 489 (1985), that Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act . . . .").

42 Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (antitrust)

43 "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." CARL KAYSEN AND DONALD F. TURNER, ANTITRUST POLICY 17 (1959); *see* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Restraint may be exerted through force or fraud or agreement.").

G. Key Elements of RICO

Restated in plain English—with Supreme Court commentary in the footnotes—RICO's substantive elements provide:

(a) **a "person"**[44] who has received income from a "**pattern of racketeering activity**"[45] cannot invest that income in an **"enterprise**,"[46]

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44 18 U.S.C. § 1961(3) (2006); *see* Gerardi, *supra* note 13 (offering a detailed analysis of "person" in federal jurisprudence).

45 In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 230 (1989), the Court, noting that it is a limitation, *not* a definition, clarified the term "pattern" in § 1961(5). It acted in light of its legislative history to reflect a "relationship" between the acts in the "pattern," that is, that they were not isolated events, and must reflect "continuity" or its threat. The Court only required the threat of continuity where the "pattern" did not go on for a "substantial period" (more than a few weeks or months); at the same time, the Court noted that the regular way of doing business of an ostensibly legitimate or a plainly illegitimate business might show a threat of continuity. *H.J. Inc.*, 492 U.S. at 238–43.

A person may also violate § 1962 through "collection of an unlawful debt." 18 U.S.C. § 1962(a)–(c) (2006); *see* United States v. Oreto, 37 F.3d 739, 751 (1st Cir. 1994) (stating that a collection of unlawful debt alone is sufficient); United States v. DiSalvo, 34 F.3d 1204, 1211 (3d Cir. 1994) (stating "used, or aided and abetted another person to use, implicit threats to collect a debt" is sufficient).

Two key elements of any RICO claim are "pattern" and "enterprise." Each is unique to RICO. The Court "clarified"—said advisedly in light to the various decisions that followed the clarification—the "pattern" element in *H.J. Inc.*, in which it developed a precise, but simple, six-step process to use to determine the existence of a "pattern" within the meaning of RICO. *See H.J. Inc.*, 492 U.S. at 238–43. For an excellent discussion of the linguistic difficulty inherent in any effort to define a primary concept like "pattern," which is intuitively known by native speakers of the language, but difficult to put into precise words, see *Apparel Art International, Inc. v. Jacobson*, 967 F.2d 720, 722–24 (1st Cir. 1992) (Breyer, C.J.). For example, any aficionado of football who watched Joe Montana and John Elway pass knew, without having to have it explained to him or her, that Montana passed in a "pattern," while Elway improvised most of the time.

Two goals are crucial: relationship and continuity (or its threat). *See H.J. Inc.*, 492 U.S. at 239 (explaining that "pattern" reflects relation and continuity). Indeed, failure to instruct on each of these elements may constitute prejudicial plain error, obviating the need to object to defective instructions. *See Cain*, 671 F.3d at 284–90. Evaluating whether a litigant satisfies these goals requires answering a series of questions:

First, do the acts in the series (at least two) relate to one another; for example, are they part of a single scheme? *H.J. Inc.*, 492 U.S. at 240.

The Court's language in *H.J. Inc.*, 492 U.S. at 242 ("A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement . . . .") most creditably reads in two sentences establishing two *separate* ways of establishing a close-end pattern: (1) a series extending over a substantial period, or (2) a series not extending over a substantial period, but contain-

ing a threat of future conduct. Thus, a threat of future conduct is *not* required in a series extending over a substantial period; the pattern concept does not, therefore, contain a "single scheme" exclusion. Indeed, both the majority and the concurring Justices unanimously agreed in *H.J., Inc.* that the Eight Circuit requirement of more than a single scheme was not the law. Strangely, in light of the Court's unanimous holding to the contrary, the courts of appeals created out of whole cloth an exclusion from "pattern" for "single schemes." *See, e.g.*, Bixler v. Foster, 596 F.3d 751, 761 (10th Cir. 2010) (finding that a single scheme to accomplish the discrete goal of transferring a mining interest to another corporation is not a pattern); Gamboa v. Velez, 457 F.3d 703, 705–09 n.2 (7th Cir. 2006) (noting that RICO is concerned with eradicating organized, long-term, habitual criminal activity, that "continuity" is a proxy for frequent, habitual criminal conduct, and finding that multiple acts by police officers extending from 1997 to 2002 aimed at obstructing justice in false homicide prosecution and concealing their participation was a one-time endeavor and was not a pattern; acts of concealment do not extend pattern); Western Assocs. Ltd. P'ship v. Market Square Assocs., 235 F.3d 629, 633–36 (D.C. Cir. 2001) (finding a single scheme over eight years to achieve a single real estate objective was not a pattern (ironically citing *H.J. Inc.*, 492 U.S. at 239)); GE Inv. Private Placement Partners II v. Parker, 247 F.3d 543, 549–51 (4th Cir. 2001) (finding a single scheme from the spring of 1998 to November 1999 (date of complaint filing) with a built-in ending point was not a pattern); Duran v. Carris, 238 F.3d 1268, 1270–71 (10th Cir. 2001) (finding no threat of continuing activity existed and no pattern where bribery and extortion were part of single boundary dispute during the limited period of time of a single year); Efron v. Embassy Suites (P.R.), Inc., 223 F.3d 12, 14–20 (1st Cir. 2000) (finding a single scheme of 21 months involving one partnership was not a pattern; factors beyond time are relevant in determining whether a pattern exists). A fair conclusion from a reading of these cases is that the lower courts are not faithfully following the teaching of the Court. In sum, under the Court's holding in *H.J., Inc.*, "pattern" neither requires nor prohibits single schemes.

Second, if not, are they related to an "external organizing principle that renders them 'ordered' or 'arranged,'" for example, to the affairs of the enterprise? *H.J. Inc.*, 492 U.S. at 238. On the external organization point (an enterprise) and relationship to it, see *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir. 1978), and *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983). Second Circuit jurisprudence, however, contains conflicting decisions on relationship. *Compare* Ianniello v. United States, 10 F.3d 59, 62–64 (2d Cir. 1993) (citing United States v. Long, 917 F.2d 691, 697 (2d Cir. 1990) (requiring "horizontal relatedness")) (holding that the acts must related to one another and are not sufficient if only related to enterprise), *with* United States v. Locascio, 6 F.3d 924, 943 (2d Cir. 1993) (holding that acts may relate to each other by their relation to the enterprise—in the prosecution of mob boss John Gotti). *Ianniello* and *Long* do not square with the "external organizing principle" language of *H.J. Inc.*; they are also inconsistent with *Elliot* and *Sinito*. The court attempted to unwind the confusion in *United States v. Daidone*, 471 F.3d 371, 374–76 (2d Cir. 2006); whether it did so successfully is another matter. *See generally* John Robert Blakey, *Could Prosecutors Convict John Gotti in the Fifth Circuit?: A Criticism of* Heller v. Grammco's *Approach to the Relatedness Requirement*, 11 CIV. RICO REP. (LRP Publ'g, Horsham, Pa.), Apr. 17, 1996, at 6 (criticizing the restrictive approach of *Heller Fin., Inc. v. Grammco Computer Sales*, 71 F.3d 518 (5th Cir. 1996), and *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992)); *Evans, supra* note 13 (reviewing federal and Florida deci-

sions under FED. R. EVID. 404(b) admitting other bad acts to show "enterprise" or a "pattern of racketeering activity," making a connection between "predicate acts," or proving an essential element of a "predicate act").

If you answer either question in the affirmative, you must answer up to two additional questions:

Third, are the acts in the series open-ended, that is, do the acts have no obvious termination point? *See H.J. Inc.*, 492 U.S. at 241–43.

Fourth, if not, did the acts in the closed-ended series go on for a "substantial period of time," that is, more than a few weeks or months? *Id.* at 242.

If you answer either question in the affirmative, continuity is present.

If you answer both questions in the negative, you must answer up to two additional questions:

Fifth, could a jury infer a threat of continuity from the character of the *illegal* enterprise? *See id.* at 242–43; *see also* United States v. Indelicato, 865 F.2d 1370, 1383–84 (2d Cir. 1988) (en banc) (describing the character of on-going enterprises, scilicet, commission of mob families in NYC).

Sixth, if not, could a jury infer a threat of continuity because the acts represent the regular way of doing business (RWDB) of a *lawful* enterprise? *H.J. Inc.*, 492 U.S. at 243.

If you answer either question in the affirmative, a threat of continuity is present. Some courts follow a rule of thumb that if the pattern does not continue for more that twelve months, it does not constitute a "pattern." *See, e.g.*, Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366–67 (9th Cir. 1992); Hughes v. Consol-Pennsylvania Coal Co., 945 F.2d 594, 609–11 (3d Cir. 1991). *But see* Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995) (refusing to adopt a per se rule). Courts assess continuity prospectively, not from hindsight, that is, after the "pattern" ends. *See* United States v. Aulicino, 44 F.3d 1102, 1112 (2d Cir. 1995) (citing United States v. Busacca, 936 F.2d 232 (6th Cir. 1991)). You can show a threat of continuity by establishing that the conduct is a RWDB. *See* Shields Enters., Inc. v. First Chic. Corp., 975 F.2d 1290, 1296–97 (7th Cir. 1992) (holding that coercing shareholders was RWDB). *But see* Word of Faith World Outreach Ctr. Church v. Sawyer, 90 F.3d 118, 123 n.4 (5th Cir. 1997) (citing, but rejecting, for the Fifth Circuit *Shields Enterprises, Inc. v. First Chicago Corp.*, 975 F.2d 1290 (7th Cir. 1992) (where defendant used extortion every time it wished to accomplish a goal in dealing with plaintiff, it reflected RWDB); Ticor Title Ins. Co. v. Florida, 937 F.2d 447 (9th Cir. 1991) (three forgeries within thirteen month period suggests a RWDB); United States v. Busacca, 936 F.2d 232 (6th Cir. 1991) (where defendant misappropriated money whenever an expense was incurred, it showed a RWDB); Ikuno v. Yip, 912 F.2d 306 (9th Cir. 1990) (pattern requirement met as RWDB, with the filing of two allegedly false annual reports)). You can also use elements of the RICO violation beyond the racketeering activity in assessing continuity. *See, e.g.*, United States v. Gonzales, 921 F.2d 1530, 1544–45 & n.23 (11th Cir. 1991); *Indelicato*, 865 F.2d at 1383–84. Finally, "pattern" must also be in the "affairs" of the enterprise under § 1962(c). *See* United States v. Miller, 116 F.3d 641, 675–77 (2d Cir. 1997) (noting that relatedness exists where the offenses relate to the enterprise's activities, even if they were not in furtherance of it or if the defendant commits the acts solely by virtue of his position in the enterprise); *accord* United States v. Starrett, 55 F.3d 1525, 1542 (11th Cir. 1995) (describing related acts as those that reflect an "'effect upon the common, everyday affairs of the enterprise'" or that for which the "'facilities and services of the enterprise were regularly and repeatedly utilized'"

(quoting United States v. Carter, 721 F.2d 1514, 1527 (11th Cir. 1984))). If not, liability does not obtain. *See* Palmetto State Med. Ctr. v. Operation Lifeline, 117 F.3d 142, 148–49 (4th Cir. 1997) (finding no evidence of conduct in the affairs of the enterprise). Justice Scalia's call for a reexamination of the constitutionality of RICO's "pattern" in his concurrence in *H.J. Inc.* resulted in lower courts' uniformly upholding it. *See H.J. Inc.*, 492 U.S. at 255–56 (Scalia, J., concurring). *Compare H.J. Inc.*, 492 U.S. at 256, *with* G. Robert Blakey, *Is "Pattern" Void for Vagueness?*, 5 CIV. RICO REP. (Buraff Publications), Dec. 12, 1989, at 6 (arguing no).

46 The Court, in *United States v. Turkette*, 452 U.S. 576, 580–83 (1981), rejected an attempt to confine § 1961(4)'s term "enterprise" to licit organizations, holding that in light of the word "includes," the definition of "enterprise" extended to licit and illicit organizations of "any" type. *See also Scheidler I*, 510 U.S. at 259 n.5 (recognizing that "enterprise" may play the role of perpetrator, instrument, prize, or victim in violations of RICO). As the Court recognized in *Scheidler I*, enterprises may play different "roles" in different configurations of RICO claims. The roles, not necessarily mutually exclusive, include "victim" (e.g., where an otherwise innocent "enterprise" or its members are injured or used); "prize" (e.g., where control is sought over an "enterprise" or its members); "instrument" (e.g., where an otherwise innocent "enterprise" or its members are used); or "perpetrator" (e.g., where the "enterprise" or its members are culpable). *See generally* Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989) (discussing the history, definitions, and functions of "enterprise").

One of the more difficult concepts in RICO is that of an association-in-fact enterprise. The Court clarified it in *Boyle v. United States*, 556 U.S. 938, 948–51 (2009), holding that an association-in-fact has three elements, scilicet: purpose, relationship, and longevity; while rejecting the contention that "structure" in a relationship is limited to an organization similar to a Mafia family. Thus, the Court repudiated the teachings of *Bledsoe* and its progeny. *See* United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) ("[A]n enterprise must have an 'ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity. This distinct structure might be demonstrated by proof that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes. The command system of a Mafia family is an example of this type of structure as is the hierarchy, planning, and division of profits within a prostitution ring." (citation omitted)). Even so, the concept of "purpose," that is, "common purpose," remains troubling to some. The "common purpose" requirement is necessary to avoid guilt by *mere* association, because the RICO enterprise does *not* require a single conspiracy. *See* Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 996 (8th Cir. 1989) ("[Common purpose is] mandated 'in order to avoid the danger of guilt by association that arises because RICO does not require a proof of a single agreement as in a conspiracy case . . . .'" (quoting United States v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987))). The membership of an association-in-fact may be in a "conspiracy;" a "conspiracy," of course, requires an "agreement" that as such embraces a "common purpose." *See* United States v. Felix, 503 U.S. 378, 389–90 (1992) ("[T]he 'essence' of a conspiracy offense 'is in the agreement or confederation to commit a crime.'" (quoting United States v. Bayer, 331 U.S. 532, 542 (1947))); *see also* Iannelli v. United States, 420 U.S. 770, 777 (1975). This is basic hornbook law. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 12.2(a), at 622 (4th ed. 2003). Nevertheless, the membership of an association-in-fact may not be in a con-

spiracy, but may have a "common purpose" through "aiding and abetting." This, too, is hornbook law. *Id.* at 624–25 (citing the leading case of *State ex rel. Martin v. Tally*, 15 So. 722 (Ala. 1894) (holding that a person who aids others in a conspiracy to murder by stopping a warning to intended victim, wholly independent of the others, is not a co-conspirator but an aider and abettor in the effort to kill the intended victim)). At the same time, the membership of an association-in-fact may not be in a "conspiracy," but may reflect a "common purpose" through innocent agency. *See* United States v. Lester, 363 F.2d 68, 72–73 (6th Cir. 1966) ("[An indictment need not charge 'causing' to consider such membership because] [i]t has been beyond controversy, . . . at least since the 1951 amendment to 18 U.S.C. § 2(b), that the accused may be convicted as causer, even though not legally capable of personally committing the act forbidden by a [f]ederal statute, and even though the agent willfully caused to do the criminal act is himself guiltless of any crime. . . . We can perceive no basis in reason or policy to distinguish a case of willfully causing innocent police officers, 'acting under color of law', to deprive another of his civil rights, from a case of willfully causing an innocent bank clerk to mail a fraudulently obtained check, or causing a lender to make a false report of prices paid for homes, or causing a union representative to receive money unlawfully from employers, or causing a licensed dealer in firearms to fail to maintain required records . . . ." (citations omitted)). This, too, is hornbook law. *See* LaFave, *supra*, § 13.1(a), at 664–65. How a court resolves the issue of "common purpose" on a motion to dismiss, for example, depends on how the plaintiff pleads the association-in-fact. *See, e.g.*, *In re* Ins. Brokerage Antitrust Litig., 618 F.3d 300, 361–71 (3d Cir. 2010) (holding that a complex antitrust conspiracy and RICO conspiracy association-in-fact were plausibly plead only in part, because the plaintiffs did not plausibly allege a "rim" in a "hub-and-spoke conspiracy;" a "common purpose" independent of "conspiracy" was not considered). That said, a tendency remains to confuse "common purpose" with "conspiracy." Thus, litigators and courts often confuse the "common purpose" requirement for the membership of an association-in-fact under RICO, which the Court articulated in *Turkette*; it arises when the focus shifts between wholly illicit enterprises, as in *Turkette*, 452 U.S. at 579 (involving a conspiracy for drugs, arsons, defrauding insurance companies, bribing police officers, and influencing state court proceedings), and other enterprises, which are basically lawful, but perverted by a subset of its members, as in *United States v. Beasley*, 72 F.3d 1518, 1522–23, 1525 (11th Cir. 1996) (discussing a legitimate religious group corrupted by a subset of its members who engaged in a pattern of murders). Such associations-in-fact have a "common purpose" (e.g., practice a religious faith) without reflecting the elements of a "conspiracy" (e.g., agreement to murder as part of the common faith). It also arises where an enterprise is composed of witting and unwitting members, as in *Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558–63 (1st Cir. 1994), where an insurance company, a victim enterprise, was scammed by insiders and outsiders of the company. The victim may be part of the association-in-fact (e.g., sharing a common purpose of paying insurance claims) without agreeing to victimize itself (e.g., paying insurance claims rooted in fraud). The Second Circuit troubles itself little over enterprises that includes among its members an "innocent instrument" or "victim" of the pattern of racketeering activity. *See* DeFalco v. Bernas, 244 F.3d 286, 306–09 (2d Cir. 2001) (holding that a town run by corrupt officials was an enterprise, stating that an enterprise is "often a passive instrument or victim of . . . racketeering activity" (quoting Riverwoods Chappaqua Corp. v. Marine Midland Bank, 30 F.3d 339, 344 (2d Cir. 1994))); *accord* United States v. Boylan, 898 F.2d 230,

236, 243 (1st Cir. 1990) (finding the Boston Police Department as the victim enterprise); United Energy Owners Comm., Inc. v. U.S. Energy Mgmt. Sys., Inc., 837 F.2d 356, 362 (9th Cir. 1988) ("[T]he plaintiffs are free to allege that they or one of their members is a RICO enterprise or part of a RICO enterprise."); *cf.* Jacobson v. Cooper, 882 F.2d 717, 720 (2d Cir. 1989) (holding that an enterprise may include the victim). In contrast, the First Circuit struggled with, but finally upheld, the allegation of "common purpose" in *United States v. Cianci*, 378 F.3d 71, 81–89 (1st Cir. 2004). The trouble in *Cianci* arose from an *unexamined assumption* that the enterprise (and its various members) can *only* play the role of perpetrator(s), that is, in some sense be "guilty" (guilty together, i.e., co-conspirators in a single conspiracy), even though, while the enterprise is the center or organizing principle of RICO litigation, it is *not* the defendant. That is the best explanation of Justice (then Judge) Breyer's opinion in *Ryan v. Clemente*, 901 F.2d 177, 180 (1st Cir. 1990) (stating "'associate[s]' of a criminal enterprise must share a 'common purpose'" (citations omitted)). In addition, seeing that the membership of the enterprise does *not* necessarily have to be in a "conspiracy" (i.e., requiring an agreement as opposed to a common purpose among its members) unpacks the palpable confusion, which then quickly dissipates. *See generally* United States v. Feldman, 853 F.2d 648, 657 (9th Cir. 1988) ("Although individuals charged as an associated-in-fact enterprise often also will be charged with conspiracy and will be codefendants, RICO does not require intentional or 'purposeful' behavior by corporations charged as members of an association-in-fact. Individual corporations may be entirely legitimate and need not benefit from the racketeering; in fact, the criminal activity charged may harm each individual corporation by looting it, or a corporation may be used by the defendant to line his or her pockets. Nor does RICO require that the association-in-fact be a conspiracy; there must be an enterprise regardless of whether there is any conspiracy to engage in the predicate acts of racketeering. What RICO does require as a showing of common purpose is 'proved by evidence of an ongoing organization, formal or informal, and evidence that the various associates function as a continuing unit.'" (citations omitted)). For an illuminating discussion of the victim-enterprise issue, see *Shapo v. Engle*, No. 98 C 7909, 1999 WL 1045086, at *9 (N.D. Ill. Nov. 12, 1999) (concluding that nothing in *Scheidler I* means that an enterprise may not be a victim). Indeed, an association-in-fact enterprise, although it must have a "common purpose," may even contain *opposing* factions, as in *United States v. Orena*, 32 F.3d 704, 710 (2d Cir. 1994) (holding that an intra-organization conflict in an organized crime family does not defeat the enterprise element). *Accord* United States v. Fernandez, 388 F.3d 1199, 1222–23 (9th Cir. 2004), *modified on unrelated grounds*, 425 F.3d 1248 (9th Cir. 2005). Obviously, the contours of "common purpose" differ in different fact patterns, and a case-by-case approach is best. A leading treatise on organizations states:

> An organizational goal[, that is, a common purpose,] is a desired state of affairs that the organization attempts to realize. . . . A goal, then, is a state that we seek, not one that we have. Such future states of affairs . . . [are] images . . . .
>
> But whose image of the future does the organization pursue? That of top executives? The board of directors or trustees? The majority of the members? Actually none of these. The organizational goal is that future state of affairs that the organization *as a collectivity* is trying to bring about. It is in part affected by the aims of the top executives, those of the board of directors, and those of the rank and file. Sometimes it is determined

> through peaceful consultation, at other times it is the outcome of a power play among the various organizational divisions, plants, cabals, ranks, and "personalities."
>
> . . . .
>
> How, then, does one determine what the goal of an organization is? In part, the participants may act as informants. We may interview [them] . . . .
>
> In interviewing them, however, we must carefully distinguish their *personal* goals from the goals of the *collectivity*. . . . [W]e can [also] analyze the division of labor of the organization, its flow of work, and its allocation of resources . . . .
>
> . . . .
>
> Virtually all organizations have a formal, explicitly recognized, sometimes legally specified organ for setting initial goals and for their amendment. . . .
>
> In practice, goals are often set in a complicated power play involving various individuals and groups within and outside the organization . . . .
>
> . . . .
>
> Conflict goes on continually, but at the same time, persons and groups bargain for some say in determining organizational goals, though often such bargaining is implicit or "silent." The net result is that what happen to be the goals of an organization at a particular time may be seen as the features of a bargain struck among negotiators, or as the terms of a truce among combatants. The goals are always temporary, likely to be modified whenever the power balance shifts, either inside the organization or in the environment.

EDWARD GROSS & AMITAI ETZIONI, ORGANIZATIONS IN SOCIETY 9–13 (1985) (emphasis added) (citation omitted).

If it were true, as it is sometimes argued, that a "common purpose" means *unitary purpose* among the membership of a putative organization, it would virtually preclude the existence of *most* organizations in society (under RICO or otherwise), because they would—in the real world of everyday life—have few, if any, "common" goals. That cannot be the law, and it is not now, despite what some argue. *See, e.g.*, United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) ("[W]hatever *private* purposes there may have been[,] there was also the requisite commonality of purpose between the defendants to give form to the associational enterprise charged." (emphasis added)). *Compare* Baker v. IBP, Inc., 357 F.3d 685, 691–92 (7th Cir. 2004) (holding that a company that wants lower wages, labor recruiters for illegal immigrants, and an ethnic support group lacks the requisite common purpose), *with* Williams v. Mohawk Indus., 465 F.3d 1277, 1285–86 (11th Cir. 2006) (criticizing and rejecting *Baker*'s reasoning). The reasoning of *Williams* is more persuasive than that of *Baker*.

While *DeFalco v. Bernas*, 244 F.3d 286 (2d Cir. 2001), had it "right" on "enterprise," it got it flat "wrong" on another theory: civil aiding and abetting. Following the unwise lead of *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644, 656–57 (3d Cir. 1998) (relying on the reasoning of *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164 (1994), *superseded by statute*, Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, without discussing *United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985) (a civil matter upholding civil adding and abetting under RICO), and holding that no private claim for relief is in RICO for aiding and abetting a RICO violation), *abrogated on unrelated*

grounds by Rotella v. Wood, 528 U.S. 549 (2000), *DeFalco* foreclosed relying on aiding and abetting for civil RICO liability, 244 F.3d at 330. Mistakenly, it applied *Central Bank of Denver*, 511 U.S. at 171–90 to civil RICO; it did not recognize the basic *legal* distinction between Title 15 of the United States Code, which is a non-positive law title, where the Office of the Law Revision Counsel places securities and other trade related provisions, and Title 18, where *Congress* enacted RICO directly into the federal code. *See* 1 U.S.C. §§ 112, 204 (2006); J. MYRON JACOBSTEIN ET AL., FUNDAMENTALS OF LEGAL RESEARCH 158–62 (7th ed. 1998); *see also* OFFICE OF THE LAW REVISION COUNSEL, POSITIVE LAW CODIFICATION IN THE UNITED STATES CODE, *available at* http://uscode.house.gov/codification/Positive%20Law%20Codification.pdf (explaining more about the codification process). Title 15 reflects separate acts of Congress enacted in isolation one from the other; the Office of the Law Revision Counsel arranges them in Title 15. In contrast, Congress itself directly put RICO into Title 18, a legislatively codified part of the United States Code. In short, Congress enacted RICO ("Chapter 96 - Racketeering and Influenced and Corrupt Organizations") and put it directly into a codified Title 18. Title 18 is a *congressionally* codified revision of federal criminal law, including as a crucial and integral part 18 U.S.C. § 2 (2006) (stating, *inter alia*, that someone who aids or abets an offense against the United States can be punished as a principal). Thus, 18 U.S.C. § 2 expressly applies aiding and abetting theory to *each* provision of Title 18, including RICO, criminally *and* civilly. Reading one chapter of an integrated book in isolation from another is simply a bad technique of statutory interpretation. In fact, the Third Circuit got it right in *Local 560*, 780 F.2d at 288 n.25, *aff'g* 581 F. Supp. 279, 332–34 (D.N.J. 1984) (holding that 18 U.S.C. § 2 governs civil aiding and abetting under RICO). In substance, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1016–21 (7th Cir. 2002) (rejecting *Central Bank*'s reasoning and recognizing aiding and abetting liability for 18 U.S.C. § 2333) also got it "right." On finding aiding and abetting present in the teeth of a reliance to the contrary in *Denver Bank,* see Boim v. Holy Land Found. for Relief and Dev. (*Boim* II), 549 F.3d 685, 690–91 (7th Cir. 2008) (en banc), *cert. denied,* 130 S. Ct. 458 (2009); Boim v. Quranic Literacy Inst. (*Boim* I), 291 F.3d 1000, 1012–16 (7th Cir. 2002). That said, other courts disagree with my analysis on aiding and abetting, though they have not faced these particular arguments. *See, e.g.*, Young v. Wells Fargo & Co., 671 F. Supp. 2d 1006, 1028–31 (S.D. Iowa 2009) (following *Central Bank*'s reasoning and rejecting the possibility of a private cause of action for aiding and abetting a RICO violation). Nevertheless, for a holding that civil aiding and abetting applies to 18 U.S.C. § 1962(a), see *Hernandez v. Vanderbilt Mortg. & Fin., Inc.*, No. C-10-67, 2010 WL 3359559, at *11 n.4 (S.D. Tex. Aug. 25, 2010). Similarly, for an analysis that aiding and abetting applies, not to the substantive sections of § 1962, but to the predicate offense themselves, see *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 CIV 6876 LMM, 2000 WL 1694322, at *4–6 (S.D.N.Y. Nov. 13, 2000). While the status of *Lambert* in light of *DeFalco* is problematic, you can make a persuasive distinction between the holdings.

Last, a standard motion by defense counsel in light of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), is to insist on the pleading not only of the existence of an association-in-fact enterprise, but also of its internal workings *before* the discovery process has begun. Insightful courts should reject it for what it is: a classic "Catch-22" ploy. *See* Dubai Islamic Bank v. Citibank, N.A., 126 F. Supp. 2d 659, 671 (S.D.N.Y. 2000) ("'[I]t will not always be reasonable to expect that when a defrauded plaintiff frames his complaint, he will have available

(b) a "**person**" cannot get or keep control of an "**enterprise**" by a "**pattern of racketeering**;"
(c) a "**person**"[47] who is employed by or associated with an "**enterprise**" cannot "**conduct**"[48] the affairs of the "**enterprise**" through a "**pattern of racketeering**;" and
(d) a "**person**" cannot "**conspire**" to violate RICO.[49]

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sufficient factual information regarding the *inner* workings of a RICO enterprise . . . .'" (emphasis added) (quoting Friedman v. Hartmann, No. 91 Civ. 1523 (PKL), 1994 WL 376058, at *2 (S.D.N.Y. July 15, 1994))); s*ee also* JOSEPH HELLER, CATCH-22 52 (reprt. 1999) (1961) ("There was only one catch and that was Catch-22 . . . . Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions. Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. . . . Yossarian was moved very deeply by the absolute simplicity of . . . Catch-22 . . . .").

47 The Court, in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162–63 (2001), while recognizing that the individual or entity that plays in § 1962(c) the role of a "person" defendant cannot also play the role of an "enterprise," held that the "enterprise-person" rule did not preclude charging the individuals or entities employed or associated with the "enterprise," including its owner, as long as the individuals or entities were not also charged as the "enterprise." *Compare* Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 598 (7th Cir. 2001) (holding that a person charged with violating RICO must have participated in the operation or management of the enterprise and must have asserted some control over the enterprise), *and* United States v. Viola, 35 F.3d 37, 43 (2d Cir. 1994) (holding that an unwitting janitor/handyman was excluded from those who operated and managed the enterprise), *abrogated on unrelated grounds by* Salinas v. United States, 522 U.S. 52, 64 (1997), *with Aetna Cas.*, 43 F.3d at 1559 ("By acting with purpose to cause Aetna to make payments on false claims, appellants were participating in the 'operation' of Aetna.").

48 The Court, in *Reves v. Ernst & Young*, 507 U.S. 170, 177–86 (1993), established that "conduct" meant some part in the "operation or management" of the enterprise's affairs. *Compare Slaney*, 244 F.3d at 598 (holding that person charged with violating RICO must have participated in the operation or management of the enterprise and must have asserted some control over the enterprise), *and Viola*, 35 F.3d at 43 (excluding an unwitting janitor/handyman), *with Aetna Casualty Sur. Co.*, 43 F.3d at 1559 (holding that causing insurance payments to be made is included in "operation").

49 The usual rules relating to conspiracy apply as well to a RICO conspiracy under § 1962(d). *Salinas*, 522 U.S. at 63. Conspiracy is an inchoate offense separate from the substantive offense. *See* Callanan v. United States, 364 U.S. 587, 593 (1961) ("'It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses.'" (quoting Pinkerton v. United States, 328 U.S. 640, 643 (1946))). The essence of the crime of conspiracy "is an agreement to commit an unlawful act." Iannelli v. United States, 420 U.S. 770, 777 (1975). The three classic ways directly to prove a conspiracy are (1) by electonic surveillance of co-conspirator conversations or subpoenaing internal written records of corporations, unions, or other lawful entities, (2) flipping members of the conspiracy against other members of the conspiracy by having them turn states's evidence, or (3) employing undercover agents to infiltrate the conspiracy.

Because "[s]ecrecy and concealment are essential features of successful conspiracy," circumstantial evidence is also admissible indirectly to prove the conspiracy by focusing on the concerted conduct of the conspirators. Blumenthal v. United States, 332 U.S. 539, 556–58 (1947); *see* Direct Sales Co. v. United States, 319 U.S. 703, 711–13 (1943); Glasser v. United States, 315 U.S. 60, 80 (1942) ("Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a 'development and a collocation of circumstances.'"), *superseded on unrelated matters by* FED. R. EVID. 104(a) *as recognized in* Bourjaily v. United States, 483 U.S. 171, 181 (1987). See *infra* note 49 on the particular difficulty of using of only circumstantial evidence to show conspiracy in white-collar offenses. The main difference between traditional conspiracy and RICO conspiracy is the breadth of its objective, that is, through an enterprise to engage in a diverse pattern of offenses. *See* United States v. Starrett, 55 F.3d 1525, 1543 (11th Cir. 1995) ("The focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts. 'A RICO conspiracy differs from an ordinary conspiracy in two respects: it need not embrace an overt act, and it is broader and may encompass a greater variety of conduct.'" (quoting United States v. Pepe, 747 F.2d 632, 659 (11th Cir. 1984) (footnotes omitted))). *See generally* Brouwer v. Raffensperger, Hughes & Co., 199 F.3d 961, 963–64 (7th Cir. 2000) (explaining that a RICO conspiracy requires an agreement, not to commit, but to facilitate a pattern of two or more statutorily enumerated predicate acts); United States v. Gonzalez, 921 F.2d 1530, 1540 (11th Cir. 1991) ("That the many defendants and predicate crimes were different, or even unrelated, [is] irrelevant, so long as it [can] be reasonably inferred that each crime was intended to further the enterprise."); United States v. Friedman, 854 F.2d 535, 562 (2d Cir. 1988) ("A RICO conspiracy is . . . by definition broader than an ordinary conspiracy to commit a discrete crime . . . ."); United States v. Valera, 845 F.2d 923, 930 (11th Cir. 1988) ("Under the RICO Act, . . . a series of agreements, which, pre-RICO, would constitute multiple conspiracies, can form, under RICO, a single 'enterprise' conspiracy."); United States v. Rosenthal, 793 F.2d 1214, 1233–34 (11th Cir. 1986) ("Congress intended to authorize the single prosecution of a multi-faceted, diversified conspiracy . . . . The RICO statutes permit the joinder into a single RICO count or counts several diverse predicate acts . . . ."), *modified on other grounds*, 801 F.2d 378 (11th Cir. 1986).

Traditionally, that a particular defendant does not fall within the class that can violate a substantive offense is no defense to aiding and abetting or conspiracy if the person he aids or abets or with whom he conspires falls within the class. *See* United States v. Rabinowich, 238 U.S. 78, 86 (1915) (discussing conspiracy); Coffin v. United States, 156 U.S. 432, 447 (1895) (discussing aiding and abetting). *Salinas* reflects these rules, 522 U.S. at 56. *Accord* RSM Prod. Corp. v. Freshfields Bruckhaus Deringer U.S. LLP, 682 F.3d 1043, 1047–48 (D.C. Cir. 2012) (explaining that you need not be the person who operates if you agree to endeavor under § 1962(d) and citing *Salinas*); Smith v. Berg, 247 F.3d 532, 536–37 (3d Cir. 2001) (explaining that you need not actually operate the corrupt enterprise, so long as the defendant facilitates the scheme including the RICO enterprise); United States v. Posada-Rios, 158 F.3d 832, 857 (5th Cir. 1998) (holding *Reves* does not apply to § 1962(d) in light of *Salinas*); *Starrett*, 55 F.3d at 1542 (holding *Reves* applies to criminal substantive RICO, but operation or management rule does not apply to conspiracy under § 1962(d)); United States v. Quintanilla, 2 F.3d 1469, 1484–85 (7th Cir. 1993) (stating that *Reves* "did not address the principles of conspiracy law undergirding § 1962(d)"); *cf.* Handeen v.

This "outline is deceptively simple, however, [because] each concept is a term of art which carries its own inherent requirements of particularity."[50]

Lemaire, 112 F.3d 1339, 1349 (8th Cir. 1997) (holding attorneys not per se excluded from RICO liability when they cross the line from traditional rendering of legal services to active participation in directing the enterprise); *RSM Prod. Corp.*, 682 F.3d at 1051–52 (holding attorneys merely providing legal services does not plausibly give rise to inference of conspiracy; distinguishing *Handeen*); Napoli v. United States, 45 F.3d 680, 683 (2d Cir. 1995) (finding that investigators directed by attorneys play a part in direction of affairs). *See generally* Nancy L. Ickler, Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587 (1983) (comparing traditional conspiracy law and conspiracy under RICO).

The issue of intracorporate conspiracy also chevys RICO. The circuit courts of appeals are in conflict. The majority correctly holds that the doctrine is not applicable to RICO. *Compare* Kirwin v. Price Commc'ns Corp., 391 F.3d 1323, 1326–27 (11th Cir. 2004) (holding the intracorporate conspiracy doctrine inapplicable to § 1962(d)), *and* Webster v. Omnitrition Int'l, Inc., 79 F.3d 776, 787 (9th Cir. 1996) (holding that a corporation can engage in a RICO conspiracy with its officers and representatives), *and* Ashland Oil, Inc. v. Arnett, 875 F.2d 1271, 1281 (7th Cir. 1989) (rejecting application of intracorporate conspiracy doctrine to RICO conspiracy), *with* Fogie v. THORN Ams., Inc. 190 F.3d 889, 898 (8th Cir. 1999) (holding the doctrine of intracorporate conspiracy applicable to § 1962(d)), *and* Detrick v Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997) (holding that a RICO conspiracy under § 1962(d) cannot exist between a corporation and its officers). The off-hand dicta in *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003) cannot overrule *Ashland*'s holding for the circuit; consequently, it does not state the law of the Seventh Circuit. RICO's origins in antitrust law unnecessarily vex the issue, even though it is the wrong body of law to examine on this issue. That body is the *general* federal criminal law. *See* LAFAVE, *supra* note 46, § 12.4(c)(3), at 657–58. In brief, as long as the minimum of a plurality of human persons is present, the facts meet the rationale of conspiracy law. *Id.* (citing *Developments in the Law Criminal Conspiracy*, 72 HARV. L. REV. 920, 953 (1959)). That should end the matter, absent congressional direction otherwise. While the Supreme Court has not directly faced the issue, this conclusion ineluctably follows from *Salinas*, 522 U.S. at 63 (stating RICO criminal conspiracy law follows general criminal conspiracy doctrine) and *Cedric*, 533 U.S. at 166 (stating that intracorporate conspiracy doctrine of antitrust law under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), turns "on specific antitrust objectives" inapplicable to RICO). *Beck v. Prupis*, 529 U.S. 494 (2000) is distinguishable, as no peculiar doctrine of civil conspiracy, which might arguably point to the contrary, is relevant here. *See generally* Blakey & Roddy, *supra* note 13, at 1439–42 (discussing the intracorporate conspiracy doctrine as it relates to identifying a plurality for RICO purposes); Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155 (1982) (discussing the same—best single piece on the issue).

50 Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). This plain language translation of RICO owes its origin to *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000).

Other courts have established other key issues that frequently arise in negotiations to settle civil RICO litigation. *See, e.g.*, McClellan v. Cantrell, 217 F.3d 890, 893 (7th Cir. 2000) ("[Fraud within bankruptcy] is not limited to misrepresenta-

II. STATUTES OF LIMITATIONS IN CRIMINAL RICO CASES

A. History and Justifications

At common law, the king could bring a criminal prosecution at any time, as the rule was *nullum tempus occurit regi*.[51] The first Ameri-

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tion[ ] . . . . Fraud is a generic term, which embraces all the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false suggestions or by the suppression of truth. No definite and invariable rule can be laid down as a general proposition defining fraud, and it includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated." (internal quotation marks omitted)); *In re* Arm, 87 F.3d 1046, 1048–49 (9th Cir. 1996) (holding RICO damages are not dischargeable in bankruptcy); Friedman v. Hartmann, 787 F. Supp. 411, 415–18 (S.D.N.Y. 1992) (finding that RICO permits neither contribution nor indemnity by analogizing RICO claims to the antitrust claims in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981)).

51 United States v. Thompson, 98 U.S. 486, 489–90 (1878) (finding that no lapse of time-bars the king). Facing whether a state statute of limitations on a contract bound the United States (and holding in the negative), the Court observed:

> The rule of *nullum tempus occurit regi* has existed as an element of the English law from a very early period. It . . . has come down to the present time. . . .
>
> The common law fixed no time as to the bringing of actions. Limitations derive their authority from statutes. The king was held never to be included, unless expressly named. No laches was imputable to him. These exemptions were founded upon considerations of public policy. It was deemed important that, while the sovereign was engrossed by the cares and duties of his office, the public should not suffer by the negligence of his servants. "In a representative government, where the people do not and cannot act in a body, where their power is delegated to others, and must of necessity be exercised by them, if exercised at all, the reason for applying these principles is equally cogent."
>
> When the colonies achieved their independence, each one took these prerogatives, which had belonged to the crown; and when the national Constitution was adopted, they were imparted to the new government as incidents of the sovereignty thus created. It is an exception equally applicable to all governments.
>
> Congress, like the British Parliament, has made a number of specific limitations both in civil and criminal cases. They will be found in the Revised Statutes, and need not be here repeated.

Id. (citations omitted).

The reason underlying the principle, according to Justice Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." United States v. Hoar, 26 F. Cas. 329, 330 (D. Mass. 1821) (No. 15,373); *see* 1 WILLIAM BLACKSTONE, COMMENTARIES *238–40 ("Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong. Which antient [sic] and fundamental maxim is not to be understood, as if every thing [sic] transacted by

the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power, in our free and active, and therefore, compounded, constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice. . . . In farther pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* is the standing maxim upon all occasions: for the law intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects." (footnote omitted)); *accord* Holland, *supra,* note 42 at 307 ("The king, according to the maxim of the common law can do no wrong, No action can be brought against him . . . or his ambassador."). The reason underlying the principle under Amerian law, according to Justice Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." United States v. Hoar, 26 F. Cas. 329, 330 (D. Mass. 1821) (No. 15,373). The notion that time does not bar the king was first articulated by Bracton. *See* Bracton, *supra* note 6, f.55(b)–56, at 167 (stating "*tempus a tali petitione regem non excludit*," which is translated as "time does not bar the king from his action." (emphasis added)); *id.* f.103, at 293 (stating "*nullum tempus currit*" which is translated as "time does not run against [the king]." (emphasis added)). Bracton rationalized private time-bars "because of the impossibility of proof." *Id.* f.102, at 293 (stating most private actions are confined to "*tempora limitantur pro defectu probationum*" translated as "fixed periods, because of the impossibility of proof." (emphasis added)). Pollock & Maitland thought the maxim "wholesome," but doubted that it had "been observed," and "doubt[ed] whether the kings themselves have made strenuous effort to maintain" it. 1 Frederick Pollock & Frederic William Maitland, the History of English Law Before the Time of Edward I 572 (2d ed. 1899); *see also* 10 William Holdsworth, A History of English Law 355 (1938) ("This prerogative principle has wide and far-reaching effects. One of the most important of these effects—an effect which has sometimes worked great injustice—is the rule that no statutes of limitation bind the Crown . . . . [A]nd it is still a principle of English law [unless otherwise explicitly stated]."); Ernst H. Kantorowicz, The King's Two Bodies 168 (1957) ("Bracton's arguments . . . were purely juristic. He explained . . . that things pertaining to the king's peace and jurisdiction were 'things quasi holy,' *res quasi sacrae*, which could no more be alienated than could *res sacrae* pertaining to the Church."). In fact, Parliament made a handful of exceptions in the area of criminal treason and quasi-criminal actions brought by the king's lawyers and private persons. *Id.* at 449. Nevertheless, no general criminal or civil period of limitations bars the king in English law today. That said, the rule today in this country still exists, but it rests on radically different considerations. See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132–33 (1938), where the Court observed:

> The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of . . . the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. But whether or not that alone accounts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now

can criminal statute of limitations appeared in the Colony of Massachusetts in 1652.[52] The First Congress passed a similar law applicable

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> underlying the rule even though it may in the beginning have had a different policy basis. . . . Regardless of the form of government and independently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king. So complete has been its acceptance that the implied immunity of the domestic "sovereign," state or national, has been universally deemed to be an exception to local statutes of limitations where the government, state or national, is not expressly included . . . .

Id. (citations omitted).

While limitations did not bar the sovereign, he could take advantage of legal limitations that barred others. *See* Stanley v. Schwalby, 147 U.S. 508, 515–16 (1893) ("[W]hile the king is not bound by any act of Parliament unless he be named therein by special and particular words, he may take the benefit of any particular act though not named. And, he adds, that the rule thus settled as to the British crown is equally applicable to this government; and that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae* or universal trustee, enters as much into our political state as it does into the principles of the British constitution." (citing Dollar Sav. Bank v. United States, 86 U.S. (19 Wall.) 227, 239 (1873) ("[The king] may . . . take the benefit of any particular act, though not named. The rule thus settled respecting the British Crown is equally applicable to this government . . . ." (footnote omitted)))). Thus, by settled law, Congress may create a claim for relief without restricting the time to assert it. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 360, 367 (1977). Unless Congress explicitly provides otherwise, no statute of limitation or laches bars the Government. *See* United States v. Summerlin, 310 U.S. 414, 416 (1940).

52 The statute provided:

> It is Ordered by this Court. That no Person shall be Indited, presented, informed against[,] or Complained of, to any Court or Magistrate within this jurisdiction, for the breach of any penall law, or any other misdemeanor, the forfeiture whereof belongs to the Country, unles the said Inditement or Complaint be made and exhibited within one year after the Offence be Committed, and if any such Inditement, presentment, information[,] or Complaint, be not made within the time limited, then the same shall be void and of none effect. Provided alwayes, this law shall not extend to any Capitall Offences, nor any Crimes that may concerne loss of member or Banishment, or to any Treasonable Plots or Conspiracies against the Common wealth, nor to any fellonies above *ten shillings*, nor shall it hinder any person grieved or any wrong done to him or his wife, children[,] or servants, or estate[,] real or personal[,] but that every such person, shall have such remedies as formerly he might or ought to have.

WILLIAM H. WHITMORE, COLONIAL LAWS OF MASSACHUSETTS 163 (1889).

The laws and legal institutions of the colony reflected "the law of England"—the colonists and colony's leaders did not know any other law—but the prism by which they viewed the law was Sacred Scripture, as understood by the "Puritans." "Puritans"

and "the law of England" require clarification. Misconceptions abound around the use of "Puritan," often arising from the tendency ("ignorance" or "prejudice") to read "back into history the attitudes or values of a later day." GEORGE LEE HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 12 (1960). In one version of a Whig's view of history, the writer sees the past as inevitably a progress toward an enlightened presence. *See, e.g.,* MICHEL BENTLEY, MODERN HISTORIOGRAPHY 64–5 (1999) ("Whigs were predominantly Christian, predominantly Anglican, thinkers for whom the Reformation supplied the critical theatre of enquiry when considering the origins of modern England. When they wrote about the history of the English constitution, as so many of them did, they approached their story from the standpoint of having Good News to relate.") Thus, to understand "Puritans" we must put to one side our evaluations of them. In fact, "Puritanism was both a religious phenomenon and a political movement. Beginning as a way of life, it became a sect and later a political party." HASKINS, *supra*, at 13. Religiously, the Puritans preeminently were reformers of the Anglican Church (strip it of Roman Catholic visible vestiges (e.g., no stained glass windows, statues of saints, etc.)), reformers of institutions (e.g., no popes, councils, bishops, or priests, especially the Jesuits), and adopters of Reformation doctrines, principally the teaching of John Calvin (e.g., *sola scriptura* (only scripture; no tradition), plain meaning of the text of the law of God in the Mosaic Code, the principle guide to life, the doctrine of original sin or human depravity, requirement of Divine grace to do good, election by God or predestination, theocracy, powerful ministers, absolute control of individual conduct, etc.). Politically, they also had a heavy hand in the Revolution of 1642, and they ruled England during the Interregnum, the period that began with the execution of Charles I in January 1649 and ended with the restoration of Charles II in May 1660. *See generally* EAMON DUFFY, THE STRIPPING OF THE ALTARS (1992) (discussing revisionist history); GEOFFREY ROBERTSON, THE TYRANNICIDE BRIEF (2005) (tracing the development of English liberties during the Puritan Revolution); CONRAD RUSSELL, THE CAUSES OF THE ENGLISH CIVIL WAR (1990) (discussing revisionist history). Well before the Revolution, in 1628, the Massachusetts Bay Company successfully established a colony in New England; about 20,000 people, overwhelmingly Puritans, migrating to it in the 1630s. The colony gained a Charter in 1629, but this Charter limited its law making powers, providing that the colony could not make any laws contrary to the laws and statutes of the Realm. *See Charter of Massachusetts Bay: 1629*, THE AVALON PROJECT, http://avalon.law.yale.edu/17th_century/mass03.asp (last visited Feb. 17, 2013) ("And to make Lawes and Ordinnces for the Good and Welfare of the saide Company, and for the Government and ordering of the saide Landes and Plantacon, and the People inhabiting and to inhabite the same, as to them from tyme to tyme shalbe thought meete, soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Statuts of this our Reaime of England."). As is "Puritans," the phrase "not contrary to the laws and statutes of the Realm" is ambiguous. Mistakenly, most historians have read it to mean "the common law;" that is, the law applied in the king's courts. Julius Goebel, Jr., *King's Law and Local Custom in Seventeenth Century New England*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 83, 84 (David H. Flaherty ed., 1969). In fact, the "English law" that the colonists brought with them was "local custom" or the law of the "local courts." *Id.*; *accord*, George L. Haskins, *The Legal Heritage of Plymouth Colony*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, *supra*, 121, at 127 ("[T]he legal center of gravity for the average Englishman was the local court of the neighborhood—the borough court, the court leet, and the county court."). That said, the dominant influence on the

colonists was the reformer's view of the Bible. "While during the Middle Ages an identity had been discovered by philosophers between the *lex Mosis* and the natural law, it remained for the reformers during the sixteenth and seventeenth centuries the task of attempting to put to lay uses the law of the Pentateuch." Goebel, *supra*, at 92 n.14. Indeed, Calvin conceived of the Bible as "a manifestation of how the Christian community should be organized to do God's work on earth, [and] found in the Pentateuch the law for effecting this achievement." *Id.* Significantly, that law bound the ruler as well as the ruled. The interest at stake was the "rule of law." HASKINS, *supra*, at 132–33 (claiming the notion of a rule was useful "to check the threatened usurpations of kings" and to "attack . . . the royal prerogative courts" in the seventeenth century). Because the Massachusetts magistrates—in function if not in power, they were similar to justices of the peace in England—had wide discretion in the enforcement of the law, "[a] popular demand for security against the arbitrary power of the judiciary mark[ed] the early history of Massachusetts law." Richard B. Morris, *Massachusetts and the Common Law: The Declaration of 1646*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, *supra*, at 135–36 n.2. It was the dominant force behind the Declaration of 1646. *Id.* Further, it was the dominant force behind the justly famous Laws and Liberties of 1648. Thorp L. Wolford, *The Laws and Liberties of 1648*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, *supra*, at 147, 148; *accord* HASKINS, *supra*, at 124 ("[T]he freemen did not believe that the magistrates could be counted upon to decide fairly and to impose equitable penalties, in accordance with inherited ideas of justice and fair play, unless the rules which were to guide their decisions were public property. . . . [T]he colonists attached [importance] to stable and written laws and . . . [they] distrust[ed] . . . discretionary justice."); *id.* at 226–27 ("When the colony leaders resorted to such devices as . . . discretionary penalties . . . there came into prominence a countervailing pressure . . . . This pressure was especially evident in the agitation of the deputies [in the General Court] for written laws and for clearly prescribed penalties, which resulted in the enactment of the [Laws and Liberties] of 1648."). Indeed, historians mark the Laws and Liberties of 1648 as "an important milestone in the effort to curb, by written law, the discretionary power of" those who enforce the law. Wolford, *supra*, at 151. In particular, the Act of 1648 influenced the law of other colonies. *See* George L. Haskins & Samuel E. Ewing, *The Spread of Massachusetts Law in the Seventeenth Century*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, *supra*, at 186, 186, 191 (citing its adoption in part or in whole in Connecticut and New Haven in 1650 and 1657, respectively, and its influence in the Provinces of New York and New Jersey and Pennsylvania). In turn, John Adams, its principal draftsmen, enshrined the idea of "the rule of law" in the Massachusetts Constitution of 1780, the oldest functional constitution in the world. *See* MASS. CONST. art. XXX, *available at* malegislature.gov/Laws/Constitution ("[T]o the end it may be a government of laws and not of men."). Moreover, in turn, the Massachusetts Constitution of 1780 served as a model for the United States Constitution, drafted in 1787, and made effective in 1789; similarly, the Bill of Rights, effective in 1791, reflects its language, as it—to close the circle—reflected the language of the Declaration of Independence of 1776. Significantly, however, the Act of 1648 excludes from its period of limitations capital offenses and felonies above ten schillings. Capital offenses then encompassed (1) worshiping any God, but the Lord God, (2) being a witch, that is, a person who consulted with a familiar spirit, (3) blasphemy, (4) murder, (5) manslaughter (sudden slaying in anger), (6) sodomy with a man or beast, (7) adultery, (8) man-stealing, (9) false witnessing that resulted in death, (10) treason against the Commonwealth,

(11) cursing parents, if above 15 years old with sufficient understanding, (12) rebelling against a father, if more than 16 years old and with sufficient understanding, and (12) rape or sex with a child above 10. THE LAWS AND LIBERTIES OF MASSACHUSETTS 5–6 (Thomas G. Barnes ed., 1982) (citing scripture for each offense); *see also id.* at A2–A3 (drafting in light of God's "[g]overnment among his people Israel[,]" "according to the rules of his most holy word[,]" "a modell of the Iudiciall lawes of Moses" and "the clear light of nature in civil nations" "to satisfie" "frequent complaints for want of such a volume to be published in print: wherin (upon every occasion) you might readily see the rule which you ought to walke by[,]" and so that "no man's life" or otherwise "be taken" from him "by the vertue" of "some expresse law of the Country warranting" it). The Act omits the common law felonies of larceny, robbery, arson, and burglary in its list of capital offenses. Otherwise, the list is more comprehensive than the common law, particularly in light of its religious offenses. Accordingly, viewed in the light of these materials, the period of limitations in the Act of 1652 probably reflected, not so much staleness or judicial efficiency—two of our modern interests—but a desire to curb the extraordinary discretion of the magistrates in their "misdemeanor" jurisdiction. In fact, the jurisdiction was extraordinary. "[A]t that time not yet established as a word of classification in the common law, ['misdemeanor' was] used [in colonial law] to describe conduct, the criminal character of which the magistrate was to determine." Goebel, *supra*, at 110. Indeed, the "magistrate was given virtually an ordinance power in respect to specifying misdemeanors." *Id.* at 112. "These provisions vesting so large a discretion in the magistrates appear to be of a religious origin." *Id.* at 110 n.45. Apparently, it "was introduced by Calvin[ists] into the law of Geneva." *Id.* That said, Calvin himself thought the judiciary should "be restrained by fixed laws." *Id.* at 111 n.45. Moreover, larceny above 12 *d.* was capital in England, as was robbery and burglary. In addition, the open-textured character of the possible penalties was in sharp contrast with English law of the time. *Id.* Thus, the Act went considerably beyond both Calvin and the English common law, however understood. Rightfully, "many colonists were fearful of violating the Charter by enacting laws possibly repugnant to the laws of England." Wolford, *supra*, at 150. In fact, "[a] 1692 act . . . against counterfeiting or clipping of coins was disallowed [by the Privy Council] . . . on the ground that the crimes were not punished as in England." Joseph H. Smith, *Administrative Control of the Courts of the American Plantations*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW, *supra*, at 281, 331. The Privy Council took similar action against statutes that deal with treason and witchcraft. *Id.* To defend the Act of 1646, the colonist drew up a *"Parallels"* that purported to show the source of each provision in the Act. Morris, *supra*, at 137. At the time and later, people apparently took the *Parallels* for the 1646 Act (and by extension the similar parallels that appear with 1648 Act) at face value. *Id.* Scholarship that is more recent finds them deficient in what they included and what they excluded. *Id.* at 139–45 (providing a detailed examination of the *Parallels*). In fact, they were "apologetic," "disingenuous," and "not a fair presentation of fundamental law." *Id.* at 145. Seemingly, however, the tactic worked to ward off objections, as the Council did not disallow the Act, or the Act of 1648. *Id.* at 146. Apparently, too, nobody in Massachusetts or England raised an objection to the criminal period of limitations in Act of 1652. In contrast, the Council (at the stimulation of the Board of Trade) was particularly solicitous as to civil statute of limitations that touched on commercial interests. Smith, *supra*, at 330 & n.198. Evidently, the groundbreaking Act of 1652, because it dealt with minor criminal matters, did not warrant notice or objection by the Privy Council,

to federal offenses in 1790.[53] This first federal criminal statute of limitations set a short limitations period—two years for non-capital offenses and three years for capital offenses (willful murder and forgery excepted).[54] Congress has extended this general period over the years,[55] and now, various crimes specify a different, usually longer, limitations period.[56]

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but it set in motion the modern concept that codes carrying penalties ought contain periods of limitations. No longer could the Sovereign do no wrong. That simple notion morphed into the complex of values reflected in modern statutes of limitations. *See generally* Gabelli v. SEC, 2013 U.S. LEXIS 1861 *11–*12 (Feb. 27, 2013) ("Thus the 'standard rule' [for limitations] is that a claim accrues 'when the plaintiff has a complete and present cause of action.' . . . That rule has governed since the 1830s . . . . This reading sets a fixed date when exposure to the specified Government enforcement efforts ends, advancing 'the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities.' . . . Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' . . . They provide 'security and stability to human affairs.' . . . We have deemed them 'vital to the welfare of society,' . . . and concluded that 'even wrongdoers are entitled to assume that their sins may be forgotten,' . . . ." (citations omitted)).

53 Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 ("*And be it further enacted*, That no person or persons shall be prosecuted, tried[,] or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offense aforesaid shall be done or committed; nor shall any person be prosecuted, tried[,] or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence, or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice.").

54 *Id.*

55 The current general limitations period for non-capital federal crimes is five years. 18 U.S.C. § 3282(a) (2006) ("Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."). *See generally* Lindsey Powell, *Unraveling Criminal Statutes of Limitations*, 45 AM. CRIM. L. REV. 115, 128–31 (2008) (discussing the purposes behind criminal statutes of limitations). I found Powell's essay extraordinarily helpful in preparing these materials. For example, Powell includes a valuable chart titled "Appendix: Timeline of the Rule and its Exceptions" that traces the congressional action through the rules, amendments, and their exceptions. *Id.* at 154–55.

56 *See, e.g.*, 18 U.S.C. § 3293 (2006) (extending the limitations period to ten years for violations of certain statutes including § 1344 (bank fraud) and § 1963 (RICO; "to the extent that the racketeering activity involves [bank fraud]")).

Criminal statutes of limitations limit the exposure of an individual to prosecution to a certain period following the commission of the crime.[57] The purpose of criminal statutes of limitations is to balance

57 Toussie v. United States, 397 U.S. 112, 114 (1970). The rationale of *Toussie* is preeminently that of a "continuing offense" limitation; finding that "continuing offenses" were exceptional and not routinely implied into statutes, it held that failure to register for the draft was not a continuing offense. Ironically, Congress rejected the Court's result on registering for the draft. *See* United States v. Eklund, 733 F.2d 1287, 1296–99 (8th Cir. 1984) (citing Pub. L. No. 92-129, Title I, § 101(a)(31), 85 Stat. 348, 352–53 (1971) (codified as amended at 50 U.S.C. app. § 462(d) (2006)) (providing that a person may be prosecuted for failing to register for the draft as late as five years after he attains the age of 26)). "[S]ection 462(d) compels the conclusion that the duty to register is a continuing one, thus supplying the indication of congressional intent found lacking by the Supreme Court in *Toussie*, and that failure to fulfill that continuing duty is a continuing offense." *Id.* Thus, *Toussie*'s teaching, still valid, is that a court should not lightly determine that any crime, including RICO, is a continuing offense. *See* United States v. DiSantillo, 615 F.2d 128, 134 (3d Cir. 1980) (citing *Toussie*, 397 U.S. at 114–15) ("[T]he federal judiciary must regard assertions that a crime is a continuing offense [with disfavor]").

Nevertheless, federal courts consistently recognize that the pattern element in RICO, where it is applicable, makes RICO a "continuing offense" within the meaning of *Toussie*. *See, e.g.*, United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) ("RICO, however, is a continuing offense under the *Toussie* definition. It criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one, and thus an exception to the normal start of the limitations period."); United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994) ("Because the limitations period is measured from the point at which the crime is complete, a defendant may be liable under substantive RICO for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations, so long as that defendant committed one predicate act within the five-year limitations period. Similarly, a defendant is liable for participation in a RICO conspiracy for predicate acts the separate prosecution of which would be time-barred, so long as that defendant has not withdrawn from the conspiracy during the limitations period." (citations omitted)); United States v. Coia, 719 F.2d 1120, 1124 (11th Cir. 1983) (citing *Toussie* and holding that because RICO does not require proof of an overt act, "the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period"); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977) (holding that a RICO prosecution is not time-barred if at least one of the purported predicate acts occurred within five years of the indictment), *aff'd without opinion* 578 F.2d 1371 (2d Cir. 1978).

If it is a continuing offense, which normally it is, for criminal purposes, it is also a continuing tort for civil purposes. *See* Isaacs v. Deutsch, 80 So. 2d 657, 660 (Fla. 1995) (finding a breach of a duty to support a child to be a continuing offense and noting that "in the case of an obligation payable by instalments [sic], 'the statute of limitations [sic] runs against each instalment [sic] from the time it becomes due; that is, from the time when an action might be brought to recover it.'" (quoting *Limitations of Actions*, 34 AM. JUR. §142 at 114)); Lopez-Infante v. Union Cent. Life Ins. Co., 809 So. 2d 13, 15 (Fla. Dist. Ct. App. 2002) ("[T]he alleged fraud was . . . ongoing . . . . [E]ach

the interest of the government in prosecuting crimes against the interest of the defendant in not having to answer "overly stale criminal charges"[58] along with general considerations of fairness and efficiency.[59] The state possesses a strong interest in prosecuting crimes for the protection and maintenance of society, and in recent years, legislators have placed more emphasis on just deserts as a justification for criminal punishment as well as on victims' rights.[60] Statutes of

yearly premium payment by the appellants resulted in consequent injury to them by virtue of their reliance on the representations of Union Central."); State Dep't of Envtl. Prot. v. Fleet Credit Corp., 691 So. 2d 512, 514 (Fla. Dist. Ct. App. 1997) (finding environmental pollution to be a continuing offense that does not trigger the statute of limitations until it desists); *see also* Perera v. Wachovia Bank, 2010 U.S. Dist. LEXIS 33618, at *5–*10 (S.D. Fla. Mar 15, 2010) (recommending a finding that civil theft and conversion claims are not barred by the statute of limitations under Florida's continuing torts doctrine), *adopted by* 2010 U.S. Dist. LEXIS 33759 (S.D. Fla. Apr. 6, 2010). In addition, the Florida Supreme Court's decision on the nature of sexual abuse is instructive. *See* Hearndon v. Graham, 767 So. 2d 1179, 1186 (Fla. 2000) ("Reasons in favor of application of the doctrine [of delayed discovery] in the case of childhood sexual abuse are as follows. First, it is widely recognized that the shock and confusion resultant from childhood molestation, often coupled with authoritative adult demands and threats for secrecy, may lead a child to deny or suppress such abuse from his or her consciousness. Second, the doctrine is well established when applied, for example, in cases involving breach of implied warranty or medical malpractice; it would seem patently unfair to deny its use to victims of a uniquely sinister form of abuse. Accordingly, application of the delayed discovery doctrine to childhood sexual abuse claims is fair given *the nature of the alleged tortious conduct* and its effect on victims, and is consistent with our application of the doctrine to tort cases generally; thus, we hold that the doctrine is applicable to childhood sexual abuse cases." (emphasis added) (footnotes omitted) (citations omitted)).

58 United States v. Ewell, 383 U.S. 116, 122 (1966); *accord* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 903 (5th ed. 2009) ("But foremost is the desirability of requiring that prosecutions be based upon reasonably fresh evidence so as to lessen the possibility of an erroneous conviction." (internal quotation marks omitted)).

59 *See* United States v. Marion, 404 U.S. 307, 322 (1971) ("[Statutes of limitations] represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice . . . .").

60 Powell, *supra* note 55, at 137–40. Congress also requires federal courts to impose sentences in accordance with the purposes of the criminal law, beginning with just deserts:

> The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> . . . .
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

limitations by their nature prevent punishment, sometimes "arbitrarily"[61] allowing a criminal to escape prosecution. Thus, many people

> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner . . .

18 U.S.C. § 3553 (2006).

61 Those who write on time-bars, whether in judicial opinions, scholarly essays, or for law reform commissions, inevitably brand them with the label "arbitrary." *See, e.g.*, Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1394 (7th Cir. 1990) (Posner, J., concurring) (describing statutes of limitations as "inescapably arbitrary"); Powell, *supra* note 55, at 117 (noting the "fundamental arbitrariness" of limitations periods); I WORKING PAPERS OF THE NATIONAL COMMISSION OF REFORM OF FEDERAL CRIMINAL LAW 281 (1970) (labeling statutes of limitations as "largely arbitrary"). For a lawyer who is a member of a legal profession that prides itself on its reasons, few labels are more odious. Thus, a word in favor of line drawing as reasonable is in order. "Arbitrary" means "based on random choice or impulse." OXFORD ENGLISH DICTIONARY 37 (Paperback ed. 2002). If that is an appropriate definition of "arbitrary," and it is, whatever statutes of limitations are, they are not "based on random choice or impulse." They are, in Justice Story's words, "wise and beneficial." Bell v. Morrison, 26 U.S. 351, 360 (1828). How then are they "arbitrary?" They are not. Justice Holmes, in dissent, put it aptly in *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 41 (1928):

> When a legal distinction is determined . . . between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn . . . . Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted . . . .

Id. at 41; *accord* Schlesinger v. Wisconsin, 270 U.S. 230, 241 (1926) (Holmes, J., dissenting) ("[T]he great body of the law consists in drawing such lines . . . ."); Dominion Hotel, Inc. v. Arizona, 249 U.S. 265, 269 (1919) (Holmes, J.) ("If . . . the distinction is justifiable, . . . the fact that some cases . . . are very near to the line makes it none the worse."); Haddock v. Haddock, 201 U.S. 562, 631–32 (1906) (Holmes, J., dissenting) ("Most distinctions [are questions of degree], and are none the worse for it. . . . When a crime is made burglary by the fact that it was committed thirty seconds after one hour after sunset . . . the act is a little nearer to midnight than if it had been committed one minute earlier, and no one denies that there is a difference between night and day." (citation omitted)); Ranney v. Whitewater Eng'g, 122 P.3d 214, 221 (Alaska 2005) ("As with all line drawing, . . . the precise point where the line is drawn may seem arbitrary, and there may be 'close cases at the margins.' But this does not mean that line drawing is impermissible. This kind of line drawing-which involves balancing the benefits of greater precision against its costs . . . is within the legislature's competence. We decline [the] invitation to substitute our judgment for the legislature's." (citing Colgrove v. Battin, 413 U.S. 149, 182–83 (1973) (Marshall, J., dissenting) ("Normally, in our system we leave the inevitable process of arbitrary line drawing to the Legislative Branch, which is far better equipped to make ad hoc compromises. In the past, we have therefore given great deference to legislative decisions

mistakenly see statutes of limitations as only preventing criminals from receiving their just deserts and as a barrier to vindicating victims' rights.

If the government's interest in prosecuting crimes, and the goals of just deserts and victims' rights were the *only* considerations, statutes of limitations might well be "arbitrary," but other weighty considerations argue in favor of having time-bars to prosecution.[62] As time passes after the commission of a crime, and "basic facts . . . [are] obscured by the passage of time,"[63] just deserts is no longer a valid consideration, and victims' rights are problematic. In fact, the presumption is that a "fair"—either in the sense of accurate or consistent with a proper balance between the power of the state and the individual in a free society—trial is not possible.[64] Even if a fair

in cases where the line must be drawn somewhere and cannot be precisely delineated by reference to principle. This Court has involved itself in the sticky business of separating cases along a continuum only when the Constitution clearly compels it to do so and when the legislature has plainly defaulted."))); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 224 (1983) (discussing line-drawing for burglary, a crime which must take place at night, and explaining how "antiently the day was accounted to begin only at sunrising, and to end immediately upon sunset; but the better opinion seems to be, that if there be daylight or *crepusculum* [twilight] enough, begun or left, to discern a man's face withal, it is no burglary."); Burke, *supra* note 9, at 123 ("No lines can be laid down for civil or political wisdom. They are a matter incapable of exact definition. But, though no man can draw a stroke between the confines of day and night, yet light and darkness are upon the whole tolerably distinguishable."); MARCUS TULLIUS CICERO, ACADEMICA 585 (E.H. Warmington ed., H. Rackham trans., 1974) ("[I]n no matter whatsoever—if we are asked by gradual stages, is such and such a person a rich man or a poor man, famous or undistinguished, are yonder objects many or few, great or small, long or short, broad or narrow, we do not know at what point in the addition or subtraction to give a definite answer."); Oliver Wendell Holmes, *Law in Science and Science in Law*, *in* COLLECTED LEGAL PAPERS 210, 233 (1920) ("[Only] a tyro thinks to puzzle you by asking where you are going to draw the line . . . ."). Inevitably, most time-bars are ad hoc legislative compromises; whatever they are, they are not, merely because they draw lines, "arbitrary."

62 *See* Powell, *supra* note 55, at 139.

63 Toussie v. United States, 397 U.S. 112, 114 (1970); *see also* Pub. Schs. v. Walker, 76 U.S. 282, 288 (1869) ("[Statutes of limitations] are made for the repose of society and the protection of those who may, in that time, have lost their means of defence.").

64 *See Marion*, 404 U.S. at 322 ("[Statutes of limitation] provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."); *see also* Stogner v. California, 539 U.S. 607, 615 (2003) ("[A] statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict. And that judgment typically rests, in large part, upon evidentiary concerns—for example, concern that the passage of time has eroded memories or made witnesses or other evidence

trial were possible, when a long time passes between the commission of a crime and its prosecution, the perpetrator may have reformed his life and become a productive member of society, or changed so drastically that he is, at least arguably, in a psychological sense, not the "same" person who committed the crime.[65] In that case,

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unavailable." (citation omitted)). Further, the purpose of a trial is to "ascertain the truth." See Estes v. Texas, 381 U.S. 532, 540 (1965) (holding that trials after memories have faded and evidence has disappeared does not further the interest of truth). In fact, it is usually no longer possible to determine "the truth." "To the contrary, the passage of time only diminishes the reliability of criminal adjudications." Herrera v. Collins, 506 U.S. 390, 403–04 (1993) (citing McCleskey v. Zant, 499 U.S. 467, 491 (1991) ("[W]hen a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time' prejudice the government and diminish the chances of a reliable criminal adjudication." (quoting Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986)))). For an insightful and lapidary consideration between justice as just deserts or moral worth and justice as political fairness between persons in a liberal society, see JOHN RAWLES, JUSTICE AS FARIRNESS: A RESTATEMENT 72–74 (2001).

65 *See* DANIEL W. SHUMAN & ALEXANDER MCCALL SMITH, JUSTICE AND THE PROSECUTION OF OLD CRIMES 30–34 (2000). For example, the perpetrator may have committed the crime many years ago, as a juvenile, but now is a responsible adult, or the perpetrator may have committed the crime many years ago, as a healthy adult, but now suffers from dementia. Nevertheless, any argument that a person has changed so drastically that he or she is no longer the same individual is objectionable, because it undermines the principle of personal responsibility that is essential to the criminal justice system and society today. To hold a person responsible in the future for *any* of his past actions (whether a murder or wedding vows), society must view a person as a continuous individual, the same self today as yesterday and tomorrow. *See id.* at 33. Locke, too, recognized the significance of a resolution of the issue of our "personal identity" that is at the foundation of "all the right and justice of reward and punishment." Locke, *supra* note 9 at 225. This makes all the more problematic his turn to materialism with only—literally—a *deus ex machina* to justify it. Here, Shuman and Smith accept, as they must for their argument, one (not necessarily the only one) resolution of the classic problem of "identity."

According to Greek legend:

> The ship wherein Theseus and the youth of Athens returned [from Crete] had thirty oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their place, insomuch that this ship became a standing example among the philosophers, for the logical question as to things that grow; one side holding that the ship remained the same, and the other contending that it was not the same.

1 PLUTARCH'S LIVES 22–23 (A.H. Clough trans. 1911) (footnote omitted).

Thus, Plutarch raises the question at what point in change, if any, does one entity become another, as whether Thesus's ship would remain the "same," even if, piece by piece, none of the original boards were in the refurbished ship. Often known as Thesus's Paradox, it has troubled philosophers from the beginning of reflective thought. The issue is the pervasive character of change. As Bertrand Russell says,

"[t]he search for something permanent is one of the deepest of the instincts leading men to philosophy." BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 45 (1945). Heraclitus taught famously: "You cannot step twice into the same river . . . ." *Id.* Is nothing, therefore, permanent? "[While] Heraclitus maintained that everything changes[,] Parmenides retorted that nothing changes." *Id.* at 48. Thus, the thinkers of the Greek Enlightenment sought a resolution of their bewilderment. Aristotle sought a middle way, distinguishing four "causes" (aitia) in things: the material (bronze in a statute, that out of which the sculptor makes it); the formal (the shape of the finished statue, the expression of what it is); the efficient (the sculptor, the means by which he makes it); and the final end or telos (the purpose for which the sculptor made the statute). ARISTOTLE, PHYSICS, in 8 GREAT BOOKS, *supra* note 5, at 271. This final end ("telos") gave rise to the term "teleology," the study of ends or purposes of things. SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY 374 (1996). For Aristotle, Theseus's Paradox resolves itself without difficulty. The formal cause (the "ship") does not change, while the material cause (the "boards") easily changes as the shipbuilder replaces old boards. In any event, Aristotle's word aitia, usually translated as "cause," misleads our ears, because modern minds understand "cause," not as "purpose," as Aristotle understood "cause," but in the sense that we use it in modern physics, that is, "mechanical." *See generally* Richard Taylor, *Causation*, in 2 THE ENCYCLOPEDIA OF PHILOSOPHY 56 (1967) (discussing Aristotle's four causes, the traditional problems of efficient causation, and the contemporary problems of causation). Today, we naturally think of things as machines, a materialistic bias we probably owe to Descartes and his division of mind and body into an immaterial substance and a material body. Thus, if you understand the parts of a machine, you understand the machine. The word that Aristotle used, *aition*, is the neuter nominative singular form (*aitia* is its plural form) of the adjective *aitios*, best translated as "blamed," "charge," or "allegation." JAMES DONNEGAN, A NEW GREEK AND ENGLISH LEXICON 32 (1845). For lawyers, the best translation is "cause of action" or "claim for relief," that is, who, what, where, when, how, and, in particular, the why of a thing in a court proceeding. *See* ARISTOTLE, PHYSICS, in 8 GREAT BOOKS, *supra* note 5, at 275 ("[T]he number [of causes is answered by] the question 'why.'"); *see also* ARISTOTLE, METAPHYSICS, in 8 GREAT BOOKS, *supra* note 5, at 501 ("[T]he 'why' is reducible finally to the definition, and the ultimate 'why' is a cause and principle . . . ."). Aristotle's key concept, however, was final cause, or telos, best translated as "end," "completion," or "perfect state." Donnegan, *supra*, at 755; *see generally* Alan Gotthelf, *Aristotle's Conception of Final Causation*, in PHILOSOPHICAL ISSUES IN ARISTOTLE'S BIOLOGY 204 (Allan Gotthelf & James G. Lennox eds., 1987). For Aristotle, the essence of a thing was its end, purpose, or perfection, abstracted by a person by conception from particular things, apparent to the person through their sensible attributes. *See* ARISTOTLE, PHYSICS, in 8 GREAT BOOKS, *supra* note 5, at 271 ("[M]en do not think they know a thing till they have grasped the 'why' of it . . . ."). Understanding nature from a biologist's viewpoint, Aristotle's theory of the "causes" posits a nature characterized by "purpose," hardly the modern view that tends to see nature governed, if at all, by chance, not purpose, materially, not transcendentally, determined, without freedom, and devoid of an ultimate efficient cause, agnostic, if not atheist, and no final cause (thus reducing Aristotle to two causes: immediately efficient and material), presuppositions that have a crucial difficulty handling the problem of identity. Locke, a believing Puritan, but in his turn away from medieval scholasticism (Aristotle synthesized with Christianity and ossified), became the modern father of an empiricism of a materialist bent.

a prosecution is arguably unfair, and might do more harm than good.[66]

See RUSSELL, *supra,* at 604, 609 (describing Locke's "dislike[ ]" of "scholasticism" and status as the "founder of empiricism"). Locke, however, never took his thought as far as David Hume, his intellectual heir in empiricism/materialism, but a determinist, an atheist, and a skeptic. *See id.* at 672–73 ("[Hume] arrives at the disastrous conclusion that from experience and observation [-all an empiricist has-] nothing is to be learnt. There is no such thing as a rational belief . . . . Subsequent British empiricists rejected [Hume's] skepticism without refuting it . . . . The growth of unreason throughout the nineteenth century . . . is a natural sequel to Hume's destruction of empiricism."). Moreover, because of their thoroughgoing commitment to reductionist materialism, neither Locke nor Hume was able, in terms of materialism, to solve the problem of personal identity. *See* DAVID HUME, A TREATISE OF HUMAN NATURE, app. at 675 & 678 (Ernest C. Mossner ed., 1969) ("But upon a more strict review of the section concerning personal identity, I find myself involv'd in such a labyrinth, that, I must confess, I neither know how to correct my former opinions, nor how to render them consistent. . . . For my part, I must plead the privilege of a sceptic, and confess, that this difficulty is too hard for my understanding."); Locke, *supra* note 9, at 223 ("be best resolved into the goodness of God"). Locke saw the significance of a possible failure to do it on "reward and punishment" in society; thus, his appeal to God; Hume, an atheist, lacked that out by a god on a machine, as the Greek playwrights presented it in tragedy, a plot device aptly criticized by Aristotle in his *Poetics,* in 9 GREAT BOOKS, *supra* note 5, at 689 ("[T]he denouement should arise out of the plot and not "depend on a stage-artifice, as in [Euripides's] *Media* [who the gods saved from her arguably just fate."). Thus, giving up Aristotle and adopting materialism, Locke and Hume left themselves with an unresolved Theseus's Paradox on the issue of personal identity, an embarrassment for the presuppositions for human reward and punishment. More, too, is at stake, because for Hume, at least, "[m]orals . . . are not so properly objects of the understanding as of taste and sentiment." David Hume, AN ENQUIRY CONCERNING HUMAN UNDERSTANDING, in 35 GREAT BOOKS, *supra* note 5, at 509. Human good or evil becomes subjective, not even the fit subject of rational discussion (Who seriously argues the difference between vanilla and chocolate ice cream? The morality of the Holocaust becomes a matter of taste!). In sum, Hume's view of life is a dead end that need not attract us for reasons that go beyond their failure to resolve Thesus's Paradox, which, in any case, is beyond these materials. *See generally* THE WANING OF MATERIALISM (Robert C. Koons & George Bealer eds. 2010) (examining the various versions of materialism, finding them seriously defective; and featuring arguments from conscious experience, from the unity and identity of the person, from intentionality, mental causation, and knowledge).

66 Society can justify punishing reformed individuals based on just deserts for their previous bad acts or general deterrence of others, but the goals of rehabilitation and incapacitation are not served by punishing individuals who are already reformed or who no longer pose a threat to others. Nevertheless, deciding that a possible offender has rehabilitated himself and that, for that reason alone, the prosecution should not go forward is a matter for the sound discretion of the prosecutor. *See* United States v. Dotterweich, 320 U.S. 277, 285 (1943) ("[In a strict liability offense context,] the good sense of prosecutors . . . must be trusted. Our system of criminal justice necessarily depends on 'conscience and circumspection in prosecuting officers . . . .'" (quoting Nash v. United States, 229 U.S. 373, 378 (1913) (Holmes, J.))).

Statutes of limitations benefit society as well as the accused. They encourage "law enforcement officials promptly to investigate suspected criminal activity,"[67] to devote their limited resources to solving recent crimes that pose an immediate threat to society, because of repetition, as from recidivists come most offenses.[68] Statutes of limitations also incentivize law enforcement efficiency by keeping stale cases out of over-taxed court systems[69] and providing a bright-line rule guid-

67 *Toussie*, 397 U.S. at 115.

68 Recidivism is an ever-present fact of the criminal justice system. *See* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 45 (1967) ("The most striking fact about offenders who have been convicted of the common serious crimes of violence and theft is how often how many of them continue committing crimes. Arrest, court, and prison records furnish insistent testimony to the fact that these repeated offenders constitute the hard core of the crime problem."). The typical offender is different from the professional offender, as is the juvenile offender. *Id.* at 46. Nevertheless, overall "roughly a third of the offenders released from prison will be reimprisoned, usually for committing new offenses, within a 5-year period." *Id.* at 45. Yet the most disheartening fact is that little has changed in more than forty years except the calendar. Various recent data are at BUREAU OF JUSTICE STATISTICS, http://bjs.ojp.usdoj.gov/index.cfm?ty=gsearch (last visited Feb. 18, 2013). *See* Patrick A. Langan and David J. Levin, *Recidivism of Prisoners Released in 1994*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NO. NCJ 193427, at 1 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf. ("Within [three] years from their release . . . 67.5% of the prisoners were rearrested for a new offense . . . ."). Everything changes; everything remains the same.

69 *See* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 313 (1945). Justice Jackson's opinion in *Chase* contains a characteristically concise, insightful, and comprehensive statement of the theory and most of the issues posed by the statutes. He observed,

> Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of [the] opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.
>
> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the

ing when a prosecutor can and cannot bring a case.[70] Finally, statutes

> privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. at 313–14 (footnotes omitted) (citation omitted).

70 *See* Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 79–81 (2005) (discussing the efficiency justifications for statutes of limitations). *But see* Powell, *supra* note 55, at 143–45 (rightly arguing that statutes of limitations do not necessarily promote efficiency and predictability, because they lead to a multitude of complicated legal questions). In fact, statutes of limitation in the common law tradition had their origins not in considerations so utilitarian as efficiency, but in deeply rooted notions of a distrust of the exercise of official discretion, ironically in the area of minor offenses. An absolute time limitation on such prosecutions was a necessity to protect liberty from the exercise of arbitrary power. Nevertheless, the common law system in Great Britain, even to this day, has not developed a general limitation of the power of a royal prosecutor to secure an indictment. In this country, separated from royal power in London by more than 3,000 miles of not easily traversed oceans, our Puritan forefathers were fearful of any unlimited form of governmental power, including the power exercised by their own magistrates in their colony in the area of misdemeanor and minor offenses. Most felonies, punishable by death, had no period of limitations, as today. They wanted the power of the magistrates circumscribed by law, and they wanted the law plainly set out, so that all could see it. One aspect of their aspiration for a government of law, not men, was the first general statute of limitations on minor offenses. It was a forerunner of the first federal statute of limitations. *See supra* note 52. In sum, a point exists beyond which a person should rest at peace with his or her government. Swords of Damocles are the instruments of despotic, not free, governments.

In fact, as Cicero so delightfully tells the tale, the sword hung over the head of a flatterer, Damocles, who the tyrant Dionysius sought to teach a lesson that a king is never happy, no matter what he appears to have, because his subjects are ever ready to overthrow him. Cicero uses the story to make his point that the tyrant's treatment of his people meant that the ruler could not rest easily, and what was worse, "it was not even open [to him] to return to justice . . . . As a young man at a thoughtless age, he had entangled himself in errors, and had done things such that he could not be safe if he should come to his senses." CICERO, TUSCULAN DISPUTATIONS II & V 113 (A.E. Douglas ed. & trans., 1990). His point is that justice is a precondition to security in person and possessions, real and intangible, *both for ruler and ruled*. *See* Klopfer v. North Carolina, 386 U.S. 213, 221–22 (1967) ("The petitioner . . . [does not retain] his liberty by this prosecution merely because its [indefinite] suspension permits him to go 'whithersoever he will.' The [indefinite] pendency of the indictment may subject him to public scorn and deprive him of employment, and . . . force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation,' the criminal procedure condoned in this case . . . denies the petitioner the right to a speedy trial . . . ."). In *Klopfer*, the fear was of an indefinite suspension of

of limitations offer repose to society, the alleged perpetrator, and the victim.[71] In the United States, most jurisdictions have statutes of limitations that bar prosecution after the stated period elapses.[72] In deter-

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an indictment. How much more so would be the fear of an indefinite, pending investigation, and a possible indictment for an unknown charge at an unknown date? It is rightly every civil libertarian's worst nightmare. It would surely be of Kafkaesque proportions.

71 *See Toussie*, 397 U.S. at 115 ("[C]riminal limitations statutes are 'to be liberally interpreted in favor of repose . . . .'" (quoting United States v. Scharton, 285 U.S. 518, 522 (1932); United States v. Habig, 390 U.S. 222, 227 (1968))); Bridges v. United States, 346 U.S. 209, 215–16 (1953) ("[There is] a longstanding congressional 'policy of repose' that is fundamental to our society and our criminal law."); *see also* Doggett v. United States, 505 U.S. 647, 668 (1992) (Thomas, J., dissenting) ("[O]ur legal system has long recognized the value of repose, both to the individual and to society. But that recognition finds expression not in the sweeping commands of the Constitution, or in the common law, but in any number of specific statutes of limitations enacted by the federal and state legislatures. Such statutes not only protect a defendant from prejudice to his defense[,] . . . but also balance his interest in repose against society's interest in the apprehension and punishment of criminals.").

72 While the federal government has a general criminal statute of limitations. 18 U.S.C. § 3282(a) (2006) (stating that the federal criminal statute of limitations for non-capital crimes is five years after commission of the offense). Of the states, only South Carolina and Wyoming do not have any criminal statutes of limitations, although all states allow the prosecution of murder at any time, as did our Puritan ancestors. *See supra* note 52. Nevertheless, the states differ in how they characterize their statutes. *Compare* People v. Gwinn, 627 N.E.2d 699, 701 (Ill. App. Ct. 1994) (holding that a defendant who fails to raise the statute of limitations as a defense before trial waives that defense), *with* People v. Ware, 39 P.3d 1277, 1279 (Colo. App. 2001) ("Under Colorado law, the statute of limitations in criminal matters operates as a jurisdictional bar to prosecution that cannot be waived."). The Supreme Court's view is that of *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), holding that "[t]he statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases . . . ."

Whether courts characterize statutes of limitations as waivable affirmative defenses or as jurisdictional is crucial in the context of a trial for murder where a jury might convict on a time-barred lesser offense, if the court views the statute of limitations as waivable. *See generally* Alan L. Adlestein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 206 (1995) (arguing that, based on their history and purposes, criminal statutes of limitations are not absolute jurisdictional bars, and courts ought to allow defendants knowingly to wave them).

Significantly, it also affects the decisions of prosecutors and defense counsels when they decide whether to waive the statute and to enter into negotiations to resolve criminal matters without an indictment. Not indicted is better than winning a jury trial. Being a witness is most of the time better than being a defendant. Those kinds of resolutions come from talking to the prosecutor. Short "time-fuses" should not get in the way of the negotiation to settle matters, criminally, or, for that matter, civilly. If you can waive a statute of limitations, and settle a civil matter, it is usually better than extensive motion practice and intensive preparation before trial, but settling on the courthouse steps. Affected, too, is how after the negotiations break

down, and the prosecutor procures an indictment, the defense counsel handles the issue of a time bar. The comprehensive and concise review of the law in *United States v. Thurston*, 358 F.3d 51, 62–63 (1st Cir. 2004), *vacated on other grounds*, 543 U.S. 1097 (2005), bears quoting at length:

> Thurston argues that the trial court erred in not granting his post-verdict Rule 29 motion for acquittal, because the government had not proved an overt act during the limitations period, and in not sua sponte instructing the jury on the statute of limitations.
>
> The statute of limitations for 18 U.S.C. § 371 crimes is the general five-year statute of limitations contained in 18 U.S.C. § 3282. Here, that five years ran back from January 22, 1998, the date of the indictment, less the six weeks during which Thurston agreed to toll the limitations period. The government, therefore, had to prove an overt act was done on or after December 11, 1992. The indictment properly alleged at least eight overt acts within the limitations period.
>
> Thurston did not raise the defense of statute of limitations either before or at trial, did not request an instruction on the defense, and did not object when the judge instructed without addressing the issue. Thurston first raised the issue by Rule 29 motion after the verdict. The government says Thurston raised the issue too late. There is a preliminary question of when such a motion should be raised, a question affecting our standard of review.
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> "The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases . . . ." *Biddinger v. Comm'r of Police*, 245 U.S. 128, 135 (1917). Here the indictment adequately pled facts to establish that the crime was within the limitations period. Thurston was not required to raise the defense before trial under Rule 12(b)(3), FED. R. CRIM P. Nor would it have made sense for him to do so, since the defense depended on what the government proved or failed to prove at trial. In a criminal case a defendant need only plead as to the accusation of guilt in the indictment and need not raise the statute of limitations as an affirmative defense before trial. Thurston mistakes these truisms for an argument that he need not raise the limitations defense at all before the jury delivers a verdict of guilt.
>
> The government says Thurston has waived the issue and may not raise it at all. Absent an explicit agreement to waive the defense, we treat the issue as a forfeiture and not a waiver, contrary to the government's argument. This was not an intentional relinquishment or abandonment of a known right, the definition of a waiver. The issue of failure to assert the defense was viewed as forfeiture in *United States v. O'Bryant*, 998 F.2d 21, 23 n.1 (1st Cir. 1993). The rule we use—that the defense of statute of limitations must be raised at trial and, if not, is forfeited but not waived—is the rule in most circuits. *See* United States v. Ross, 77 F.3d 1525, 1536 (7th Cir. 1996) ("[I]t is widely accepted that a statute of limitations defense is forfeited if not raised at the trial itself.") (citing cases).
>
> Thurston has indeed forfeited the defense that the government did not prove facts that an overt act occurred within the limitations period. The defense should have been raised at trial. Waiting until after the jury has rendered a verdict of guilt to raise a limitations defense for the first time is inconsistent with the characterization of the statute of limitations as an affirmative defense and would unfairly sandbag the government.

mining the appropriate period of limitations, when the limitations period should accrue, and when it should toll, courts, and legislatures ought to take into account the factors that militate for *and* against having a period of limitations for any set period. Every extension of the limitations period, every tolling rule, and every accrual rule that starts the limitations period running later tends to undermine the purposes of having statutes of limitations in the first place.[73] The public interest demands thoughtful care.

> Because this was a forfeiture and not a waiver, there is still plain error review available under FED. R. CRIM. P. 52. *See United States v. Olano*, 507 U.S. 725, 731–32 . . . (1993). Our conclusion is straightforward. The government's evidence established overt acts by the conspirators within the limitations period, so there was no error at all as to the statute of limitations, much less plain error.

Id.

In *Spaziano v. Florida*, 468 U.S. 447 (1984), the defendant in a capital murder case refused to waive the statute of limitation for lesser-included offenses where the statute of limitations had run on those defenses. *Id.* at 450. The trial court declined to instruct on these offenses. *Id.* On appeal the defendant argued to no avail that the trial court's refusal violated *Beck v. Alabama*, 447 U.S. 625 (1980), which held that in a capital case, a lesser-included offense instruction was required for a fair trial. *Id.* at 452. The Court disagreed and held that the defendant would have to be satisfied with a "choice between having the benefit of the lesser included offense instruction or asserting the statute of limitations on the lesser included offenses." *Id.* at 456.

73 For example, Iowa, like many states over the past two decades, has revised its statute of limitations for sexual abuse crimes against children. Prior to 1990, the limitations period was four years after the commission of the offense. IOWA CODE ANN. § 802.2 (West 2003 & Supp. 2012) (amended 1990, 1994, 2000, 2005, and 2007) (providing older language in an annotation to the current statute). Currently, it is "ten years after the person upon whom the offense is committed attains eighteen years of age," or, if DNA evidence exists, three years after the government identifies the person who is the source of the DNA by name, whichever is later. IOWA CODE ANN. § 802.2 (West 2003 & Supp. 2012). Arguably, Iowa's extension of the limitations period for child sexual abuse cases frustrates the legitimate goals of the limitations periods. The extension allows old cases to go to court, when witnesses may have disappeared, and memories will surely have faded. Several decades after the crime, the perpetrator may have reformed or become senile. The decision to prosecute later may put the prosecutor between the victim's demand for justice and the exigencies of justice. Hard choices make bad prosecutions. In fact, law enforcement officials will have less incentive to investigate the crime as vigorously when they are fresh, especially after gathering and preserving DNA evidence when the limitations period extends indefinitely. Courts will become enmeshed in older cases where justice is hard to do, when their priorities ought to be to settle fresher ones fairly. Finally, repose for society, the perpetrator, and, in fact, too, the victim, will not result. At the same time, a longer limitations period promotes the society's interest in prosecuting heinous crimes, and, particularly with DNA evidence, it allows the government justly to punish and incapacitate child molesters who otherwise will recidivate. Moreover, the longer limitations period allows victims to come forward as adults to vindicate

B. Determining the Limitations Period for Criminal RICO

1. Federal RICO

An examination of RICO and its legislative history sadly reveals that it does not contain a provision for a statute of limitations specifically designed to take into account the unique character of a RICO investigation and prosecution.[74] Thus, the catchall five-year statute

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their rights whereas the fixed, previous four-year limitations period undoubtedly expired while many victims were still children. Presumably, the Iowa legislature decided that the interest of the society in prosecuting suspected child molesters outweighed the justifications for having a shorter limitations period—an imminently defensible conclusion, as long as the legislature took into account each aspect of the threefold balance of court, victim, and perpetrator.

74 The text of RICO is silent on the issue of a statute of limitations. An abbreviated version of the legislative history appears in G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMPLE L.Q. 1009, 1014–1021 (1980); a more detailed legislative history appears in *Civil Fraud Action, supra* note 15, at 249–80. When Senator Roman Hruska and Congressman Richard Poff introduced the bills that formed the template for RICO's language that primarily dealt with the infiltration of organized crime into legitimate business, they appropriately included provisions for a statute of limitation. Blakey & Gettings, *supra*, at 1015 & n.27, 1016–17. The American Bar Association endorsed them. *Id.* at 1016 & n.29. Had those provisions passed, they would have been the "end of the matter." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). Nevertheless, when Senator John McClellan and Senator Hruska introduced the bill that was the immediate forerunner of RICO, the private civil provisions were not included in the bill. Blakey & Gettings, *supra*, at 1017–18 & n.45 (referring to § 1861, which had "a broader purpose; it was directed at all forms of 'enterprise criminality"'). Section 1861 did not include these private civil provisions, because at the time that I drafted the new bill, I did not know enough about them to make an appropriate recommendation to Senator McClellan for their inclusion in the pending legislation, and I made no recommendation to Senator McClellan when I did not sufficiently understand the relevant provisions. I had too much respect for him. Those who knew the Senator know why. SHERRY LAYMAN, JOHN L. MCCLELLAN, UNITED STATES SENATOR, FEARLESS (Tate Publishing 2011) renders with great skill McClellan's character, his sense of integrity, and the personal tragedies that touched his life as well as his exemplary public service to his region and to the nation. The John L. McClellan I knew was a great man. Nor had I fully understood the implications of the blended legislation. Senator McClellan's prior bill aimed at Mafia-like criminal organizations, while Senator Hruska's bill focused on legitimate businesses. *See* Blakey & Roddy, *supra* note 13, at 1666–69. I took the general period of limitations at face value. *See* Blakey & Gettings, *supra*, at 1017. The Senate Judiciary Committee incorporated § 1861 in the Organized Crime Act as Title IX. The Committee reported out the amended bill; it passed the Senate; and the House of Representatives assigned it to the House Judiciary Committee. *Id.* at 1019–21. Senator McClellan assigned his Senate Subcommittee staff, including me, to work with Congressman Poff, the second ranking Republican on the House Judiciary Committee who did not have a Committee staff to work for him. Senator McClellan (and Senator Hruska) and Congressman

for non-capital federal offenses governs criminal RICO cases.[75] This

Poff kept in daily touch while processing the legislation in the House Judiciary Committee. Thus, at the end of the process in the Committee and on the House floor, the key senators had had their input to the bill. In fact, it turned out to make unnecessary a House Senate conference on the House amendments. Even though bills were before the House Judiciary Committee that included statutes of limitations, *id.* at 1020 & n.63, the House sent the legislation back to the Senate with various changes, including civil provisions, but no period of limitations. *Id.* at 1020 & n.63, 1021. The Senate sent it to the President, because the end of Second Session of the Ninety-first Congress was near, the Senate bill was largely intact, and prospects of fruitful negotiations over any differences with the House were dismal. *Id.* at 1021 & nn.68–69. In fact, Senator McClellan considered most of the House amendments as minor changes of "clarifying and strengthening" effect. 116 CONG. REC. 36,293 (1970). Senator Hruska agreed; the House changes were "not of major significance." *Id.* The President signed the legislation on October 15, 1970. *Id.* at 37,264.

That said, as reported by the Senate Judiciary Committee, the blended legislation expressly classified RICO as a "continuing offense" under particular circumstances. S. REP. NO. 91-617, at 23, 159–60 (1969) (discussing in detail criminal and civil limitations in light of the doctrine of continuing offenses). The House Judiciary Committee omitted the provision. *See* Blakey & Gettings, *supra*, at 1020 (describing the provisions to be "unnecessary language"); H. REP NO. 91-1549, at 123 (1970) (providing no explanation for the omission).

On "contintuing offenses," see *supra*, note 57. I regret that I was unsuccessful when I worked for Congressman Poff at Senator McClellan's instructions to secure a limitations period in the bill reported out by the House Judiciary Committee. Had I been successful then, I would not have to write this Article. On the other hand, I would not have learned what writing this Article taught me.

75 18 U.S.C. § 3282(a) (2006). Section 3282 governs the limitations period except "to the extent that the racketeering activity involves a violation of section 1344 [bank fraud]." 18 U.S.C. § 3293(3) (2006). Then, a ten-year limitations period applies. *Id.* The inclusion of a murder predicate offense does not change the result, because under RICO, its maximum punishment is life imprisonment. 18 U.S.C. § 1963(a) (2006). Nevertheless, separately indicting the murderer, where the facts warrant it, for murder in aid of racketeering under 18 U.S.C. § 1959 (2006) implicates the death penalty, for which Title 18 provides that murder is "without limitation." *Id.* § 3281; *see also* United States v. Payne, 591 F.3d 46, 57–59 (2d Cir. 2010) (following *Smith v. United States*, 360 U.S. 1, 8 (1959), which held that charging the statute rather than facts warranting death invokes the unlimited period of limitations).

Prospects for life imprisonment or death tend to lead even the head of an organized crime family to cooperate with law enforcement, a radical turn of events in the history of the mob. *See* ANTHONY M. DESTEFANO, THE LAST GODFATHER 285 (2006) ("So it was that one of the most seismic events in law enforcement's long struggle against organized crime got underway. [Joseph] Massino[, the boss of the Bonanno crime family,] was a beaten man. He faced not only the certainty of life in prison[, for the RICO charges, because they involved six listed murders and a $10 million dollar forfeiture,] . . . but also the prospect that he could be executed if convicted—a strong likelihood—in the next year's trial for the murder of Gerlando Sciascia. It seemed clear to Massino that he had one card left to play and that was to [cooperate] . . . .

statute, too, requires liberal interpretation of repose,[76] a policy not necessarily in accordance with the unique character of RICO.

Before courts reached the consensus that RICO was governed by the catchall five-year period, courts held that, where the racketeering activity under § 1961(1)(a) must be "chargeable under [s]tate law," the state statute of limitations should apply.[77] This contention was a misinterpretation of RICO. Courts correctly read "chargeable" to incorporate only the substantive definitions of state law, not statutes of limitation, or other procedural rules.[78] A contrary holding would

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[The] reality was now the fact that in a coffin was the only way Massino would get out of prison.").

76 *See supra* note 57.

77 United States v. Forsythe, 429 F. Supp. 715, 721, 723 (W.D. Pa. 1977), *rev'd*, 560 F.2d 1127 (3d Cir. 1977).

78 United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977) ("To interpret state law offenses to have more than a definitional purpose would be contrary to the legislative intent of Congress and existing state law." (citing United States v. Revel, 493 F.2d 1, 2–3 (5th Cir. 1974); United States v. Cerone, 452 F.2d 274, 286 (7th Cir. 1971))); United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977); *accord* United States v. Davis, 576 F.2d 1065, 1067 (3d Cir. 1978) ("[T]he words 'chargeable under State law' in § 1961(1)(A) mean 'chargeable under State law at the time the offense was committed.'"); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977) (rejecting defendant's claim that the running of state statutes of limitations for predicate offenses barred prosecution); *cf.* United States v. Borden, 10 F.3d 1058, 1060 (4th Cir. 1993) ("[A] defendant can be charged under the [federal] Lacey Act even when the statute of limitations for the predicate state offense has run.").

Even when it incorporates the *language* of state law, RICO does not sanction *violations* of state law; it sanctions violations of federal law. The difference between RICO and state law was well articulated in *Brown v Cassens Transport Co.*, 675 F.3d 946 (6th Cir. 2012) (holding that a right to recover compensation in Michigan worker's compensation scheme is "property" within RICO, despite effort to exclude federal remedy):

> Although RICO's predicate of mail fraud is similar to the underlying fraud that affects a state-recognized interest [in its worker's compensation scheme], mail fraud is a distinct offense. . . . [Because of] the Supremacy Clause, Michigan does not have the authority to declare a state remedy exclusive of federal remedies. . . . Regardless of whether RICO preempts [the state compensation scheme], RICO provides a distinct cause of action . . . .
>
> The flaw with the defendants' argument [that the state scheme is the exclusive remedy] is that the predicate offense for the RICO action is mail fraud, not the denial of worker's compensation. "The gravamen of [a] RICO cause of action is not the violation of state law, but rather certain conduct, illegal under state law, which, when combined with an impact on commerce, constitutes a violation of federal law. Therefore, it is not alleged that [the defendants are] subject to 'liability under' the [state law]; their liability . . . stems from RICO." The district court here erred when it stated that this case does not "involve[ ] a separate and independent tort (theft or

make the definition of pattern, which includes a ten-year period, "meaningless."[79]

2. State RICO

Following the enactment of federal RICO, many states enacted their own RICO statutes.[80] Of the thirty-five state RICO statutes that create criminal offenses, thirteen contain a limitations period, or

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> conversion or some similar claim)" because the plaintiffs "cannot disentangle their RICO claim from their underlying claim for benefits." Admittedly, the plaintiffs are entitled to damages for the alleged fraud only if they were actually entitled to worker's compensation and were not properly compensated, which is a question of state law. But this fact shows an overlap in sanctioned conduct, not a dependency relationship between state and federal law. It is well established that "[t]he fact that a scheme may violate state laws does not exclude it from the proscriptions of the federal mail fraud statute." It follows that mail fraud is still criminal even when the existence of fraud varies according to whether a state prohibits conduct or whether it affords entitlements. Thus, mail fraud is a sanctionable offense even when it resembles a state tort. . . . A federal civil RICO claim and a state claim for worker's compensation are legally distinct, even though they share factual underpinnings.

Id. at 953–55 (citations omitted).

Section 1961(1) provides that "'racketeering activity' means (A) any *act or threat involving* murder . . . bribery, [or] extortion . . . ." 18 U.S.C. § 1961(1)(A) (2006) (emphasis added). Thus, it includes "conspiracy," *United States v. Fernandez*, 388 F.3d 1199, 1259 (9th Cir. 2004), "attempt," *United States v. Pimentel*, 346 F.3d 285, 297–99 (2d Cir. 2003), "solicitation," *United States v. Welch*, 656 F.2d 1039, 1048 (5th Cir. 1981), and "facilitation" of murder, *United States v. Miller*, 116 F.3d 641, 674–75 (2d Cir. 1997). The section's language incorporates "generic" state offenses. S. REP. NO. 91–617, at 122 (1969); H. REP. NO. 91–1549, at 56 (1970). It serves solely a "definitional purpose." United States v. Salinas, 564 F.2d 688, 690 (5th Cir. 1997). To determine if a particular state offense fits with its generic form, typically, a court looks at analogous federal and state statutes existing in 1970 as well as the provisions of the Model Penal Code. *See Scheidler II*, 537 U.S. 393, 409–10 (2003) (citing United States v. Nardello, 393 U.S. 286, 295–96 (1969) (finding that "extortion" within 18 U.S.C. § 1952 includes "blackmail" in § 1961)); *see also* Perrin v. United States, 444 U.S. 37, 42–45, 49 (1979) (finding that "bribery" within 18 U.S.C. § 1952 includes "commercial bribery" in § 1961, even though it did not at common law). On the other hand, because it lacks a comparable state of mind, "manslaughter" is not within "murder." United States v. Diaz, 176 F.3d 52, 100–01 (2d Cir. 1999).

79 *Fineman*, 434 F. Supp. at 194.

80 Thirty-five U.S. jurisdictions now have "little" RICO statutes. *See supra* note 13. The title "little" is inappropriate. To be sure, the states often modeled their statutes on federal RICO, copying without change RICO's language, but not always, for sometimes their drafts represent a reconception of the issues (*e.g.*, Florida, which is, in fact, the model for other state statutes, (*e.g.*, Georga)); often, too, they are broader or narrower than federal RICO, as these materials show. In sum, they stand on their own, demanding careful attention to the language of the particular statute.

another part of the code specifies a limitations period (usually five years).[81] Another nineteen "little RICO" statutes do not specify a limitations period. Determining the limitations period for these statutes, then, is similar to determining the limitations period for the federal statute—courts should apply the state's catchall criminal statute of limitations unless the legislature unequivocally intended otherwise.[82]

C. Determining the Point of Accrual

1. Accrual and Commencement of Prosecution in Criminal Cases

Criminal statutes of limitations accrue when the perpetrator commits the crime and run until the government commences the prosecution. Thus, determining whether a prosecution is timely involves two questions[83]: First, when did the perpetrator commit the offense; and second, when did the government begin the prosecution? If the government does not begin the prosecution within the statutorily prescribed period after the commission of the crime, then the statute bars prosecution.

When an offense was "committed" is not always obvious. While courts generally consider most offenses committed when they are complete,[84] certain offenses are continuing offenses.[85] For continu-

81 *See* CONN. GEN. STAT. § 53-403(a) (2013) (five years); FLA. STAT. ANN. § 895.05(10) (West 2000) (five years); GA. CODE ANN. § 16-14-8 (2011) (five years); LA. REV. STAT. ANN. § 15:1356(H) (2005) (five years); MISS. CODE ANN. § 97-43-9(8) (West 2011) (five years); NEV. REV. STAT. ANN. § 207.520 (West Supp. 2012) (five years); OR. REV. STAT. ANN. § 166.725(11) (West 2011) (five years); 42 PA. CONS. STAT. ANN. § 5552 (West Supp. 2012) (five years); P.R. LAWS ANN. tit. 25, § 971(c) (2003) (no limitations; ten years for predicate acts); R.I. GEN. LAWS § 12-12-17(b) (2002) (ten years); TENN. CODE ANN. § 39-12-206(h) (West 2010) (five years); WASH. REV. CODE § 9A.04.080(1)(d) (2012) (six years for violations of § 9A.82.060 or § 9A.82.080); WIS. STAT. ANN. § 946.88(1) (West 2008) (six years).

82 All nineteen jurisdictions have catchall criminal statutes of limitations except for Virginia, which does not have statutes of limitations for felonies. *See* ARIZ. REV. STAT. ANN. § 13–107 (2010); COLO. REV. STAT. ANN. § 16-5-401 (West Supp. 2011); DEL. CODE ANN. tit. 11, § 205 (2013); HAW. REV. STAT. ANN. § 701-108 (LexisNexis 2007); IDAHO CODE ANN. § 19-402 (Supp. 2012); 720 ILL. COMP. STAT. 5/3-5 (West Supp. 2012); IND. CODE § 35-41-4-2 (West 2010); IOWA CODE § 802.3 (West Supp. 2012); MICH. COMP. LAWS ANN. § 767.24 (West Supp. 2012); MINN. STAT. ANN. § 628.26(k) (West Supp. 2012); N.J. STAT. ANN. § 2C:1-6 (West Supp. 2012); N.M. STAT. § 30-1-8 (LexisNexis Supp. 2011); N.Y. CRIM. PROC. LAW § 30.10 (McKinney Supp. 2012); N.D. CENT. CODE § 29-04-02 (Supp. 2011); OHIO REV. CODE ANN. § 2901.13 (LexisNexis 2010); OKLA. STAT. ANN. tit. 22, § 152 (West Supp. 2012); UTAH CODE ANN. § 76-1-302 (LexisNexis 2008); V.I. CODE ANN. tit. 5, § 3541 (2003).

83 I leave aside for now the question of tolling. *See infra* Part II.D.

84 *See* United States v. Irvine, 98 U.S. 450, 452 (1878) ("Whenever the act or series of acts necessary to constitute [the crime] have transpired, the crime is complete, and

ing offenses, the statute of limitations does not begin to run when the perpetrator has satisfied each of the elements of the offense. Rather, the statute of limitations begins to run when the criminal course of conduct ends. Conspiracy is an example. In *United States v. Kissel*, the Court held that a conspiracy is a continuing offense that does not terminate until the co-conspirators abandon it or achieve their aim.[86] In later cases, the Court held that a conspiracy continues until the defendant shows the contrary by, for example, abandonment,[87] and that

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from that day the Statute of Limitations begins to run . . . ."); *see also* Pendergast v. United States, 317 U.S. 412, 418 (1943) ("Statutes of limitations normally begin to run when the crime is complete.").

85 *See, e.g.*, United States v. Bailey, 444 U.S. 394, 413 (1980) (holding that an escape from prison is a continuing offense and the prisoner was under a continuing duty to return); United States v. Kissel, 218 U.S. 601, 607 (1910) (Holmes, J.) ("[T]he mere continuance of the result of a crime does not continue the crime. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous coöperation of the conspirators to keep it up, and there is such continuous coöperation, . . . [it is a continuing offense.]" (citation omitted)). Accordingly, once the judgment is made to treat an offense as continuing, it is improper to divide it into segments to make it separate offenses: "[I]t is a perversion of natural thought and of natural language to call such continuous coöperation a cinematographic series of distinct conspiracies, rather than to call it a single one." *Id. See generally* M. C. Dransfield, Annotation, *When Does Statute of Limitations Begin to Run Against Civil Action or Criminal Prosecution for Conspiracy*, 62 A.L.R.2d 1369 (1958) (discussing how several courts treat conspiracy as a continuing offense).

The general subject of continuing offenses besets the courts. On "continuing" offenses" generally, see *supra* note 58. The possession decisions are illustrative. Arguably, the decisions reach contradictory results. *Compare* People v. Grant, 6 Cal. Rptr. 3d 579, 594–96 (Ct. App. 2003) (interpreting CAL. PENAL CODE § 496 (a) (West Supp. 2013) and holding that there was sufficient evidence of concealing stolen property, a continuing offense, when a stolen computer was found in the mother's car in garage, and the defendant testified that he bought it for a low price), *with* State v Webb, 311 So. 2d 190, 191 (Fla. Dist. Ct. App. 1975) (interpreting FLA. STAT. ANN. § 811.16 (currently codified at FLA. STAT. ANN. § 812.031 (2007)) and holding that the theft of radio equipment and its installation at a radio station where the manager had knowledge that it was stolen was not a continuing offense of receiving and concealing stolen property). *See generally Possession of Stolen Property as Continuing Offense,* 24 A.L.R. 5th 132 (1994) (examining the case law determining whether possession of stolen property counts as a continuing offense).

86 *Kissel*, 218 U.S. at 607–08. In *Hyde v. United States*, 225 U.S. 347 (1912), the Court held that the defendant had to take "affirmative action" abandoning the conspiracy. *Id.* at 369–70 (1912) ("Having joined in an unlawful scheme, having constituted agents for its performance, . . . until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law."); *see also* Pinkerton v. United States, 328 U.S. 640, 646 (1946) (affirming the holding from *Hyde* that abandonment of a conspiracy requires affirmative action).

87 *See, e.g.*, United States v. Or. State Med. Soc'y, 343 U.S. 326, 333 (1952) ("When defendants are shown to have settled into a continuing practice or entered

frustration, as well as success or abandonment, could terminate a conspiracy.[88] Thus, for a conspiracy prosecution where you do not have to show an overt act,[89] the statute of limitations does not begin to run until the conspirators abandon it, something frustrates the goals of the conspiracy, the conspirators accomplish their goals, or withdraw from the conspiracy.[90] For a conspiracy prosecution where an overt

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into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof."); Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293, 298 (1934) ("In the absence of definite proof to that effect, abandonment will not be presumed."). In *Grunewald v. United States*, 353 U.S. 391 (1957), the Court considered whether acts of concealment, as an implied objective of all conspiracies, continue a conspiracy. *Id.* The Court held that the acts of concealment in that case did not continue the conspiracy. *Id.* at 406. But the issue is fact dependent:

> By no means does this [holding] mean that acts of concealment can never have significance in furthering a criminal conspiracy. But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.

Id. at 405.

88 *See* Fiswick v. United States, 329 U.S. 211, 217 (1946) (finding that admissions or confessions by a conspirator frustrate the conspiracy—terminating it "[s]o far as each conspirator who confessed was concerned").

89 At common law, an overt act was not an element of the offense of conspiracy. *Hyde*, 225 U.S. at 359. Today, the rule obtains, unless the statute specifically requires an overt act. *See* Salinas v. United States, 522 U.S. 52, 63–66 (1997) (holding that usual conspiracy rules apply to RICO; no over act is required, because none is specified by statute); Singer v. United States, 323 U.S. 338, 340 (1945) (holding that a conspiracy to violate the Selective Training and Service Act of 1940 does not require an overt act); Nash v. United States, 229 U.S. 373, 378 (1913) (holding that a Sherman Act antitrust conspiracy does not require an overt act).

90 *See* United States v. Grammatikos, 633 F.2d 1013, 1023 (2d Cir. 1980) (dealing with a conspiracy to import and distribute controlled substances).

A conspirator can also end his participation in a conspiracy by withdrawal where "[she] prove[s] she took affirmative steps, *inconsistent with the objectives of the conspiracy*, to disavow or to defeat the conspiratorial objectives." United States v. Acuna, 313 F. App'x 283, 293–94 (11th Cir. 2009) (holding cessation of one activity is not sufficient to establish withdrawal from a multi-objective conspiracy). "Additionally, the defendant must have either made a reasonable effort to communicate those steps to her coconspirators or disclosed their scheme to law enforcement authorities." *Id.* *See generally* United States v. Spero, 331 F.3d 57, 60 (2d Cir. 2003) (collecting and citing decision on conspiracy withdrawal from the First, Second, Sixth, Seventh, and Eleventh Circuits); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, JR.,, HANDBOOK ON CRIMINAL LAW § 6.6 f 12.4(b) at 558–60 (5th ed. 2010) (noting withdrawal requires successfully bringing home, in a reasonable manner, to each of the coconspirators the withdrawal or informing law enforcement; withdrawal ends participation; it is not an affirmative defense to liability); *see also Development in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 959 (1959).

act is an element of the crime, the statute begins to run at the completion of the last overt act by any one of the co-conspirators.[91]

After determining when the perpetrator committed the offense, the next question one must answer is whether the prosecutor timely initiated the prosecution. To answer this question, you must know what, by law, triggers the beginning of a prosecution. A prosecution generally begins when the grand jury indicts the suspect or when the prosecutor issues an information.[92] Nevertheless, depending on the jurisdiction, a prosecutor may commence a prosecution in several other ways: by filing a complaint,[93] by issuing a warrant,[94] or by the return of a presentment.[95] Once the prosecutor commences the prosecution, the statute of limitations tolls.[96]

A statute of limitations defense is an affirmative defense not cognizable on appeal unless raised by the defendant in the trial court and submitted to the jury on proper instructions; raising it at a later time does not give the court time to formulate and give the jury instructions; thus, the defendant "waives or forfeits" it. *Spero,* 331 F.2d at 60 n.2; *see also* United States v. Lo, 231 F.3d 471, 480 (9th Cir. 2000) ("Failure to comply with the statute of limitations, however, is an affirmative defense which the defendant waives if not raised at trial.").

91 *See Fiswick*, 329 U.S. at 216; Brown v. Elliott, 225 U.S. 392, 401 (1912).

92 *See* 18 U.S.C. § 3282(a) (2006).

93 *See* S.D. CODIFIED LAWS § 23A-42-4 (2004) ("All actions referred to in §§ 23A-42-1 to 23A-42-3, inclusive, shall be deemed commenced by the filing of a complaint, information or indictment with any committing magistrate or clerk of any court having jurisdiction of the offense.").

94 *See* 42 PA. CONS. STAT. ANN. § 5552(e) (West Supp. 2012) ("Except as otherwise provided by general rule adopted pursuant to section 5503 (relating to commencement of matters), a prosecution is commenced either when an indictment is found or an information under section 8931(b) (relating to indictment and information) is issued, or when a warrant, summons or citation is issued, if such warrant, summons or citation is executed without unreasonable delay. ").

95 *See* TENN. CODE ANN. § 40-2-104 (Supp. 2011) ("A prosecution is commenced, within the meaning of this chapter, by finding an indictment or presentment, the issuing of a warrant, the issuing of a juvenile petition alleging a delinquent act, binding over the offender, by the filing of an information as provided for in chapter 3 of this title, or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense.")

96 *See* United States v. Zvi, 168 F.3d 49, 54 (2d Cir. 1999); *see also* United States v. Wilsey, 458 F.2d 11, 12 (9th Cir. 1972) (per curiam) ("The filing of an indictment results in a tolling of the statute upon the charges embraced."). The Federal Rules of Criminal Procedure permit an indictment to be sealed. FED. R. CRIM. P. 6(e)(4). The expiration of the statute of limitation after the issuance of the indictment, but before its unsealing, will not invalidate an indictment, so long as the delay between the sealing and unsealing of the indictment does not prejudice the defendant. United States v. Muse, 633 F.2d 1041, 1041–42 (2d Cir. 1980) (en banc).

2. Accrual Problems in Criminal RICO Cases

In RICO litigation, the point at which the limitations period begins to run depends on which section of RICO is the basis for the charge.

a. Pattern Violations

Section 1962(c) prohibits the operation of an enterprise through a pattern of racketeering activity.[97] Because § 1962(c), if it requires a pattern, is a continuing offense, the statute of limitations runs from the last predicate act of racketeering in the pattern.[98] Thus, where

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Similarly, "John Doe" indictments allow prosecutors to avoid statute of limitations problems by indicting individuals identified only by their DNA profiles. *See* 18 U.S.C. § 3282(b):

> (b) DNA Profile Indictment.—
> (1) In General.—In any indictment for an offense under chapter 109A for which the identity of the accused is unknown, it shall be sufficient to describe the accused as an individual whose name is unknown, but who has a particular DNA profile.
> (2) Exception.—Any indictment described under paragraph (1), which is found not later than 5 years after the offense under chapter 109A is committed, shall not be subject to—
> (A) the limitations period described under subsection (a); and
> (B) the provisions of chapter 208 until the individual is arrested or served with a summons in connection with the charges contained in the indictment.

18 U.S.C. 3282(b) (2006).

A John Doe indictment legally commences the prosecution, thus, tolling the statute of limitations, even though the accused's name is unknown. *See generally* Meredith A. Bieber, Note, *Meeting the Statute or Beating It: Using "John Doe" Indictments Based on DNA to Meet the Statute of Limitations*, 150 U. PA. L. REV. 1079 (2002) (discussing how the government employs the John Doe indictments to toll the statute of limitations).

97 Section 1962(c) provides:

> 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.

18 U.S.C. § 1962(c) (2006).

98 *See* United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) ("RICO, however, is a continuing offense under the *Toussie* definition. It criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one, and thus an exception to the normal start of the limitations period."); United States v. Wong, 40 F.3d 1347, 1366 (2d Cir. 1994) ("Both substantive RICO and RICO conspiracy offenses are continuing crimes."); United States v. Persico, 832 F.2d 705, 714 (2d Cir. 1987) ("[I]n order to satisfy the statute of limita-

one predicate act of racketeering in a pattern of racketeering falls

tions for section 1962(c), the government must demonstrate that a defendant committed at least one predicate racketeering act within the limitations period."). On "continuing offenses," see, *supra,* note 57.

To the degree that the rule of *Persico* envisions that *any* act committed by *any* co-defendant counts, it is similar to the usual rule for continuing offenses (*e.g.*, conspiracy.). *Hyde* stands for the rule that each co-conspirator is responsible for the acts of each other co-conspirator: "The statute cuts through such puzzles and make the [first and last overt] act of a conspirator . . . the legal inception of guilt inculpating all and subjecting all to punishment." Hyde v. United States, 225 U.S. 347, 362 (1912). One overt act in any jurisdiction anywhere makes each coconspirator subject to trial in that place. The opinion states:

> Let him meet with his fellows in secret and he will try to do so; let the place be concealed, as it can be, and he and they may execute their crime in every State in the Union and defeat punishment[, as they would if the trial could only be held in the place where they hatched the conspiracy] . . . . We see no reason why a constructive presence should not be assigned . . . and do with it as with other crimes which are commenced in one place and continued in another.

Id. at 363–64.

If the conspiracy continues, the court measures the period of limitation for each co-conspirator from the last overt act by any one of the co-conspirators, even if a particular conspirator does not commit an over act within the period. "[If one conspirator does] not do anything within the . . . period but [understands] that further acts should be performed, they, if performed, would be his acts and would have the same effect against him as if he had done them himself." *Id* at 368 (internal quotation marks omitted). Each conspirator is an agent for each other conspirator until the conspiracy ends or he affirmatively withdraws from the conspiracy. "As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance." *Id.* at 369–70; *see also* Salinas v. United States, 522 U.S. 52, 62–66 (1997).

To the degree that it envisions, as it does explicitly, a *personal* act by *each* defendant within the period of limitations, as it does, it indefensibly goes well beyond the usual rules for continuing offenses; it is squarely inconsistent with the language, rationale, and holding in *Salinas,* which held that no personal act was required for substantive or conspiracy under RICO. *Id.* It is an anachronism left over from the period in which a minority of circuits followed the personal act rule. *See id.* at 61–62 (citing United States v. Ruggiero, 726 F.2d 913, 921 (2d. Cir 1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981)). Neither *Winter* nor *Ruggiero* involved a limitations issue, but the "two personal acts" rule of *Ruggiero* lead to the result in *Persico* on the issue of limitations. *Persico,* 832 F.2d at 713 (citing *Ruggiero* on the two personal act requirement). In turn, the two personal acts requirement stemmed from language (not a holding) in *United States v. Elliot,* 571 F.2d 880, 903 (5th Cir. 1978), that summarized the language of the statute itself for a restatement of the elements of a violation, but nothing in *Elliot* said anything about a personal act requirement. *See Civil Fraud Action, supra* note 16, at 290 n.151 at 296–97 (tracing the evolution of rule in dicta, to a rule of evidence, to a rule of law, and finally to a rule with a limited rationale). The only trouble was that the brief rationale offered in *Winter,* "protection to those who might otherwise be convicted through guilt by association," was perverse

in terms of the objective of RICO itself. 663 F.2d at 1136. Compare the *Winter* Court's holding to *United States v. Neapolitan,* which held that:

> The crime chieftains . . . have developed the process of 'insulation' to a remarkable degree. . . . Convicting[them] of crimes . . . is usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the utmost care to insulate himself from any apparent physical connection with the crime or with his having to commit it.

Neapolitan v. United States, 791 F.2d 489, 498 (7th Cir. 1986) (citing PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE S. COMM. ON GOVERNMENT OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 89-72, at 2 (1965) (reported by Senator John L. McClellan, the principle sponsor of RICO)).

Whatever Congress designed RICO for, or however private litigants use it now, facilitating the conviction of upper level bosses in organized crime families was unquestionably a core concern. If you require bosses to engage in personal acts under RICO, but not under general conspiracy jurisprudence, you perversely further insulate them from conviction. Indeed, one rationale behind the organizational structure of the families of organized crime in a hierarchical structure was to separate the higher-level members from the crimes themselves to make it difficult to convict them. Another rationale included insulating the bosses from violence within the family; mere members do not associate with the high-level bosses. The low-level members and their non-member associates personally commit the crimes. Thus, as designed, the bosses do not "get their hands dirty." *See generally*, DENNIS N. GRIFFIN & ANDREW DIDONATO, SURVIVING THE MOB (2010). Construing RICO to require "dirty hands" for the bosses, as *Ruggiero*, *Winter*, and *Persico* do, turns the statute's rationale upside down.

The importance of the point requires a detailed examination of *Persico*'s two major sections, the fountainhead of the *personal* act agreement requirement in RICO conspiracy context and the requirement of a personal act within the period of limitations.

(1) In *Persico*, the circuit observed on the question of the running of the statute on a *conspiracy* count,

> The government argues . . . the statute of limitations for RICO conspiracy should not begin to run until the accomplishment or abandonment of the objectives of the conspiracy. We agree. . . . By his agreement, a RICO defendant signals his membership in a conspiracy to conduct the affairs of the charged enterprise. Thus, the RICO conspiracy statute is most closely analogous to other conspiracy statutes pursuant to which overt acts in furtherance of the conspiracy need not be pleaded or proven. Under such statutes, '[f]or limitations purposes, the conspiracy may be deemed terminated when, in a broad sense, its objectives have either been accomplished or abandoned, not when its last overt act was committed.' . . .
>
> The limitations period is measured from the point at which the crime is complete. Because the RICO conspiracy statute does not require proof of an overt act, we believe that the crime of RICO conspiracy is not complete until the purposes of the conspiracy either have been accomplished or abandoned. Although proof of a RICO conspiracy requires a demonstration that a defendant *agreed to commit two or more predicate acts*, rather than a simple showing that the defendant agreed to join the conspiracy, the agreement proscribed by section 1962(d) is conspiracy to participate in a charged enter-

> prise's affairs, not conspiracy to commit predicate acts. We perceive no valid reason why the RICO conspiracy statute should be analyzed in a manner inconsistent with other conspiracy statutes not requiring proof of overt acts.
>
> Based on the foregoing, we conclude that the statute of limitations for the RICO conspiracy charges at issue here did not begin to run at least until the filing of the indictment. . . . [T]he government amply demonstrated that the conspiracy to conduct the affairs of the Colombo Family continued until, and well after, April 4, 1985, the date the superseding indictment was filed.

Persico, 832 F.2d at 713–14 (emphasis added) (citations omitted) (citing *Ruggiero*, 726 F.2d at 921 and a collection of cases).

On the contrary, under *Salinas*, each co-conspirator need not *agree* that *he* will commit *personally* two predicate acts; it is only necessary that *he* agree that *someone* in the conspiracy will commit two predicate acts. *See* United States v. To, 144 F.3d 737, 744 (11th Cir. 1998) ("'[T]he focus is on the agreement to participate in the enterprise through the pattern of racketeering activity, not on the agreement to commit the individual predicate acts.' . . . In this case, . . . the government could prove [the defendants'] agreement to participate in either of two ways. . . . [T]he government could show an agreement on an overall objective. An agreement on an overall objective may be proved 'by circumstantial evidence showing that each defendant must necessarily have known that others were also conspiring to participate in the same enterprise through a pattern of racketeering activity.'"); United States v. Vaccaro, 115 F.3d 1211, 1221 (5th Cir. 1997) ("To be guilty of a RICO conspiracy, the conspirator 'must simply agree to the objective of a violation of RICO; he need not agree personally to violate the statute.'") (*quoting* United States v. Marmolejo, 89 F.3d 1185, 1196 (5th Cir. 1996)); MCM Partners, Inc. v. Andrews-Bartlett & Assocs., 62 F.3d 967, 980 (7th Cir. 1995) ("[A] defendant may conspire to violate section 1962(c) if [he] agreed 'to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity,' and 'it is only necessary that the defendant agree to the commission of [at least] two predicate acts on behalf of the conspiracy.' The defendant need not have agreed to actually commit the predicate acts [himself] or even to participate in the commission of those acts so long as [he] agreed that the acts would be committed on behalf of the conspiracy." (*quoting Neapolitan*, 791 F.2d at 498)). In light of these rulings, no reason appears to require a *personal* participation in a last predicate act, overt act, or other conduct to show that the conspiracy continued into the period of the statute. Each member of a RICO conspiracy is liable for the acts of the other members of the RICO conspiracy; personal conduct (beyond agreement to the RICO objective) is not required; vicarious liability, based on conduct of others, meets the test of the law under *Salinas*, 522 U.S. at 62–66.

(2) In *Persico*, the circuit observed on the question of the running of the statute on a *substantive* count:

> The district court determined that the statute of limitations . . . should begin to run from the *last overt act* committed by *any* member of the group charged. . . .
>
> . . . .
>
> [I]n order to establish a defendant's violation of section 1962(c), the government must prove that the defendant committed two or more predicate offenses, at least one of which occurred within the federal five-year statute of limitations for non-capital offenses. In rejecting [the] claim that the evidence indicated only that a co-defendant had committed a timely predi-

> cate act, we emphasized that there was sufficient evidence that [the defendant] also had committed the act. Central to our analysis was the fact that [the defendant] himself had participated in a timely predicate act. . . .
>
> Even if we were to assume that [the case] involved single defendants, under the government's statute of limitations analysis it would have been sufficient for us to determine whether any unindicted member of the enterprise had committed timely predicate acts, a search that we did not undertake. Instead, we focused solely on the defendant who raised the limitations defense and determined that he had committed one predicate act within the limitations period.
>
> Based on the reasoning of our prior decisions, we conclude that in order to satisfy the statute of limitations for section 1962(c), the government must demonstrate that a defendant committed at least one predicate racketeering act within the limitations period. . . . Therefore, because the government failed to demonstrate that either [defendant] committed a predicate act within the five-year statute of limitations, we reverse their convictions under section 1962(c).

832 F.2d at 714 (emphasis added) ("Such a conclusion comports with the structure of section 1962, which treats conspiracies to violate RICO and substantive RICO offenses separately. The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise, which are proscribed by section 1962(d). We reject the government's attempt to analyze section 1962(c) as if it were a second RICO conspiracy statute.").

On the contrary, each person in a § 1962(c) charge need not commit *personally* two predicate acts; it is only necessary that someone involved with him in the violation commit two predicate acts. *See Salinas*, 522 U.S. at 62–66 (holding that no personal act required for substantive or conspiracy under RICO). If that is the law, as it is, then *Persico* is not the law. Moreover, this analysis does not treat §§ 1962 (c) and (d) as if each were a conspiracy provision, but properly treats each section as a continuing offense, and applies continuing offense (or tort jurisprudence) to them in their criminal and civil manifestations. On "continuing offenses," see, *supra* note 57.

Sadly, *Perscio* had an immediate and adverse impact in one of the most important criminal prosecutions ever brought under RICO. In *United States v. Salerno*, 868 F.2d 524, 528, 534 (2d Cir. 1989), the government brought a RICO prosecution against the organized crime commission that sat over the five families in New York City. *See* S. REP. NO. 91-617, at 36–43 (1969) (identifying six of eleven individual indicted in 1984 as a focus of RICO); N.Y. TIMES, Feb. 27, 1984, at 1 (reporting on the indictment under RICO of eleven mob leaders, six of whom on commission and heads of New York City area families). *Salerno*'s only competition in the "most significant" category might be *United States v. Schiro*, 679 F.3d 521, 535 (7th Cir. 2012), which dealt with the prosecution under RICO of the "Outfit," the lineal descendant of Al Capone's gang. In *Schiro*, the court noted: "If anyone doubted that the Chicago Outfit during its heyday ranked as one of the most dangerous and reprehensible criminal organizations in our nation's history, the record compiled in this case would put those uncertainties to rest." *Id.* (Wood, J., dissenting). Yet, *Schiro* comes in a distant second to *Salerno*. Chicago, after all, is the "Second City." In *Salerno*, the grand jury indicted Anthony Indelicato, a "capo" in the Bonanno crime family, for § 1962(d) (conspiracy) and § 1962(c) (substance) on November 19, 1985. 868 F.2d at 534. Each of his racketeering acts (the simultaneous murders of Carmine Galante and two associates) occurred

in 1979. *Id.* In *United States v. Indelicato*, the Second Circuit held that the murders were part of a pattern of racketeering acts. 865 F.2d 1370, 1383–85 (2d Cir. 1989) (en banc) ("Though the murders were . . . simultaneous, they . . . constituted more than one act. . . . [T]he three murders were . . . related since . . . each was [for the] facilitation of the desired change in leadership of the Bonanno crime family. . . . [B]oth the nature of the Commission . . . and the . . . Bonanno family, control of which the murders were designed to achieve, [showed] that there was a threat of continuing racketeering activity." (citing G. Robert Blakey & Brian Gettings, *supra* note 74, at 1030 & nn.97–101 (1980))). The period of limitations was five years. *See supra* note 75. Following *Persico,* as it had to as a panel, the *Salerno* court held that the five years for the conspiracy ended "only when the purposes of the conspiracy have either been accomplished or abandoned." 868 F.2d at 534. It added "withdraw[al]." *Id.* at 534 n.4. On the other hand, for a substantive offense, the statute barred a prosecution "as to any defendant unless *that defendant* committed a predicate act within the five-year . . . period." *Id.* at 534. The court reviewed the jury instructions on § 1962 (d) that required a finding that Indelicato continued as an "associate or conspirator" of the "enterprise" and that *any one* of the coconspirators committed a racketeering act after November 19, 1980. *Id.* It then upheld the verdict on the conspiracy conviction. *Id.* "On the other hand, since all predicate acts committed by *Indelicato* occurred prior to November 19, 1980, [the court held that] *Persico* require[d] reversal of his conviction" for § 1962(c). *Id.* Had *Salinas* been the law then, the court would have rightly upheld the convictions. *See* United States v. Pizzonia, 577 F.3d 455, 464–67 (2d Cir. 2009) ("Pizzonia held the rank of captain in the Gambino crime family. In that capacity, he sat on a special committee that sought to increase family revenues from the Gambinos' assorted criminal activities. It is difficult to imagine evidence that could more convincingly demonstrate a defendant's agreement to participate in the affairs of the charged enterprise through a pattern of continuing criminal activity."); United States v. Eppolito, 543 F.3d 25, 44–58 (2d Cir. 2008) ("The jury was entitled to view the offers [of the officers] to provide assistance to members and associates of organized crime as general and open-ended—as was alleged in the Indictment—and thus as encompassing defendants' conduct [after retirement] in Las Vegas, which included [defendant's] offers and attempts to launder the proceeds of narcotics trafficking and . . . [the former officers'] involvement in narcotics trafficking . . . to induce would-be investors to give them money for a film in whose funding members of organized crime were integrally involved. The district court's narrow focus on the agreement of [the defendants] to provide confidential law enforcement information as the be-all and end-all of the enterprise and of the conspiratorial agreement was thus inconsistent with the allegations of the Indictment and disregarded or discounted the above evidence [in the record]. . . . Where a given partnership has offered a variety of services to a defined category of customers, it is not entitled to a ruling that as a matter of law its services do not constitute a pattern simply because the offered services were varied. Finally, as to the need to prove continuity or the threat of continuity . . . 'the threat of continuity is sufficiently established where the predicates can be attributed to a defendant operating as *part of a long-term association that exists for criminal purposes.*' Plainly, the evidence described above was sufficient to permit the jury to find that . . . [the defendants] operated as part of just such an association. The fact that there was a gap of some eight years between proven racketeering acts [in New York] did not as a matter of law preclude a finding of pattern or continuity, for Congress expressly defined pattern to include two

or more acts of racketeering activity within a period (excluding any period of imprisonment) of 10 years." (citations omitted)); Morris v. City of New York, 16 Misc. 3d 126A, 847 N.Y.Y.2d 903 (2007) (holding that notice of claim was untimely because of lack of equitable tolling where administratrix of murder victim killed by police officers); *cf.* United States v. Yannotti, 541 F.3d 112, 121–23 (2d Cir. 2008) (upholding a post-*Salinas* RICO conspiracy conviction, even though the government proved organized crime family membership based on defendant's criminal conduct outside of the limitation period, because it showed the continuation of an organized crime family and defendant's membership into the period of the statute; the court did not recognize that *Salinas* eliminated the personal act rule of *Persico* for substantive offenses, and it obviated most of its discussion drawing distinctions between §§ 1962(d) and (c)).

On the importance of the Commission Case and related RICO prosecutions, see *supra* and *infra* note 382. *See also* PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON GOVERNMENTAL AFFAIRS, *Federal Government's Use Of The RICO Statute And Other Efforts Against Organized Crime*, S. REP. No. 101-407, at 31–32 (1990) ("[Department of Justice and FBI] should continue . . . their innovative and effective use of the enterprise theory of investigation, the task force approach, and the provisions of the RICO statute."); *Effectiveness of the Government's Attack on La Cosa Nostra, Organized Crime: 25 Years after Valachi: Hearing Before the Permanent Subcommittee on Investigations of the Comm. on Governmental Affairs*, 100th Cong. 505 (1988) (statement of David C. Williams, Director, Office of Special Investigations, General Accounting Office), *available at* http://www.gao.gov/assets/110/102051.pdf ("Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair. RICO facilitated the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization's bureaucracy . . . . Before the act, the government's efforts were necessarily piece-meal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization's criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented. . . ."); *see also* Selwyn Raab, *A Battered and Ailing Mafia Is Losing Its Grip on America*, N.Y. TIMES, Oct. 22, 1990, at A1, A12 ("Law-enforcement officials generally credit a long-term strategy adopted by the Justice Department and the Federal Bureau of Investigation in the early 1980's: developing cases against the top leaders of organized-crime families and relying largely on the Racketeer Influenced and Corrupt Organizations Act, or RICO, as a courtroom tool. By concentrating on enterprises rather than individuals, [f]ederal prosecutors in the last five years have removed the high commands of families through the convictions and long prison sentences of almost 100 top Cosa Nostra leaders."); Robert D. McFadden, *The Mafia of 1980's: Divided and Under Siege*, N.Y. Times, Mar. 11, 1987, at A1; Stewart Darell, *Busting the Mob*, U.S. NEWS & WORLD REP., Feb. 3, 1986, at 24; Special Report, *The Mob on Trial*, NEWSDAY, Sept. 7, 1986, at 4.

For civil materials on continuing torts, see Nieman v. NLO, Inc., 108 F.3d 1546, 1553 n. 9, 1554–62 (6th Cir. (1997) ("[A] claim for continuing trespass is not defeated where the defendant's last affirmative act of wrongdoing precedes the filing of the complaint by a period longer than the statute of limitations. . . . [U]nder Ohio law, a claim for continuing trespass may be supported by proof of continuing damages

within the period of limitations, the entire pattern of racketeering is subject to prosecution, even though earlier acts of racketeering might not be subject to prosecution as separate offenses.[99] Where no act of racketeering occurs within the period of limitations, courts properly reverse convictions.[100] Where multiple parties engage in racketeering offenses, the statute of limitations for each defendant runs from the last act of racketeering he commits, *the cases wrongfully teach*, not from the last act of racketeering committed by any member of the group.[101]

b. Use/Investment Violations and Acquisition/Maintenance Violations

Section 1962(a) prohibits the use or investment of income derived from a pattern of racketeering.[102] Use or investment occurs

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and need not be based on allegations of continuing conduct." (citing RESTATEMENT (SECOND) OF TORTS §§ 161 cmt. b, 899 cmt. d, and 930(1) (1965))); Rapf v. Suffolk County, 755 F. 2d 282, 284–90, 293 (2d Cir. 1985) (holding that a suit for injunction to requiring the county to desist from a nuisance that threatens to destroy homes by not maintaining "groins" leading to erosion that swept away up to fifty homes bars only claim for injunction, not damages); I CALVIN W. CORMAN, LIMITATION OF ACTIONS § 7.4.11 Continuing Injury, at 600–01 (1991) ("[A] continuing injury tort does not accrue, nor does the statute of limitation begin to run until the wrong terminates. Such injury results from continued unlawful acts and differs from the continuing ill effects of an original violation. . . . Postponement of the date of accrual until termination of a continuing wrong permits the inclusion of damages for the duration of the violation. When the injuries are not continuous but recurring, the statute of limitation begins to run from the occurrence of each injury." (footnote omitted)).

99 As the court stated in *United States v. Wong*:

> [T]his court has held in the statute-of-limitations context that jurisdiction over a single RICO predicate act confers jurisdiction over other predicate acts, including some that could not be prosecuted separately. Because the limitations period is measured from the point at which the crime is complete, a defendant may be liable under substantive RICO for predicate acts the separate prosecution of which would be barred by the applicable statute of limitations, so long as *that defendant* committed one predicate act within the five-year limitations period.

United States v. Wong, 40 F.3d 1347, 1367 (2d Cir. 1994) (emphasis added) (citations omitted).

100 *See, e.g.*, United States v. Bethea, 672 F.2d 407, 419–20 (1987) (reversing conviction where no act of racketeering occurs within the period of limitations).

101 *See Persico*, 832 F.2d at 714; United States v. Torres Lopez, 851 F.2d 520, 525 (1st Cir. 1988).

102 Section 1962(a) provides:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or

after the pattern of racketeering from which the perpetrator derived income. Accordingly, the period of limitations runs, not from the last act of racketeering in the pattern, but from the use or investment.[103] Unless the violation of § 1962(a) requires some element beyond the act of use or investment, the offense is complete with the use or investment.

Section 1962(b), on the other hand, prohibits the acquisition or maintenance of an interest in an enterprise through a pattern of racketeering.[104] Here, the crucial element is the "acquisition or maintenance" of an interest in an enterprise. Accordingly, the period of limitations would run, not from the last act of racketeering in the pattern, but from the last act of "acquisition or maintenance." No court of appeals case exists involving the accrual of the statute of limitations under § 1962(b). Nevertheless, in *United States v. Castellano*,[105] the district court reasonably suggested in some circumstances that § 1962(b) could be a continuing offense.[106] If so, the limitations period would not accrue until the criminal course of conduct ceases. If not, the

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> invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

18 U.S.C. § 1962(a) (2006).

103 United States v. Vogt, 910 F.2d 1184, 1196 (4th Cir. 1990) ("[The offense defined in § 1962(a)] is only consummated by the . . . act of use or investment, hence the statute [of limitations] with respect to subsection (a) is only triggered by the last such act charged.").

104 Section 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1962(b) (2006).

105 610 F. Supp. 1359 (S.D.N.Y. 1985).

106 *Id.* at 1408 (reasoning that § 1962 (b) is arguably (at least in some circumstances) a continuing offense because 'maintenance' of an enterprise implies continuous activity); *see* S. REP No. 91-617, at 158 (1969) ("The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective.").

limitations period would accrue when all the elements of the offense were otherwise satisfied.

c. Conspiracy

Section 1962(d) prohibits conspiracies to violate any of the provisions of subsections (a), (b), or (c).[107] Section 1962(d) does not

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107 Section 1962(d) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C § 1962(d) (2006).

One question vexing about §§ 1962(a), (b), and (d) is whether an injury by a predicate act under § 1961 rather than a "use or investment" or "acquisition or maintenance" injury suffices to state a civil claim for relief under §1962(d). In Beck v. Prupis, 529 U.S. 494, 501–502 (2000), the Court looked to "well-established common law of civil conspiracy" to decide its meaning in §1962(d). *Id.* The Court held that a "predicate" act—as opposed to an overt act—had to cause injury where § 1962(c) was the object of the conspiracy. *Id.* at 506–507. At common law, a plaintiff could recover for a civil conspiracy only if his or her injury resulted from an act itself unlawful or tortuous. *Id.* at 501. Overt acts—not required under *Salinas* under § 1962(d) for criminal liability—are neither unlawful nor tortuous, that is, they acquired their unlawful character only by their inclusion in Title 18 as criminal offenses. Thus, the Court found mere overt act injury insufficient. The Court refused to reach, however, whether special standing rules existed to sue for a conspiracy to violate §§ 1962(a) or (b). *Id.* at 505–506 n.10 ("[W]e do not resolve whether a plaintiff suing under § 1964(c) for a RICO conspiracy must allege an actionable violation under §§ 1962(a)–(c), or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury."). Under this analysis, a plaintiff need plead for civil liability under § 1962(d), only that his or her injury stemmed from "racketeering activity" under § 1961. To require more for a civil RICO "conspiracy," that is, a violation of the completed offense under §§ 1962(a)–(b), either that the defendants completed them (or at least substantially completed them) in a particular fashion, would read § 1962(d) out of RICO, making § 1962(d) redundant of §§ 1962(a) and (b). *See* Asarco, Inc. v. Kadish, 490 U.S. 606, 629 (1989) ("We do not agree . . . [because] the . . . interpretation . . . would render that language redundant."). Such a holding is also inconsistent with the well-established rule that a conspiracy and the substantive offense are separate offenses. United States v. Callanan 364 U.S. 587, 593–94 (1960). A claim under § 1962(d) to (a) (or, for that matter § 1962(d) to (b)) is appropriate, therefore, when a plaintiff is injured by "racketeering activity" in the course of a conspiracy by the defendant to violate § 1962(a) (or § 1962(b)). *See* Blakey & Roddy, *supra* note 13, at 1465–59 (rejecting contrary decisions). Moreover, post *Beck*, the legal premises of those prior cases not imposing more that overt act injury "remain sound." Kolar v. Preferred Real Estate Inves., Inc., 454 Fed. Appx 353, 367 n. 13 (3d Cir. 2008). Courts properly should refrain from adding unnecessary judicial gloss to the statute's plain language. *Salinas*, 522 US at 63. As Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." Techt v. Hughes, 229 N.Y. 222, 228-29, 128 N.E. 185, 186 (1920).

require the commission of an overt act.[108] Accordingly, the period of limitations does not run until the conspiratorial purposes have been abandoned or accomplished.[109] Subsections (a), (b), and (c) are subject to the general conspiracy statute[110] that requires an overt act.[111] If the government charged a defendant with conspiracy to violate sub-

108 The text of § 1962(d) does not include an overt act requirement. *See* S. REP. No. 91-617, at 159 (1969) ("The section does not require an overt act for the offense of conspiracy. It punishes conspiracy 'on the common law footing.' Hence the indictment is sufficient if the words 'or conspire to do so' extend to all conspiracies to commit offenses against the Act. . . . We think that construction is grammatically permissible and conforms with the legislative scheme." (citing Singer v. United States, 323 U.S. 338, 340–41 (1945))). No grounds exist to require an overt act. On the other hand, *United States v. Sutherland* suggested that § 1962(d) requires an overt act. 656 F.2d 1181, 1186 n.4 (5th Cir. 1981). The Court rejected the *Sutherland* position in *Salinas*. *See* 522 U.S. 52, 63 (1997) (holding that § 1962(d) does not require an overt act). The language and legislative history of RICO compelled that result.

109 United States v. Coia, 719 F.2d 1120, 1124–25 (11th Cir. 1983) (following United States v. Barton, 647 F.2d 224, 237 (2d Cir.1981)). In reversing the district court that dismissed a RICO indictment for a failure to allege an overt act, the circuit observed:

> The applicable statute of limitations provides . . . [for five years after commission of the offense].
>
> It is the question of when a crime is complete that is the raison d'etre . . . whether a RICO conspiracy requires the commission of an overt act. . . . [A] conspiracy requiring an overt act is deemed complete for statute of limitations purposes at the time of completion of the last overt act. . . . With respect to conspiracy statutes that do not require proof of an overt act, the indictment satisfies the requirements of the statute of limitations if the conspiracy is alleged to have continued into the limitations period. The conspiracy may be deemed to continue as long as its purposes have neither been abandoned nor accomplished.
>
> Both in the indictment and at the pretrial hearing, the government consistently alleged that the conspiracy continued well into the limitations period. . . . [T]he district judge ignored this, fixing his mind . . . on the nonexistence of a presumptively required overt act. . . .
>
> Since both the conspiracy itself and its enduring nature may be proven circumstantially, any indictment alleging facts in the time period close to the commencement of the limitations period could support an inference that the conspiracy continued into the limitations period. . . . [T]he district court should not require the government to launder its evidence in the presence of the defendant prior to trial.

Id. at 1124–25 (citations omitted).

110 The general federal conspiracy statute, in pertinent part, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons *do any act to effect the object of the conspiracy*, each shall be fined under this title or imprisoned not more than five years, or both.

sections (a), (b), or (c) under the general statute, the period of limitations would run from the last overt act done to affect the objective (or abandonment, frustration, or withdrawal) of the conspiracy.[112] This last overt act would not necessarily be an act of racketeering, because it is a completed offense, and an overt act can be innocent in itself.[113]

When determining whether a prosecution is timely, you have to take into account not only the length of the limitations period and when it accrues, but also any rules that toll the running of the limitations period. For example, the government can commence a RICO conspiracy prosecution under § 1962(d) more than five years after the conspiracy has terminated if a tolling rule suspends the running of the limitations period.

D. Tolling of Criminal Statutes of Limitations

1. Federal Tolling Rules

Federal law reflects two major tolling rules. The first is that the commencement of a prosecution tolls the limitations period.[114] This rule is significant, because if the government later dismisses a timely indictment (or information), it can still obtain a new indictment not barred by the statute of limitations.[115] Similarly, if the government

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18 U.S.C. § 371 (2006) (emphasis added). Section 1962(d) does not require an overt act, and its sanctions extend to twenty-year or life imprisonment plus forfeiture. Section 371, on the other hand, requires an overt act, and its sanction extends to five years imprisonment. Thus, the differences between the two conspiracy statutes are considerable.

111 *See* United States v. Barton, 647 F.2d 224, 236 (2d Cir. 1981) ("[W]e find that in the RICO provision, 18 U.S.C. § 1962(d), Congress created an offense different from the preexisting general conspiracy statute in 18 U.S.C. § 371, and intended to allow cumulative punishments.").

112 *See* Fiswick v. United States, 329 U.S. 211, 216 (1946) ("The statute of limitations, unless suspended, runs from the last overt act during the existence of the conspiracy." (footnote omitted)).

113 *See* Yates v. United States, 354 U.S. 298, 333–34 (1957) (holding attendance at a meeting constitutes a last overt act); *cf Hyde v. United States*, 225 U.S. 347, 387–88 (1912) (Holmes, J., dissenting) (arguing that an overt act need not amount to an attempt of the substantive offense).

114 *See supra* notes 83–97 and accompanying text.

115 For example, if the government indicts a defendant for a RICO conspiracy four years and eleven months after the conspiracy terminated, the indictment is timely. If the court dismisses that indictment two months later for a technical problem, the government has a month to re-indict the defendant, because the limitations period did not run during the two months while the initial indictment was pending. Actually, in a situation like that, federal law extends the time to indict—generally by six months:

discovers a problem with the initial indictment, it can obtain a superseding indictment[116] that is not time barred, so long as it does not broaden or substantially amend the charges from the original indictment.[117]

The second major federal tolling rule has existed since the first federal statute of limitations.[118] It provides, "No statute of limitations shall extend to any person fleeing from justice."[119] The justification for this rule is that a person who leaves the jurisdiction where the

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> Whenever an indictment or information charging a felony is dismissed for any reason before the period prescribed by the applicable statute of limitations has expired, and such period will expire within six calendar months of the date of the dismissal of the indictment or information, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the expiration of the applicable statute of limitations, or, in the event of an appeal, within 60 days of the date the dismissal of the indictment or information becomes final, or, if no regular grand jury is in session in the appropriate jurisdiction at the expiration of the applicable statute of limitations, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations. This section does not permit the filing of a new indictment or information where the reason for the dismissal was the failure to file the indictment or information within the period prescribed by the applicable statute of limitations, or some other reason that would bar a new prosecution.

18 U.S.C. § 3289 (2006); *cf* 18 U.S.C. § 3288 (applying when the indictment or information is dismissed after the period prescribed by the applicable statute of limitations has expired). In *United States v. Charnay*, 537 F.2d 341, 343 (9th Cir. 1976), the defendants were indicted on various federal charges. The court dismissed the first, timely indictment, and the grand jury did not return the second indictment until after the five-year limitations period had run. *Id.* at 353. The court held, however, that the prosecution was not barred by the statute of limitations, because the second indictment was returned within six months of the dismissal of the first indictment under § 3288. *Id.* at 353–55.

A related federal statute applies under much more narrow circumstances. When the government dismisses certain counts of an indictment or information under a plea agreement, and the defendant's guilty plea is subsequently vacated on the motion of the defendant, 18 U.S.C. § 3296 enables the government "to reinstate the dismissed counts within 60 days of the date on which the order vacating the plea becomes final" regardless of the statute of limitations. 18 U.S.C. § 3296(a)(4) (2006).

116 A superseding indictment "refers to a second indictment issued in the absence of a dismissal of the first." United States v. Rojas-Contreras, 474 U.S. 231, 237 (1985) (Blackmun, J., concurring).

117 United States v. Schmick, 904 F.2d 936, 940 (5th Cir. 1990) ("The return of a timely indictment tolls the statute of limitations as to the charges alleged therein. A superseding indictment filed while the initial indictment is pending is timely unless it broadens or substantially amends the charges made in the original indictment." (citations omitted)).

118 *See supra* note 54 and accompanying text.

119 18 U.S.C. § 3290 (2006).

crime is committed or goes into hiding to avoid prosecution should not benefit from his wrongful flight.[120] Still, a person who flees from justice does not completely forfeit the protection of the statute of limitations. If that person openly returns and resumes his life, he is no longer "fleeing from justice," and the statute of limitations no longer tolls.[121] Courts generally interpret the phrase "fleeing from justice" broadly.[122] An intent requirement tempers that broad interpretation.

120 Streep v. United States, 160 U.S. 128, 133 (1895) ("[A]ny person who takes himself out of the jurisdiction, with the intention of avoiding being brought to justice for a particular offense, can have no benefit of the limitation . . . ."). This tolling provision is consistent with the balance the statutes of limitations was attempting to achieve between the government's interest in prosecuting crime and the defendant's interest in not having to defend himself against overly stale charges: "where the defendant impedes the discovery and prosecution of his criminal conduct by 'fleeing from justice,' his right to avoid prosecution for distant offenses is diminished while the government's need for additional discovery time is strengthened." United States v. Marshall, 856 F.2d 896, 900 (7th Cir. 1988). In United States v. Bailey, 444 U.S. 394, 413–14 (1980), the Supreme Court relied, in part, on § 3290 to hold that escape from custody is a continuing offense. Courts are reluctant to label crimes "continuing," because doing so undermines the goals of statutes of limitations by, in effect, extending the limitations period. Nevertheless, the *Bailey* Court dismissed this concern, because the limitations period did not run "for the period that the escapee remain[ed] at large," because "an escaped prisoner is, by definition, a fugitive from justice " *Bailey*, 444 U.S. at 414 & n.10. On "continuing offenses," see *supra* note 57.

121 United States v. Parrino, 180 F.2d 613, 616–17 (2d Cir. 1950) (Hand, J.), *abrogated on other grounds as stated in* United States v. Payne, 591 F.3d 46, 47 (2d Cir. 2010).

122 In *Streep v. United States,* the Court favored a broad interpretation of "fleeing from justice" over a more narrow interpretation favorable to the defendant when the Court held that a person is "fleeing from justice" within the meaning of the statute even if no indictment or complaint was pending and no prosecution had begun. *Streep*, 160 U.S. at 133. Following the Court's lead in *Streep,* the courts of appeals broadly interpret § 3290, as they did its predecessors. For example, an accused is "fleeing from justice" within the meaning of the statute, even if he has not left the jurisdiction where the crime was committed: "Physical absence from the jurisdiction is not . . . essential to toll the statute of limitations under section 3290. It is enough that an accused leaves his usual place of abode and conceals himself for the purpose of avoiding arrest or prosecution." United States v. Wazney, 529 F.2d 1287, 1289 (9th Cir. 1976); *see also* United States v. Greever, 134 F.3d 777, 780 (6th Cir. 1998) (holding that the government does not have to prove that the defendant left the jurisdiction for § 3290 to apply). The statute of limitations for a federal crime is even tolled under § 3290 when the defendant is fleeing from prosecution for a different crime committed in another jurisdiction. United States v. Gonsalves, 675 F.2d 1050, 1052–53 (9th Cir. 1982); *see also* United States v. Morgan, 922 F.2d 1495, 1496–99 (10th Cir. 1991) (holding that the statute of limitations for the federal crime at issue tolled when the federal crime occurred while the defendant was fleeing from unrelated state charges).

James Bulger's flight from justice is classic. *See* Ray Gustini, *How the FBI Captured Whitey Bulger*, The Atlantic Wire, Jun. 23, 2011, http://www.theatlanticwire.com/

national/2011/06/how-fbi-feds-captured-whitey-bulger/39160/ ("FBI agents arrested South Boston mobster James 'Whitey' Bulger last night in Santa Monica, ending a 16-year manhunt for the fugitive Winter Hill Gang leader wanted . . . [for RICO involving 19 murders]. [The Bureau, in fact, finally] focused on Bulger's girlfriend and traveling partner Catherine Greig. . . . [A]ds highlighted Greig's frequent visits to the dentist . . . and fondness for plastic surgery."). The capture of Bulger brings to its denouement a tawdry chapter in the history of organized crime and federal law enforcement in Boston, Massachusetts. Indeed, the first motion brought by Bulger resulted in an extraordinary review and removal of the selected trial judge, a former federal prosecutor, to safeguard the appearance, not fact, of impartial justice. *In re* Bulger, 2013 U.S. App LEXIS 5142 **13–14 (Mar. 14, 2013, 1st Cir.) (reciting a plethora of successful prosecutions over a substantial period; "[A]t relevant times the defendant . . . controlled . . . the Winter Hill Gang, and . . . [he] agreed with FBI agents to act as confidential informant . . . about . . . La Cosa Nostra . . . . The period . . . overlapped . . . the dates of the activity alleged in the . . . indictment and the years that . . . [the District Court] held supervisory positions in the federal prosecutor's office." (citations omitted)). Traditionally, two organized crime groups cooperated for the control of the rackets in Boston: the Winter Hill gang, an Irish group, and a regime of the Raymond Patricara Family of the mob, an Italian group. As if to prove that trust does not exist among thieves, Bulger entered into an unholy alliance with the F.B.I, in particular Special Agent John J. Connonlly, Jr., for immunity in exchange for information against Gennaro Angiulo, the leader of the Italian group. In fact, his information gave the probable cause needed to obtain an order to place bugs that resulted a series of successful prosecutions. Stephen Fox, Blood and Power 400–05 (1990) recounts the facts of the surveillance from its surreptitious entry on a cold winter evening in the North End of Boston to its final successful raid. Among other successful cases, it underwrote a comprehensive and illustrative organized crime prosecution in United States v. Anguilo, 897 F.2d 1169, 1176, 1179 (1st Cir. 1990) (dealing with, among other matters, electronic surveillance, voice identification, expert testimony, coconspirator statements, conspiracy and accessory liability, and upholding RICO convictions, while holding "pattern" not vague, despite Justice Scalia (see, *supra,* note 45) on an as applied basis to mob family; "The evidence introduced against defendants . . . was, in large part, the product of court-authorized electronic surveillance conducted at 98 Prince Street and 51 North Margin Street in Boston's North End during the period January-May 1981. Through a combination of audio and video surveillance, FBI agents monitored the arrivals and departures of persons from these premises, as well as their conversations on the premises. Tapes and transcripts from this surveillance were introduced at trial, accompanied by material seized during the execution of various search warrants. . . . Defendants were . . . members of the Patriarca Family of La Cosa Nostra. Gennaro Angiulo was the underboss . . . in charge of its day-to-day operations. Immediately beneath him in the command hierarchy were "Capo Regimes" (captains) Samuel Granito and Donato Angiulo. Beneath the Capo Regimes, the organization consisted of soldiers and then of associates. Francesco Angiulo was a soldier, and . . . served as accountant for the organization's gambling and loansharking businesses. Michele Angiulo was an associate. The organization was headquartered at 98 Prince Street and engaged in widespread racketeering, gambling, and loansharking activities[;] the statute is not . . . unconstitutionally vague . . . because . . . uncertainty exists regarding the . . . reach of the statute in marginal fact situations . . . . Rather, in the absence of first amendment [sic] consider-

Most of the courts of appeals hold that, for a person to be "fleeing from justice" within the meaning of the statute, the person must act with the intent to avoid arrest or prosecution.[123]

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ations, vagueness challenges must be examined in light of a case's particular facts. . . . Thus, for defendants' vagueness challenge to succeed, they must demonstrate that . . . RICO's "pattern" . . . vague as to *their* conduct at issue *here*. . . . [T]hey must show that persons of ordinary intelligence in their situation would not have had adequate notice that the gambling, loansharking and conspiracy offenses at issue here constituted a 'pattern of racketeering activity' under RICO. . . . [F]or if anything is clear . . . , it is that . . . [RICO] is intended to encompass the activities of organized crime families. . . . [W]e have no doubt that the murder conspiracies and the gambling and loansharking operations . . . here are precisely the type of activity that Congress intended to reach through RICO. . . . A person of ordinary intelligence could not help but realize that illegal activities of an organized crime family fall within the ambit of . . . [RICO]."). The rank specious character of the vagueness argument is aptly brought out in a conversation overheard at 98 Prince Street. *See United States v. Cintolo*, 818 F. 2d 980, 984–85 (1st Cir. 198 (quoting Gennaro Angiulo: "Under RICO, no matter who we are, if we are together, they will get everyone of us."). DICK LEHR & GERARD O'NEILL, IN BLACK MASS (2000), recount the tragic story of the corrupt relation between the law enforcement officer and the Irish mobster from their common origins in housing projects in the most insular of Irish neighborhoods in South Boston. The corrupt relation also resulted in United States v. Connolly, 341 F.3d 444 (1st Cir. 2003) (upholding of a RICO conviction of the principal FBI agent in the corrupt alliance). Widows and the estates of murdered federal informants brought wrongful death actions, because the FBI revealed the identities of various informants in the Boston area to Irish mobsters and protected the mobsters from state or federal prosecutions for murder and other racket offenses. One succeeded. McIntyre *ex rel.* Estates of McIntyre v. United States, 545 F.3d 27 (1st Cir. 2008). One failed, because the widow failed to file her suit within two years after she knew or should have known of the existence and cause of her injury in light of public hearings on the unholy alliance widely published in the Boston press. Callahan v. United States, 426 F.3d 444, 452–55 (1st Cir. 2005) ("A plaintiff's claim accrues at the time when she knew or should have known of a causal connection between her injury and the government.").

123 While the Court in *Streep* avoided squarely addressing the issue of the state of mind (if any) under § 3290, it indicated fleeing from justice required an intent of avoiding prosecution, though not of avoiding prosecution in a specific court or jurisdiction. 160 U.S. at 133–34. Most courts of appeals, based on *Streep*, will not toll the statute of limitations unless the accused acted with the intent to avoid arrest or prosecution. *See e.g.*, United States v. Marshall, 856 F.2d 896, 900 (7th Cir. 1988) ("[T]he defendant's intent to avoid arrest or prosecution must be proved in order to trigger the tolling provisions of Section 3290."); Jhirad v. Ferrandina, 486 F.2d 442, 444 (2d Cir. 1973) ("[T]he government must show an intent to flee from prosecution or arrest before the statute of limitations is tolled."). In contrast, the Eighth Circuit and the D.C. Circuit do not require any state of mind under § 3290: If the accused leaves the jurisdiction where the crime occurred, he is "fleeing from justice," and the statute of limitations tolls. King v. United States, 144 F.2d 729, 731 (8th Cir. 1944) (relying on Roberts v. Reilly, 116 U.S. 80, 97 (1885) (extradition) and Appleyard v. Massachusetts, 203 U.S. 222, 231 (1906) (extradition)); McGowen v. United States, 105 F.2d 791, 792 (D.C. Cir. 1939) (relying on *Roberts*, 116 U.S. at 80). The circuit courts in

Two other federal statutory tolling rules only apply in special circumstances. First, when the United States is at war, the statute of limitations for certain crimes involving "war frauds of a pecuniary nature or of a nature concerning property"[124] is suspended "until 5 years after the termination of hostilities."[125] Second, when evidence of a

King and *McGowen* misinterpreted *Streep*. The Court in *Streep* pointed to the federal extradition statute as a guide in that, under each statute, a person flees justice, even if the government had not begun a prosecution or did not anticipate an immediate prosecution. 160 U.S. at 133–35. The *Streep* Court did not hold that the tolling statute and the extradition statute were identical. The Eighth Circuit and the D.C. Circuit ignore the distinction and apply the longstanding rule from extradition cases—that no state of mind is required—to toll cases in spite of contrary language in *Streep*. The decisions are unpersuasive.

124 Bridges v. United States, 346 U.S. 209, 216 (1953).

125 18 U.S.C. § 3287 (Supp. V 2011). Currently, this Section, in pertinent part, provides:

> When the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, as described in section 5(b) of the War Powers Resolution (50 U.S.C. 1544(b)), the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war or directly connected with or related to the authorized use of the Armed Forces, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation, with notice to Congress, or by a concurrent resolution of Congress.

In *Bridges*, the Court appropriately interpreted § 3287 narrowly based on its purpose—to protect the United States from fraud in wartime situations where the government's "gigantic and hastily organized procurement program" provides an unusual opportunity to defraud the United States and makes the detection and prosecution of fraud more difficult. *Bridges*, 346 U.S. at 216–18.

At the time *Bridges* was decided, § 3287 provided for a three-year limitations period, and the Court interpreted that version. 18 U.S.C. § 3287 (1952); *see* 346 U.S. at 217 n.15. The language on which the Court relied provided:

> When the United States is at war the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not, or (2) committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States, or (3) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation, or other termination or settlement, of any contract, subcontract, or purchase order

crime is (or reasonably appears to be) in a foreign country, the district court can suspend the running of the statute of limitations while the United States attempts to obtain the evidence through an official request.[126] Under this tolling provision, suspension cannot exceed more than three years.[127]

2. State Tolling Rules

Tolling rules for criminal statutes of limitations vary from state to state, but several common tolling provisions deserve mention. As on the federal level, when the government commences a prosecution, the statute of limitations tolls.[128] If a court later dismisses the indictment,

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which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities as proclaimed by the President or by a concurrent resolution of Congress.

Id. (quoting 18 U.S.C. § 3287 (1952)).

126 18 U.S.C. § 3292 (2006). This Section provides:

(a) (1) Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

(2) The court shall rule upon such application not later than thirty days after the filing of the application.

(b) Except as provided in subsection (c) of this section, a period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request.

(c) The total of all periods of suspension under this section with respect to an offense—

(1) shall not exceed three years; and

(2) shall not extend a period within which a criminal case must be initiated for more than six months if all foreign authorities take final action before such period would expire without regard to this section.

(d) As used in this section, the term "official request" means a letter rogatory, a request under a treaty or convention, or any other request for evidence made by a court of the United States or an authority of the United States having criminal law enforcement responsibility, to a court or other authority of a foreign country.

127 *Id.*

128 *See, e.g.*, State v. Underwood, 92 S.E.2d 461, 463 (N.C. 1956) ("In criminal cases where an indictment or presentment is required, the date on which the indictment or presentment has been brought or found by the grand jury marks the begin-

the government can re-indict without regard to the statute of limitations,[129] or if the first indictment is defective in some way, the government can issue a timely superseding indictment.[130] In many states,

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ning of the criminal proceeding and arrests the statute of limitations."); State v. Jennings, 657 N.W.2d 393, 397 (Wis. 2003) ("[I]t appears that the six-year statute of limitations begins to toll at the earliest point at which criminal proceedings may be commenced."). Some courts, however, hold that a defective indictment that will not support a valid conviction does not toll the statute of limitations (unless a statute specifically provides otherwise), because such indictment is a nullity. *See* Commonwealth v. Cardonick, 292 A.2d 402, 406–07 (Pa. 1972). *But see* State v. Stewart, 438 A.2d 671, 674–75 (reviewing the split among states on this point and holding that, based on the wording of the Vermont statute of limitations, an indictment tolls the running of a statute of limitations whether the indictment is valid or not). The rule set forth in *Cardonick* prevents the government from re-indicting a suspect when the court dismisses an indictment after the limitations period has run, even though the initial indictment was timely. Arguably, this rule is unduly restrictive given the purposes of statutes of limitations, because it allows fortunate defendants to escape prosecution because of a technical error, even though the initial indictment put them on notice that the grand jury had charged them with a particular crime, allowing them to preserve evidence and begin preparing a defense within the limitations period.

129 Within many states, a statute governs the amount of time that the government has to re-indict after a court dismisses the original indictment. *See, e.g.*, FLA. STAT. ANN. § 775.15(4)(c) (West Supp. 2012):

> If, however, an indictment or information has been filed within the time period prescribed in this section and the indictment or information is dismissed or set aside because of a defect in its content or form after the time period has elapsed, the period for commencing prosecution shall be extended 3 months from the time the indictment or information is dismissed or set aside.

130 The superseding indictment cannot broaden the original charges. *See, e.g.*, State v. Jennings, 928 A.2d 541, 546 (Conn. App. Ct. 2007) ("When . . . the state files an amended or substitute information after the limitations period has passed, the first information will toll the statute if the amended or substitute information does not broaden or substantially amend the charges made in the first information."); State v. Eppens, 633 P.2d 92, 95–96 (Wash. Ct. App. 1981) (holding that an amended information relates back to the original information so long as it does not broaden the charges against the defendant).

In many states, statutes limit amendments to specified circumstances. *See, e.g.*, CAL. PENAL CODE § 1009 (West 2008):

> An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. The defendant shall be required to plead to such amend-

criminal statutes of limitations also toll when the accused is absent from the state,[131] is not 'usually and publicly' a resident within the state,[132] is fleeing from justice,[133] or when the accused conceals himself.[134] Some states toll certain criminal statutes of limitations until the discovery of the crime, especially for crimes that are difficult to detect.[135] Finally, some states have special statutes, similar to tolling provisions that allow the federal government to prosecute certain

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ment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint. The amended complaint must be verified but may be verified by some person other than the one who made oath to the original complaint.

131 *See, e.g.*, CAL. PENAL CODE § 803(d) (West 2008):

> If the defendant is out of the state when or after the offense is committed, the prosecution may be commenced as provided in Section 804 within the limitations of time prescribed by this chapter, and no time up to a maximum of three years during which the defendant is not within the state shall be a part of those limitations.

132 *See, e.g.*, TENN. CODE ANN. § 40-2-103 (2010) ("No period during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the state, is included in the period of limitation.").

133 *See, e.g.*, NEB. REV. STAT. ANN. § 29-110(9) (West Supp. 2010) ("The time limitations prescribed in this section shall not extend to any person fleeing from justice.").

134 *See, e.g.*, IND. CODE ANN. § 35-41-4-2(h) (West 2012) ("The period within which a prosecution must be commenced does not include any period in which: (1) the accused person is not usually and publicly resident in Indiana or so conceals himself or herself that process cannot be served . . . .").

135 *See, e.g.*, CAL. PENAL CODE § 803(c) (West Supp. 2012):

> A limitation of time prescribed in this chapter does not commence to run until the discovery of an offense described in this subdivision. This subdivision applies to an offense punishable by imprisonment in the state prison or imprisonment pursuant to subdivision (h) of Section 1170, a material element of which is fraud or breach of a fiduciary obligation, the commission of the crimes of theft or embezzlement upon an elder or dependent adult, or the basis of which is misconduct in office by a public officer, employee, or appointee . . . .

offenses long after the usual limitations period has run based on the government's possession of identifying DNA evidence.[136]

III. Statutes of Limitations in Civil RICO Cases

A. *History and Justifications*

Civil statutes of limitations were not a part of English common law, but were creatures of the legislature.[137] The first English statutes of limitations did not specify a time beyond which they barred actions. Instead, the English Parliament chose "certain notable times;"-like the beginning of the reign of Henry I, the return of John from Ireland, or the coronation of Richard I-and barred civil actions involving realty that accrued before that date.[138] In 1540, during the reign of Henry VIII, the Parliament, recognizing the limitations of the old system,

136 *See, e.g.*, Fla. Stat. Ann. § 775.15(16)(a) (West 2010):

> In addition to the time periods prescribed in this section, a prosecution for any of the following offenses may be commenced at any time after the date on which the identity of the accused is established, or should have been established by the exercise of due diligence, through the analysis of deoxyribonucleic acid (DNA) evidence, if a sufficient portion of the evidence collected at the time of the original investigation and tested for DNA is preserved and available for testing by the accused:
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> 1. Aggravated battery or any felony battery offense under chapter 784.
> 2. Kidnapping under s. 787.01 or false imprisonment under s. 787.02.
> 3. An offense of sexual battery under chapter 794.
> 4. A lewd or lascivious offense under s. 800.04, s. 825.1025, or s. 847.0135(5).
> 5. A burglary offense under s. 810.02.
> 6. A robbery offense under s. 812.13, s. 812.131, or s. 812.135.
> 7. Carjacking under s. 812.133.
> 8. Aggravated child abuse under s. 827.03.

137 1 Horace Gay Wood, A Treatise on the Limitation of Actions at Law and in Equity § 2, at 4 (Dewitt C. Moore ed., Matthew Bender & Co., 4th ed. 1916) (1882). In a few situations, something like a statute of limitations existed in the common law. For instance, in early English law, for torts, the time limit for an heir to claim property for relief died with either party. *Id.* at 4–5 ("[T]he maxim, '*actio personalis moritur cum persona*,' applied [to tort claims]. . . .").

138 Matthew Hale, The History of the Common Law of England 123–24 (photo. reprint 1987) (1713); *see also* 1 William Blackstone, Commentaries *67 (referring to events "time out of mind" or "time whereof the memory of man runneth not to the contrary," that is, ancient customary law or the common law of the kingdom); Theodore F.T. Plucknett, A Concise History of the Common Law 312 & n.2 (Little, Brown & Company, 5th ed. 1956) (1275) (articulating that the "time of legal memory" was the date of Richard I's coronation, September 3, 1189, fixed by the statute of Westminster I, c. 39 ("beyond the time of King Richard, Uncle to King Henry, Father to the King that now is").

passed a permanent statute of limitations that created civil limitations periods.[139] In 1623, the Parliament finally enacted a comprehensive statute of limitations that became a model for American civil statutes of limitations.[140]

Many of the same justifications that animate criminal statutes of limitations also apply to civil statutes of limitations. Civil statutes of limitations save defendants from having to defend themselves against stale charges[141] and keep those stale cases out of court.[142] They provide repose for the parties[143] and certainty by notifying potential defendants of the length of their exposure to liability,[144] and they give

139 32 Hen. 8, c. 2 (1540).

140 21 Jac. 1, c. 16 (1623).

141 *See* Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348–49 (1944) ("Statutes of limitation . . . are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."); *see also* Mo., Kan., & Tex. Ry. Co. v. Harriman, 227 U.S. 657, 672 (1913) ("The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory.").

142 *See* Burnett v. N.Y. Cent. R.R. Co., 380 U.S. 424, 428 (1965) ("[C]ourts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."); *see also* Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 314 (1945) ("[Statutes of limitations] are practical and pragmatic devices to spare the courts from litigation of stale claims . . . .").

143 *See* United States v. Kubrick, 444 U.S. 111, 117 (1979); *see also* Wood v. Carpenter, 101 U.S. 135, 139 (1879) ("[Statutes of limitations] promote repose by giving security and stability to human affairs.").

144 *See* Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938) ("The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.").

"Repose" is, however, often a technical word. Whether a statute is a "statute of limitations" or a statute of "repose" is crucial to the application of tolling doctrines. Tolling doctrines, for example, do not apply to statutes of repose. Tello v. Dean Witter Reynolds, Inc. 410 F.3d 1275, 1279 n. 5 (11th Cir. 2005) (examining a securities statute of repose of five-years). Similarly, the application of other defenses turns on how the bar is conceptualized, for example, "recoupment" of moneys had and received by way of defense, or using as a counterclaim, a claim for relief otherwise time-barred. The answer in each case turns on whether the statute barred "the right or the remedy." *See, e.g.*, Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415–17 (1998) ("The Beaches concede that any right they may have had to institute an independent proceeding for rescission under § 1635 lapsed in 1989, three years after they closed the loan with the bank, but they argue that the restriction to three years in § 1635(f) is a statute of limitation governing only the institution of suit and accordingly has no effect when a borrower claims a § 1635 right of rescission as a 'defense in recoupment' to a collection action. They are, of course, correct that as a general matter a defendant's right to plead 'recoupment, a defense arising out of some feature of the

plaintiffs an incentive to litigate claims without unreasonable delay.[145] Legislatures must balance these justifications for civil statutes of limitations with the interests of the injured party and give the party a fair chance to litigate a valid claim.[146] As with criminal statutes of limita-

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transaction upon which the plaintiff's action is grounded,' survives the expiration of the period provided by a statute of limitation that would otherwise bar the recoupment claim as an independent cause of action. . . . [A] defendant may raise a claim in recoupment even if he could no longer bring it independently . . . . [T]he object of a statute of limitation in keeping 'stale litigation out of the courts[ ]' would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes 'are aimed at lawsuits, not at the consideration of particular issues in lawsuits[.]' . . . The Beaches come up short, however, on the question whether this is a case for the general rule at all. The issue here is not whether limitation statutes affect recoupment rights, but whether § 1635(f) is a statute of limitation, that is, 'whether [it] operates, with the lapse of time, to extinguish the right which is the foundation for the claim' or 'merely to bar the remedy for its enforcement.' The 'ultimate question' is whether Congress intended that 'the right shall be enforceable in any event after the prescribed time,' and in this instance, the answer is apparent from the plain language of § 1635(f). . . . The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time. . . . To be sure, a limitation provision may be held to be nothing more than a bar to bringing suit . . . . Section 1635(f), however, takes us beyond any question whether it limits more than the time for bringing a suit, by governing the life of the underlying right as well. The subsection says nothing in terms of bringing an action but instead provides that the 'right of rescission [under the Act] shall expire' at the end of the time period. It talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." (citations omitted)); Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 359–60 (1991) ("The 1934 Act [on securities claims for relief] contained a number of express causes of action, each with an explicit limitations period. With only one more restrictive exception, each of these includes some variation of a 1-year period after discovery combined with a 3-year period of *repose*. In adopting the 1934 Act, the 73d Congress also amended the limitations provision of the 1933 Act, adopting the 1-and-3-year structure for each cause of action contained therein." (emphasis added) (footnotes omitted)); BLACK'S LAW DICTIONARY 1327 (9th ed. 2009) (defining "repose" as "[a] statutory period after which an action cannot be brought in court, even if it expires before the plaintiff suffers any injury").

145 *See* Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868) ("[Statutes of limitations] are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. . . . The policy of these statutes is to encourage promptitude in the prosecution of remedies."); Wood v. Carpenter, 101 U.S. 135, 139 (1879) ("[Statutes of limitations] stimulate to activity and punish negligence.")

146 Legislative failure to give plaintiffs a reasonable time to sue raises constitutional issues. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91, 101 (1982) (holding that a one-year limitations period for paternity suits for illegitimate children denied these children equal protection of the law); Hardy v. VerMeulen, 512 N.E.2d 626, 629 (Ohio 1987) (holding that a limitations statute that barred the medical malpractice claims of

tions, legislatures must strike a balance. Plaintiffs should be able to sue for compensation when injured, but at some point the defendant's "right to be free of stale claims . . . comes to prevail over the [victim's] right to prosecute them."[147]

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plaintiffs before they could reasonably discover their injuries violated the right-to-a-remedy provision of the state constitution).

147 Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944). The court in Allen v. United States, 542 F.2d 176 (3d Cir. 1976), summarized the purposes of statutes of limitations:

> Time-bars serve different purposes in different contexts. Some statutes of limitations serve to protect the courts from the necessity for adjudicating stale claims, and the litigants from the potential for error inherent in such adjudications. Others serve to strike a balance between the need for certainty and predictability in legal relationships and the role of the courts in resolving private disputes. Still others, such as short time periods for taking appeals, reflect the need for prompt termination of the uncertainty in legal relationships caused by the pendency of litigation.

Id. at 179.

As noted, with characteristic insight and clarity of expression, Justice Jackson summarized the concerns behind of statute of limitations in *Chase Securities Corp.*, 325 U.S. at 313–14:

> Statutes of limitations always have vexed the philosophical mind for it is difficult to fit them into a completely logical and symmetrical system of law. There has been controversy as to their effect. Some are of opinion that like the analogous civil law doctrine of prescription limitations statutes should be viewed as extinguishing the claim and destroying the right itself. Admittedly it is troublesome to sustain as a "right" a claim that can find no remedy for its invasion. On the other hand, some common-law courts have regarded true statutes of limitation as doing no more than to cut off resort to the courts for enforcement of a claim. We do not need to settle these arguments.
>
> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

Id. (citation omitted) (footnotes omitted).

B. Determining the Limitations Period for Civil RICO

Usually, determining whether a civil action is timely involves three questions[148]: (1) what is the period of limitations, (2) when does the period accrue, and (3) when did the plaintiff commence the suit? The period of limitations is easy to determine where the legislature has specified it in the statute, but, with federal RICO and many state RICO statutes, the legislatures did not designate a limitations period.

1. Federal RICO

a. Before *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*

Before 1987, when the Court decided *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*,[149] federal civil RICO cases did not have an applicable limitations period. Except in rare circumstances, when a federal claim for relief lacks an express limitations period, federal courts adopt the most closely analogous limitations period provided by state law.[150] In theory, at least, adopting state limitations periods[151]

148 I leave aside, for now, the issue of tolling. *See infra* Part III.D.

149 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143 (1987). In *Malley-Duff*, the Court, shifting its usual approach of going to state law to borrow the period of limitations, instead borrowed the four-year limitations period from the Clayton Act (antitrust) and applied it to civil RICO. *Id.* at 156. The statute of limitations for the Clayton Antitrust Act, enacted in 1955 after years of confusion over the proper period of limitation for antitrust, now appears at 15 U.S.C. § 15b (2006):

> Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act.

150 What limitations period, if any, to apply to federal claims for relief when Congress does not specify a limitations period is a problem that has plagued the federal courts for over 175 years. For an extraordinarily comprehensive and insightful examination of the issues, see Mitchell A. Lowenthal, Brian E. Pastuszenski, and Mark E. Greenwald, Special Project, *Time-bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011, 1025–42 (1980) [hereinafter *Cornell Limitations Project*] (describing the development of the practice of adopting state statutes of limitations for federal causes of action). When, however, "Congress explicitly puts a limit upon the time for enforcing a right which it created, [that] is [the] end of the matter. The Congressional statute of limitation is definitive." Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946). On the other hand, when Congress does not explicitly designate a limitations period, courts, at least in theory, face numerous options. Traditionally, federal courts analogize the federal claim for relief to a state claim for relief for which the state legislature provided a limitations period and then adopt that limitations period for the federal claim for relief. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160, 181 (1976) (applying a two-year Virginia state statute of limitations to a civil rights claim under 42 U.S.C. § 1981). Initially, courts believed the Rules of Decision Act, ch. 646, 62 Stat. 944 (codified as amended at 28

ensures that some limitations period will apply to bar stale federal claims, implementing by judicial judgment a policy that rightly belongs with the legislature.[152] In practice, however, the adoption of state limitations periods tends to undermine the purposes of statutes of limitations (e.g., certainty) and leads to forum shopping and unfairness.[153] These frustrating and entangled problems were on

U.S.C. § 1652 (2006)), required federal courts to adopt state limitations periods. *See* M'Cluny v. Silliman, 28 U.S. 270, 277 (1830). Later, the Court came to belief that when a federal statute is silent, fashioning a limitations period is left to "judicial determination." *See Holmberg*, 327 U.S. at 395; *see also* DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158–63 (1983) (discussing how federal courts generally borrow state limitations periods, but are not required to). In particular, the Court now holds that lower federal courts should decline to borrow a state limitations period when that period will frustrate the objectives of the federal statute. *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977). If a court decides that adopting a state limitations period is inappropriate, it has several options. It can adopt a federal limitations period by analogy. *Malley-Duff*, 483 U.S. at 156. It can apply the doctrine of laches. *Holmberg*, 327 U.S. at 396–97. It can judicially create a limitations period (something courts are reluctant to do). UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 703–04 (1965). Alternatively, it can opt to apply no limitations period. *Occidental*, 432 U.S. at 368–72; *see* 28 U.S.C. §1658 (2006); *see also Malley-Duff*, 483 U.S. at 170 (Scalia, J., concurring in the judgment) (arguing that if state law does not supply an appropriate limitations period, then courts should apply no limitations period). Fortunately, in 1990, Congress adopted a catchall four-year civil limitations period. 28 U.S.C. § 1658 (2006). Thus, federal courts will not have to go through the complicated process of choosing a limitations period when a federal statute is silent. Nevertheless, this catchall limitations period is not retroactive. It only applies to federal causes of action created after December 1, 1990. For claims for relief already in existence, the federal courts will have to engage in the frustrating struggle to find an appropriate limitations period.

151 State limitations periods vary based on the claim for relief. Property claims tend to have long limitations periods, while personal injury claims tend to have short limitations periods. *Compare* 42 PA. CONS. STAT. ANN. § 5530 (West 2004) (establishing a twenty-one year period of limitation for "[a]n action for the possession of real property"), *with* 42 PA. CONS. STAT. ANN. § 5524 (West 2004) (establishing a two-year period for "[a]n action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process"). Limitations periods for penalties and forfeitures are often only one year. *See, e.g.*, COLO. REV. STAT. ANN. § 13-80-103(1)(d) (West 2005) (regarding "[a]ll actions for penality for forfeiture of any penal statutes").

152 Moreover, because courts consistently applied state statutes of limitations to federal actions that lack limitations periods since at least the *M'Cluny* decision in 1830, it is arguably a fair inference that "Congress intends by its silence that [courts] borrow state law." *Malley-Duff*, 483 U.S. at 147. By not objecting, Congress at least acquiesced in the practice.

153 *See* Wilson v. Garcia, 471 U.S. 261, 272 n.25 (1985) ("[T]here is 'uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations in § 1983 suits.'") (quoting Daniel E. Feld, Annotation, *What Statute of Limitations is*

stark display when, before *Malley-Duff*, federal courts adopted for varying, and not always consistent, reasons a variety of state statutes of limitations to apply to civil RICO cases.

To determine which state claim for relief, if any, was most analogous to civil RICO, federal courts had to "characterize" civil RICO claims.[154] Courts could characterize civil RICO based on the alleged

Applicable to Civil Rights Action Brought Under 42 U.S.C.A. § 1983, 45 A.L.R. FED. 548, 554 (1979)). First, because limitations periods vary from state-to-state, the application of state statutes of limitations to a federal claim for relief will necessarily lead to diverse limitations periods applying to the same federal claim for relief depending on the plaintiff's choice of forum. This, however, is the least of the complications. The statute of limitations for a given federal claim for relief may also vary among different districts within states and even case-to-case depending on how the federal district courts characterize the claim for relief and apply state borrowing statutes. *See* Lowenthal et al., *Cornell Limitations Project, supra* note 150, at 1057–84, 1095–1104. This uncertainty and lack of uniformity can make it almost impossible for plaintiffs to determine by when they must file their claim for relief and for defendants (and society) to benefit from the salutary benefit that statutes of limitations rightly provide. *See Wilson*, 471 U.S. at 275 n.34 ("On a human level, uncertainty is costly to all parties. Plaintiffs may be denied their just remedy if they delay in filing their claims, having wrongly postulated that the courts would apply a longer statute. Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose."). Moreover, this legal complexity leads to more, not less, litigation, and unnecessarily delays a final decision on the merits of the case—a feature that statutes of limitations, as bright-line rules, supposedly prevent. *See Wilson*, 471 U.S. at 275 ("Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation."). Finally, adopting state statutes of limitations can lead to forum shopping and its consequential unfairness. For example, two plaintiffs may have identical claims, accruing at the same moment, under the same federal statute, yet, a statute of limitations bars one claim, while the other moves forward, not based on the merits of the claim, appropriately discounted by the passage of time, but on the forum that the plaintiff selected. Forum shopping for the best law seldom produces just results across claims for relief and parties.

154 The "categorizing" process involves several discrete steps. Initially, the court must decide which state's laws govern for limitations purposes (horizontal choice of law). Next, the court must "categorize" the "character" of the federal claim for relief. To do this, the court must make another choice of law decision: the court has to decide whether to "categorize" a federal claim by federal law or state law (vertical choice of law). After making this vertical choice of law, the court must decide whether to "categorize" the federal claim for relief by looking to the facts of the individual case before it or uniformly to "categorize" all claims for relief under the given statute. If the court decides uniformly to "categorize" all claims arising under a statute, then, instead of looking at the facts of the case before it (or the alleged predicate acts in the case of civil RICO), the court can look to the character of the substantive elements of the federal claim for relief, as a whole, to the character of the relief requested, or to the purposes behind the federal claim for relief. After "categorizing" the federal claim for relief, the court can finally choose the most analogous limita-

predicate offenses, the nature of the relief requested, or as a distinctive separate offense. Many courts looked to the predicate acts alleged by the plaintiff, analogizing these to state law claims for relief.[155] The decision to "categorize" civil RICO based on the character of the predicate offenses was problematic, however, because of the wide variety of possible predicate offenses that a civil RICO complaint could include, many of which, taken individually, have different periods of limitations under state law.[156] Thus, under this approach, civil RICO cases, brought in the same state, could have different limitations periods, and within a single case, more than one limitation period arguably might apply.[157]

To avoid this lack of uniformity and uncertainty, other federal courts sought consistently to categorize all civil RICO claims based on the character of the relief requested.[158] Accordingly, courts determined whether RICO's treble damages provision was "punitive" or

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tions period from state law. *See Wilson*, 471 U.S. at 268 (detailing the "categorizing" process). Given the variety of choices courts have to make in the "categorizing" process, it is little wonder that using analogous limitations periods from state law leads to a complete lack of uniformity between jurisdictions, within jurisdictions, and from case-to-case.

155 *See, e.g.*, Silverberg v. Thomson McKinnon Sec., Inc., 787 F.2d 1079, 1083–84 (6th Cir. 1986) (finding that the fraud cliam was barred due to a four year statute of limitations); Alexander v. Perkin Elmer Corp., 729 F.2d 576, 577 (8th Cir. 1984) (per curiam) (finding that the fraud claim was barred due to a five year statute of limitations); Burns v. Ersek, 591 F. Supp. 837, 843–45 (D. Minn. 1984) (finding that the securities fraud claim was barred due to a three year statute of limitations).

156 *See* Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co., 792 F.2d 341, 348–49 & n.14 (3d Cir. 1986), *aff'd*, 483 U.S. 143 (1987).

157 For example, many RICO complaints at that time included allegations of wire fraud, mail fraud, and securities fraud. Under state law, securities fraud often had a different limitations period than common law fraud. Thus, courts either had to choose between two limitations periods that seem equally analogous or apply both limitations periods in the same case. Hunt v. Am. Bank & Trust Co., 783 F.2d 1011, 1014 (11th Cir. 1986) ("Either the one-year common law fraud period or the two-year securities fraud period—or both, one to each count—might be said to apply."). To provide a uniform limitations period for all civil RICO claims within a given state, a court of appeals could uniformly characterize all civil RICO claims based on a commonly alleged predicate act (e.g., fraud). This approach would lead to uniformity within jurisdictions, but it also could lead to a situation where the state statute of limitations for fraud governs a civil RICO suit containing no allegations of fraud. Given the variety of potential predicate acts, it is not accurate to characterize all civil RICO claims as analogous to fraud. *Malley-Duff*, 792 F.2d at 351 ("We . . . are reluctant to elevate one predicate act among many to the status of a uniform RICO characterization.").

158 *See, e.g.*, Tellis v. U.S. Fid. & Guar. Co., 805 F.2d 741, 745–46 (7th Cir. 1986) (characterizing a civil RICO claim as an action for treble damages and applying the two-year state limitations periods for penalties and forfeitures), *vacated*, 483 U.S. 1015

"remedial."[159] They then used that characterization to arrive at a uniform limitations period to apply to all civil RICO claims in a given state. Courts that chose this avenue of analysis found themselves embroiled in a mass of inconsistent case law. A comparison of two cases decided within the same federal circuit, *State Farm Fire & Casualty Co. v. Estate of Caton*[160] and *Tellis v. United States Fidelity & Guaranty Co.*[161] show the difficulties and flaws inherent in this approach.

In *State Farm*, the Northern District of Indiana performed an exhaustive analysis of the text, legislative history, and case law involving the treble damage provision of RICO to hold that a civil RICO action is remedial.[162] In *State Farm*, the defendant argued that civil treble damages under RICO are "penal" and did not survive the death of the wrongdoer.[163] Appropriately, the defendant analogized RICO treble damages to the treble damages recoverable under § 4 of the Clayton Act, which served as RICO's model.[164] Noting that many circuit courts held that only "actual" damages under § 4 are "remedial," and the trebled portion of the damages were "penal," the defendant plausibly argued that the award of treble damages in a civil RICO claim for relief is "punitive."[165] After a thorough analysis, the court appropriately rejected the defendant's argument.

The court began by noting, "[m]ultiple damage provisions are difficult to categorize under the traditional headings of compensatory or punitive. There are essentially two varieties of multiple damage provisions: those designed as punishment for statutory violation; and those designed to compensate the harmed individual by providing liquidated compensation for accumulated harm."[166] Although RICO's

(1987). *But see Malley-Duff*, 792 F.2d at 351–52 (refusing to apply the civil penalty or forfeiture state statute of limitations to a civil RICO claim).

159 Often, courts see multiple damages as either "punitive" or "remedial," but those are not the only options. Damages awards serve a variety of purposes, and not all damages that exceed actual damages are "punitive." *See generally* Blakey, *Of Characterization, supra* note 29 (tracing the history and economic analysis of damages, multiple and otherwise). For an insightful and enlightening analysis of the problem, see Kevin W. Goering, *The Character of Treble Damages: Conflict Between a Hybrid Mode of Recovery and Jurisprudence of Labels,* in MATERIALS, *supra* note * at 428.

160 540 F. Supp. 673 (N.D. Ind. 1982), *overruled by* Ashland Oil, Inc. v. Arnett, 656 F. Supp. 950 (N.D. Ind. 1987).

161 805 F.2d 741 (7th Cir. 1986), *vacated*, 483 U.S. 1015 (1987).

162 *State Farm*, 540 F. Supp. at 682.

163 *Id.* at 678. At common law, actions for a penalty did not survive the death of the wrongdoer. *See* Schreiber v. Sharpless, 110 U.S. 76, 80 (1884).

164 *State Farm*, 540 F. Supp. at 678.

165 *Id.*

166 *Id.* (citing United States v. Bornstein, 423 U.S. 303 (1976) and MATERIALS, *supra* note *).

treble damage provision is within a section of the Act entitled "Civil remedies,"[167] the court found the text of the treble damage provision to be "silent" on the issue of the character of the civil treble damage award.[168] Consequently, the court turned to an analysis of the legislative history of the statute, which it found "specific" and of value.[169]

The court first examined the legislative history's treatment of the relationship between RICO and the Clayton Act. The court concluded from its survey of the legislative history:

> Certainly [§] 1964(c) was modeled after [§] 4 of the Clayton Act. It was, however, cast as a separate statute intentionally to avoid the restrictive precedent of antitrust jurisprudence. The members of Congress piloting this proposed legislation changed it so that it complied with the ABA's antitrust section's report suggesting the expedience of separate legislation. Further, the equitable remedies applied in the antitrust area have always been available to the Court. Therefore, to burden RICO with restrictive antitrust precedent would be contrary to the express legislative history.[170]

In short, the court determined that the character of treble damages under § 4 of the Clayton Act was not persuasive in determining the character of treble damages under civil RICO.

The *State Farm* court next applied the Seventh Circuit's analysis from *Smith v. No. 2 Galesburg Crown Finance Corp.*[171] to determine whether RICO treble damages are "penal" for survival purposes. In *Smith*, the Seventh Circuit addressed the issue of whether a claim for relief under the Truth in Lending Act (TILA)[172] survived the death of the debtor-plaintiff.[173] Even though Congress and the Supreme Court

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167 18 U.S.C. § 1964 (2006). The Section is not entitled "Civil remedies and penalties," and none of the other provisions in that Section is feasibly "penal." In fact, the plaintiff in *State Farm* argued that the Seventh Circuit already held that §§ 1964(a) and (b) were "remedial" and not punitive in United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974). *State Farm*, 540 F. Supp. at 679.

168 *State Farm*, 540 F. Supp. at 679. The court later noted, however, that, in § 904(a) of Title IX, "Congress has explicitly denominated RICO remedial, a determination which is 'governed by . . . statutory direction.'" *Id.* at 681 (quoting Helwig v. United States, 188 U.S. 605, 613 (1903)). Section 904(a) provides, "The provisions of [Title IX] shall be liberally construed to effectuate its *remedial* purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (emphasis added).

169 *State Farm*, 540 F. Supp. at 679.

170 *Id.* at 680.

171 615 F.2d 407 (7th Cir. 1980), *overruled by* Pridegon v. Gates Credit Union, 683 F.2d 182, 194 (7th Cir. 1982).

172 Truth in Lending Act (TILA), Pub. L. 90-321, 82 Stat. 146 (1968) (codified as amended in scattered sections of 15 U.S.C. (2006 and & Supp. V. 2012)).

173 *Smith*, 615 F.2d. at 413.

had labeled TILA "penal," the *Smith* court noted that "the term 'penal' is used in different contexts to mean different things."[174] Thus, the *Smith* court had to determine independently whether TILA was "penal" for survival.[175] In holding that the action under the TILA was "remedial" rather than "penal,"[176] the *Smith* court established a three factor test for determining whether an action is penal for the purposes of survival: "(1) whether the purpose of the action is to redress individual wrongs or wrongs to the public; (2) whether recovery runs to the individual or to the public; (3) whether the authorized recovery is wholly disproportionate to the harm suffered."[177]

The district court in *State Farm* applied this three-factor test to civil RICO and found (1) that the purpose of civil RICO's civil treble damages provision (§ 1964(c)) was to redress individual wrongs; (2) that recovery runs to the individual; and (3) that the authorized recovery was not disproportionate to the harm suffered.[178] The *State Farm* court supported its conclusion that civil RICO is "remedial," not "penal," by citing the statutory construction provision from § 904(a) of Title IX.[179] The court also found it significant that the Seventh Circuit in *United States v. Cappetto*[180] already held that RICO §§ 1964(a) and (b) were "remedial" and not "punitive."[181]

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174 *Id.* at 414.

175 *Id.*

176 *Id.* at 415.

177 *Id.* at 414.

178 Specifically, the court stated,

> Section 1964(c) specifically provides that any injured person may sue to recover damages he sustained due to a violation of [§] 1962. The plain import of the section is to redress wrong suffered by the individual. Further, the recovery runs to that individual with the obvious purpose of making him whole. The multiple damage provision might give rise to the conclusion that the award is wholly disproportionate to the harm. However, the treble damages provided by the statute serve to liquidate uncertain actual damages and encourage the victim to bring suit to redress the violation.

State Farm, 540 F. Supp. at 681.

179 *See supra* note 168.

180 502 F.2d 1351 (7th Cir. 1974).

181 *State Farm*, 540 F. Supp. at 681. The court quoted the statement in *Cappetto* that "A civil proceeding . . . is not rendered criminal in character by the fact that the acts are also punishable as crimes." *Id.* (quoting *Cappetto*, 502 F.2d at 1357). That RICO offenses are punishable criminally with both fines and forfeitures as well as with incarceration suggests that RICO's civil provisions apply, in addition to the criminal sanctions, are remedial; additional penal sanctions arguably would be excessive under the Eighth Amendment. In his dissent in *Tellis v. United States Fidelity & Guaranty Co.*, 805 F.2d 741, 748 (7th Cir. 1986), *vacated*, 483 U.S. 1015 (1987), Judge Ripple found "disturbing . . . the court's characterization of RICO as no more than a federal surcharge against conduct already forbidden under state law." *Id.* Similarly dis-

Finally, the *State Farm* court suggested that the mandatory nature of treble damages under RICO[182] confirms that such damages are essentially remedial. Viewing mandatory trebling as remedial "reflects a policy of *compensating* injured persons which would be thwarted by abatement."[183] The court argued that:

> [A] construction of RICO which would insulate the assets of organized crime from treble damage claims, for example, where a nominee was killed, would frustrate the purposes of the act. To allow organized crime to profit by the fortuitous death of a principal defendant or alleged wrongdoer at the expense of the injured civil litigant would subvert the objectives of RICO, making its remedial and deterrent purposes impotent. In short, it would encourage the murder of the nominee or principal wrongdoer if the criminal organization were allowed to preserve its ill-gotten gains and avert the disgorgement contemplated by RICO.[184]

Based on this exhaustive analysis, the court concluded that an action for treble damages brought under § 1964(c) is remedial for survival.[185]

In the same case, the *State Farm* court also had to determine the proper limitations period for the civil RICO claim. The defendant argued that the court should adopt the two-year state limitations period for statutory penalties.[186] Based largely on its prior finding that civil RICO's treble damages are "remedial," the court refused to apply the two-year statute of limitations for statutory penalties.

The Seventh Circuit in *Tellis v. U.S. Fidelity & Guaranty Co.*[187] sought to determine the appropriate statute of limitations to apply to treble damages claims for relief under civil RICO. As with the question of whether a civil RICO claim abates with the death of the wrongdoer, the primary issue in *State Farm*, the *Tellis* court saw that its choice of a proper limitations period turned on the court's "characterization" of RICO's treble damages provision as either "penal" or "remedial." The *Tellis* court also saw the issue as whether it should "characterize" civil RICO claims for relief uniformly as a whole in light

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turbing is the notion that Congress would attempt to enact further penal sanctions on RICO activity under the guise of "Civil remedies."

182 The text of § 1964(c) provides: "Any person injured in his business or property by reason of a violation of [§] 1962 . . . may sue . . . and *shall* recover threefold the damages he sustains . . . ." 18 U.S.C. § 1964(c) (2006) (emphasis added).

183 *State Farm*, 540 F. Supp. at 682 (emphasis added).

184 *Id.* (citation omitted).

185 *Id.*

186 *Id.* at 685.

187 805 F.2d 741, 742 (7th Cir. 1986), *vacated*, 483 U.S. 1015 (1987).

of the statute itself or whether it should characterize civil RICO claims for relief on a case-by-case basis depending on the facts of each case.[188] The court held that "[t]he strong interests in uniformity and certainty and the desire to avoid time-consuming litigation . . . warrant[ed] an adoption of the uniform-characterization approach."[189]

Having decided to characterize civil RICO claims for relief as a whole, the court thought it had to choose an appropriate statute of limitations from Illinois state law. The court narrowed it down to three options—the two-year statute of limitations for statutory penalties, the five-year statute of limitations that applied to common law fraud, and the catchall period for all other civil claims for relief.[190] The court began the process of choosing between these limitations periods by surveying the decisions of other federal courts:

> Our sister circuits have differed in their characterization of civil RICO claims and thus in their selection of statute of limitations for civil RICO claims. The Second and Ninth Circuits have both selected a three-year period for actions based on a statute; neither court discussed other alternative characterizations. The Third Circuit has selected a six-year "catchall" limitations period, *i.e.*, a statute of limitations for actions not governed by a more specific period of limitations. Several district courts have also selected catchall limitations periods. Other district courts have noted that a large number of civil RICO claims are based on fraud, and have selected the appropriate limitations period for actions based on fraud.[191]

The *Tellis* court, however, determined that these decisions were of limited value, because the limitations periods available for federal courts to choose from varied depending upon the courts' determination of the applicable state's law.[192] Thus, the *Tellis* court felt it had to characterize civil RICO claims for relief with little guidance from precedent.

Based on its finding that "[t]he treble damages provision is the most significant aspect of civil RICO," the *Tellis* court decided that it should characterize civil RICO claims as claims for relief for treble damages.[193] The court then concluded that claims for relief for treble damages under civil RICO were "penal." Thus, the two-year limita-

188 *Tellis*, 805 F.2d at 744.

189 *Id.*

190 *See id.* at 745 (explicitly considering the first and second options and mentioning the third as what the Third Circuit had selected).

191 *Id.* (citations omitted).

192 *See id.*

193 *Id.* (citation omitted).

tions period for statutory penalties applied.[194] The court relied upon the parallel between the provision for RICO treble damages under RICO and the provision for treble damages under the antitrust laws. Because the circuit had held that the treble damages provision under an antitrust suit was "penal" for the statute of limitations,[195] the court held that a treble damage provision for a claim for relief under RICO was "penal" for the purpose of limitations. That said, the district court in *State Farm* considered and found unpersuasive parallels between RICO and the Clayton Act that the *Tellis* court found compelling.[196] Significantly, the *Tellis* majority opinion does not make a single reference to *State Farm*, even though a district court in its own circuit issued it less than five years earlier.[197] As *Tellis* illustrates, the decision to characterize RICO's treble damages provision as "penal" undermines the congressionally mandated remedial purposes of RICO because it

194 *Id.* at 746. The *Tellis* court analyzed civil RICO only from the perspective of a limitations question. The conclusion drawn in *Tellis* ought not to find mechanical acceptance in other areas, as that in *State Farm* (i.e., whether a treble damage award is "penal" for the purpose of abatement upon the death of the wrongdoer). A case-by-case analysis of that issue is more appropriate on the issue of survival for the defendant or the plaintiff. *See* Blakey, *Of Characterization, supra* note 29, at 108 n.51 (arguing that a uniform characterization-driven rule across issues is over and under-inclusive; a better line of attack is a sensitive, case-by-case analysis of each issue in light of the varying purposes behind the rules that differs from rule (e.g., limitations) to rule (e.g., abatement for plaintiff or defendant); it is also more consentient with modern (factor-based) Supreme Court jurisprudence rather than nineteenth century (analytical) Supreme Court jurisprudence).

195 *Tellis*, 805 F.2d at 746 (citing Hoskins Coal & Dock Corp. v. Truax Traer Coal Co., 191 F.2d 912 (7th Cir. 1951)). *Hoskins* became obsolete when Congress enacted a statute of limitations for antitrust claims under the Clayton Act. *See* 15 U.S.C. § 15b (2006).

196 The *Tellis* court's discussion of the parallels between RICO and the Clayton Act is limited:

> The treble damages provision in § 1964(c) is virtually identical to the damages provision in the antitrust laws. This parallelism is not merely coincidental, as Congressman Poff explained in his summary of the House version of RICO: "[RICO] represents, in large measure, an adaptation of the machinery used in the antitrust field to redress violations of the Sherman Act and other antitrust legislation." Both the Supreme Court and this Court have noted in other contexts the strong parallel between the treble damages remedy in antitrust law and the treble damages remedy under civil RICO.

Tellis, 805 F.2d at 746 (alteration in original) (citations omitted). This abbreviated analysis compared unfavorably with the *State Farm* court's extensive and nuanced analysis of the relationship between the two statutes.

197 Judge Ripple made the only reference to *State Farm* in dissent, and he only cites it for its description of Congress's failure to enact a limitations period for civil RICO. *Tellis*, 805 F.2d at 747 n.2 (Ripple, J., dissenting).

leads to circumscribing civil RICO with the short limitations periods that states typically establish for penalties and forfeitures.[198] These periods are inappropriate in light of the necessary time it takes properly to investigate, analyze the evidence of, and prepare for complicated civil RICO litigation[199]—hasty RICO filings serve neither the plaintiff, the defendant, nor the court—and prevent the effective and fair "private attorneys general" from bringing valid RICO claims to enforce civilly the provisions of RICO.[200] Moreover, the analysis in *Tellis* is demonstratively mistaken. The language and legislative history of RICO show that the treble damages provision is "remedial," not "punitive."[201]

Characterizing RICO as a distinct offense[202] was the best option for courts trying to choose an appropriate state limitations period pre-*Malley-Duff*. It avoided the widespread and debilitating uncertainty of the predicate act approach and generally led to more generous limitations periods than the relief-requested approach. Still, this method was not ideal, because it was difficult for courts to find an analogous state claim for relief with an express limitations period,[203] and if no analogous claim for relief and no state catchall limitations period

198 *See supra* note 188.

199 The RICO suit is different from other suits. While a plaintiff may know of his injury (and can sue the defendant under other theories), he may be—through no fault of his own—wholly unaware that the defendant has engaged in a "pattern of racketeering activity" or operates through complex "association-in-fact enterprises" and is subject to suit under RICO. Sometimes, only an indictment will duly inform him, an indictment that may not come until right before the five-year criminal statute runs, as it often does; even then, Assistant United States Attorneys often find it necessary to supersede their indictments as more evidence unfolds in the criminal litigation process through plea bargaining and turned defendants. By that time, the statute of limitations for civil RICO bars his claim for relief. A short statute of limitations is a bewitchment.

200 Congress designed the treble damage provision (1) to encourage private plaintiffs to file suits, (2) to deter criminal activity, and (3) to provide for monetary relief for the usual legal damages, but also for inestimable accumulative injury. *See generally*, Blakey, *Of Characterization, supra* note 29 (analyzing the history, economic analysis, and rationale of multiple damages). A short statute of limitations inhibits each of these goals.

201 *See supra* text accompanying note 186.

202 *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698, 718 (2d Cir. 1987) (liability on statute, three years), *overruled on other grounds by* Lore v. City of Syracuse, 670 F.3d 127 (2d Cir. 2012); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) (liability on statute, three years); Delta Coal Program v. Libman, 554 F. Supp. 684, 690 n.2 (N.D. Ga. 1982), *aff'd*, 743 F.2d 852 (11th Cir. 1984) (state RICO, five years); Ingram Corp. v. J. Ray McDermott & Co., 495 F. Supp. 1321, 1324 n.4 (E.D. La. 1980) (antitrust, one year), *rev'd on other grounds*, 698 F.2d 1295 (5th Cir. 1983).

203 As the Court observed in *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*,

were present, then this approach would yield no analogous or applicable limitations period. Moreover, this approach shared with the other two approaches the flaws that necessarily follow from adopting state limitations periods for federal claims for relief. Specifically, the flaws follow from the lack of uniformity state-to-state, because different states have different limitations periods for comparable claims for relief and because an analogy to a certain claim for relief in one state may not apply in another state. For example, a federal court applying Georgia law could analogize federal RICO to Georgia RICO, but a federal court applying Alabama law would not have that option, because no state RICO statute is present in Alabama. Accordingly, this lack of uniformity leads to uncertainty, unfairness, and forum shopping.[204]

Forum shopping is of special concern in civil RICO cases. Because of the breath of "pattern" in RICO and joinder and venue rules in federal law, RICO plaintiffs are often appropriately able to sue in several jurisdictions. Under RICO's nationwide service of process[205] and venue provisions,[206] plaintiffs can sue wherever a defendant resides, is located, has an agent, or transacts business. Under the

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> [E]ven RICO claims based on 'garden variety' business disputes might be analogized to breach of contract, fraud, conversion, tortious interference with business relations, misappropriation of trade secrets, unfair competition, usury, disparagement, etc., with a multiplicity of applicable limitations periods." Moreover, RICO is designed to remedy injury caused by a pattern of racketeering, and "[c]oncepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law.

483 U.S. 143, 149–50 (1987) (quoting Malley-Duff & Assocs., Inc. v. Crown life Ins. Co., 792 F.2d 341, 348 (3d Cir. 1986)).

204 *See supra* note 153 and accompanying text.

205 Section 1965(d) provides, "All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs." For a comprehensive, insightful, and persuasive review of the text of RICO, bewildering and conflicting court decisions, and relevant policy considerations, see generally Rolf, *supra* note 13 (containing a comprehensive and insightful analysis of RICO's service of process and venue provisions providing for nationwide service of process and venue). That said, not all circuits agree in their reading of RICO's service of process and venue provisions. *See, e.g.*, Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1229–34 (10th Cir. 2006) (noting split between the circuits on whether § 1965(d) provides for nationwide service of process, registering disagreement with the Ninth Circuit's interpretation of "interest of justice" in § 1965(b); holding that the period of limitation begins on "knowing or should have known" of injury; and finding that injury occurred when plaintiff received defective building equipment not when the building collapsed).

206 Section 1965(a) provides, "Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs."

general venue statute, a RICO plaintiff can sue wherever "a substantial part of the events or omissions giving rise to the claim occurred."[207] Because RICO requires a pattern of racketeering activity and effect on interstate or foreign commerce, "predicate acts will often occur in several States."[208] Thus, a "substantial part of the events or omissions giving rise to the claim"[209] can occur in several jurisdictions, and a RICO plaintiff can select from among these. Moreover, once venue and jurisdiction are satisfied for one defendant, the court can bring other defendants into the litigation in the interests of justice.[210] More generally, adopting state limitations periods for civil RICO (and other federal causes of action) is problematic, because when state legislatures establish limitations periods for state claims for relief, they do

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See generally Rolf, supra note 205, at 1236–37 (explaining "RICO's general venue provision).

207 28 U.S.C.A § 1391(b) (West Supp. 2011), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112–63 § 202, 125 Stat. 763 (2011):

> A civil action may be brought in (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; or (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

In City of New York v. Cyco.net, Inc., 383 F. Supp. 2d 526, 544 (S.D.N.Y. 2005), the court held that "[a plaintiff] may properly lay venue in accordance with *either* 18 U.S.C. 1965 or 28 U.S.C 1391 . . . [because] Congress intended the civil RICO venue provisions to be a liberalization to the federal venue statute 28 U.S.C. § 1391."

208 *Malley-Duff,* 483 U.S. at 154.

209 For the text of 28 U.S.C. § 1391(b), see *supra* note 207.

210 Section 1965(b) provides:

> In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

Compare Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1231 (10th Cir. 2006) ("When a civil RICO action is brought in a district court where personal jurisdiction can be established over at least one defendant, summonses can be served nationwide on other defendants if required by the ends of justice"; rejecting *Butcher's* on meaning of "ends of justice"), *with* Butcher's Union Local No. 498 v. SDC Inv., Inc., 788 F.2d 535, 539 (9th Cir. 1986) (noting that the "right to nationwide service in RICO suits is not unlimited" and that "merely naming persons in a RICO complaint does not, in itself, make them subject to section 1965(b)'s nationwide service provisions"). *Cory* is the more persuasive analysis on the meaning of "ends of justice," particularly where Congress mandates "liberal" construction. *See supra,* notes 29–31 (liberal construction).

not take into account national interests.[211] For example, when a state legislature decides on a limitations period for fraud, it does not consider the broad remedial purposes of RICO or the complicated nature of a RICO claim for relief based on fraud. Thus, the application of state statutes of limitations to civil RICO claims for relief undermines the purposes of the statute by not giving potential plaintiffs a uniform and fair amount of time to vindicate their rights under RICO.[212]

b. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*

In light of these problems associated with adopting state statutes of limitations for civil RICO claims for relief, the Court provided a uniform limitations period in *Malley-Duff*.[213] Two important decisions paved the way for *Malley-Duff*: *DelCostello v. International Brotherhood of Teamsters*[214] and *Wilson v. Garcia*.[215]

In *DelCostello*, the Court determined what limitations period governed a federally created claim for relief. The Court combined two suits by employees against their employers for breach of the collective bargaining agreement and against their unions for inadequate representation.[216] The Court observed that in the absence of an express federal period, courts generally adopt state limitations periods.[217] Significantly, the Court stressed that nothing in federal law requires the adoption of state limitations periods.[218] Thus, if applying state limitations periods would obstruct the "purpose or operation of federal substantive law,"[219] a federal court is free to adopt "timeliness rules drawn from federal law"[220] that better meet the purposes behind the federal statute.[221] Accordingly, the *DelCostello* Court eschewed various unsatisfactory state law options and adopted the nearest analogous federal

211 *See* Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies.").

212 *See Malley-Duff*, 483 U.S. at 154.

213 *Id.* at 156.

214 462 U.S. 151 (1983).

215 471 U.S. 261 (1985).

216 DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 155–58.

217 *Id.* at 158–59.

218 *See id.* at 159 n.13.

219 *Id.* at 161.

220 *Id.* at 162.

221 The Court summed up its reasoning:

> [W]hen a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate

limitations period, the six-month limitations period provided by § 10(b) of the National Labor Relations Act.[222]

Two years after *DelCostello*, the Court faced an analogous situation in *Wilson v. Garcia* when it determined an appropriate limitations period for another federal claim for relief, civil rights claims under 42 U.S.C. § 1983.[223] Nevertheless, unlike the *DelCostello* Court, the *Wilson* Court chose to adopt state limitations periods.[224] The Court began by identifying the steps in the characterization process:

> vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

Id. at 172.

222 *Id.* at 169; 29 U.S.C. § 160(b) (1982).

223 *See* Wilson v. Garcia, 471 U.S. 261, 262 (1985).

224 The *Wilson* Court chose this approach under 42 U.S.C. § 1988. Section 1988, in relevant part, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988(a) (2006) (the current statute is identical to the 1985 version interpreted in *Wilson* except "the provisions of titles 13, 24, and 70 of the Revised Statutes" formerly read "the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,'" in 1985). According to the *Wilson* Court:

> The language of § 1988, directs the courts to follow "a three-step process" in determining the rules of decision applicable to civil rights claims: "First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect.' If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. A third step asserts the predominance of the federal interest: courts are to apply state law only if it is not inconsistent with the Constitution and laws of the United States.

Wilson, 471 U.S. at 267 (footnote omitted) (citations omitted) (quoting Burnett v. Grattan, 468 U.S. 42, 47–48 (1984) (internal quotation marks omitted)). Because Congress did not establish a limitations period, § 1988 directed courts to adopt state limitations periods unless they undermined federal policy. *Id.* at 266–67. To the degree that RICO does not contain a provision similar to § 1988, *Wilson* is of limited value in reading RICO.

> In order to determine the most "most appropriate" or "most analogous" [state] statute to apply to the [plaintiff's] claim, we must answer three questions. We must first consider whether state law or federal law governs the characterization of a § 1983 claim for statute of limitations purposes. If federal law applies, we must next decide whether all § 1983 claims should be characterized in the same way, or whether they should be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case. Finally, we must characterize the essence of the claim in the pending case and decide which state statute provides the most appropriate limiting principle.[225]

Going through these steps, the Court held that, because 42 U.S.C. § 1988 directs courts to turn to federal law first,[226] federal law governs characterization of § 1983 claims for statute of limitations purposes.[227] Next, the Court focused on the federal interests in "uniformity, certainty, and the minimization of unnecessary litigation,"[228] and held that a uniform characterization of § 1983 claims that led to a single limitations period within each state best promoted those interests instead of a fact intensive case-by-case approach.[229] Finally, the Court held that personal injury claims for relief are the closest state analogies to § 1983 claims for relief, and the state limitations periods for those actions applies, therefore, to all § 1983 claims.[230]

As with § 1983 claims, so, too, with RICO, a strong interest in "uniformity, certainty, and the minimization of unnecessary litigation" stands out. Without uniformity, "the legislative purpose to create an effective remedy for the enforcement of federal [law] is obstructed . . . for scarce resources must be dissipated by useless litigation on collateral matters."[231] Thus, the cogent rationales that led the Court in *Wilson* to adopt a uniform limitations period for § 1983 claims applied to

225 *Id.* at 268.

226 *See supra* note 25.

227 *Wilson*, 471 U.S. at 268–69.

228 *Id.* at 275 ("We conclude that the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims. The federal interests in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach.").

229 *Id.* at 272 ("[P]ractical considerations help to explain why a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose. The experience of the courts that have predicated their choice of the correct statute of limitations on an analysis of the particular facts of each claim demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983.").

230 *See id.* at 276.

231 *Id.* at 275 (citation omitted).

civil RICO. Nevertheless, the method the Court used in *Wilson* to achieve a uniform limitations period for § 1983 claims did not fit comfortably within civil RICO.[232] As with RICO, § 1983 provides a federal remedy for a broad spectrum of conduct,[233] but the conduct at issue in § 1983 claims is more easily analogized to a single common law claim for relief than the conduct prohibited by RICO.[234] Because no appropriate state law analogy stands out for civil RICO claims for relief, the best approach for achieving a uniform limitations period for civil RICO, the *Malley-Duff* Court thought, was borrowing the period from federal law, as the Court did in *DelCostello*.

Two obstacles stood in the way of selecting a uniform limitations period for federal RICO. First, courts usually looked to state law. Second, the legislative history of RICO appeared—on one reading—to reject a uniform federal rule.[235] The bills that preceded RICO included an express period of limitations.[236] In addition, when the House of Representatives considered RICO, Representative Steiger offered an amendment that would have provided for an express period of limitations.[237] Finally, in succeeding Congresses, members

232 Moreover, 42 U.S.C. § 1988(a) does not apply to RICO.

233 *Wilson*, 471 U.S. at 272–73 ("Almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations."). *But see infra* note 234.

234 *See* Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 152 (1987) ("While '[t]he atrocities' that led Congress to enact 42 U.S.C. § 1983 'plainly sounded in tort,' there is no comparable single state law analogue to RICO. . . . [T]he predicate acts that may establish racketeering activity under RICO are far ranging, and unlike § 1983, cannot be reduced to a single generic characterization." (quoting *Wilson*, 471 U.S. at 277)).

235 The Court in *DelCostello* indicated the relevancy of a statute's legislative history when courts choose a limitations period:

> In some instances, of course, there may be some direct indication in the legislative history suggesting that Congress did in fact intend that state statutes should apply. More often, however, Congress has not given any express consideration to the problem of limitations periods. In such cases, the general preference for borrowing state limitations periods could more aptly be called a sort of fallback rule of thumb than a matter of ascertaining legislative intent; it rests on the assumption that, absent some sound reason to do otherwise, Congress would likely intend that the courts follow their previous practice of borrowing state provisions.

DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 158 n.12 (1983).

236 *See, e.g.*, S. 1623, 91st Cong. § 4, (1969) (including a four-year provision).

237 116 CONG. REC. 35,346 (daily ed. Oct. 7, 1970) (statement of Rep. Sam Steiger). Significantly, Mr. Steiger withdrew his amendment; it was not defeated, because the floor leaders from the Judiciary Committee acted under an informal agreement to oppose any floor amendments. Neither Mr. Poff nor Mr. Steiger wanted to create adverse legislative history to a particular approach to a limitation's period. Similarly,

unsuccessfully offered amendments to RICO that included express periods of limitations.[238] Accordingly, Congress, at least arguably, opted against uniformity and certainty and wanted plaintiffs through their choice of forum to select the period of limitations.

The Court in *Malley-Duff*, however, dismissed that legislative history argument. According to the Court, Congress did have several opportunities to enact a limitations period for civil RICO, but its failure to do so was by no means an unequivocal directive to courts to adopt state limitations periods.[239] Thus, the Court was judicially free to determine an appropriate limitations period for civil RICO apart from state law.[240] Echoing *DelCostello*, the Court reasoned that the antitrust statute was the most closely analogous federal statute, "a far closer analogy to RICO than any state law alternative."[241] Not only was the Clayton Act the best analogy for civil RICO, but also adopting the four-year limitations period for civil RICO claims would lead to uniformity, consistency, and less litigation, the goals the Court achieved in *Wilson*.[242] Finally, adopting the four-year limitations period from antitrust law "avoid[ed] the possibility of the application of unduly short state statutes of limitations that would thwart the legislative pur-

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the failure to enact an uniform period did not occur for lack of support, but time to process the legislation in the House. *See* Blakey & Gettings, *supra* note 74, at 1020 n.67.

238 In 1972, the Judiciary Committee reported S. 16, 92d Cong. (1972). It passed in the Senate. 118 CONG. REC. 29,379 (1972). In 1973, the Judiciary Committee reported S. 13, 93d Cong. (1973). It passed the Senate. 119 CONG. REC. 10,319 (1973). S. 16 and S. 13 were, in relevant part, identical. S. 16 and S. 13 provided a period of limitations for RICO. The House Judiciary Committee took no action, not because of opposition, but because of the press of other business. *See supra* note 237.

239 *See Malley-Duff*, 483 U.S. at 154–55.

240 *See id.* at 156.

241 *Id.* at 150. Congress used the Clayton Act as the model for civil RICO, designed the two acts to accomplish similar general objectives, and the major current in the legislative history of RICO was its reliance on the Clayton Act model. *See id.* at 150–52.

242 The *Malley-Duff* Court noted that the federal courts had not adopted a consistent approach to selecting limitations periods for civil RICO claims: "Indeed, an American Bar Association task force described the current state of the law regarding the applicable statute of limitations for civil RICO claims as 'confused, inconsistent, and unpredictable.'" *Id.* at 148 (quoting REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 391 (1985)). The Court concluded that, as with § 1983 claims, civil RICO claims required "a uniform statute of limitations . . . to avoid intolerable 'uncertainty and time-consuming litigation.'" *Id.* at 150 (quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985)). Dissimilar to the *Wilson* Court and the circuit court in *Tellis*, the *Malley-Duff* Court did not attempt a uniform characterization of RICO; instead, the Court simply borrowed from federal law. *Id.* at 156.

pose of creating an effective remedy."[243] Accordingly, the Court applied the four-year limitations period of the Clayton Act to civil RICO.

2. State RICO

a. When an Express Limitations Period Exists

Unfortunately, states with some versions of their RICO statutes now face many of the same problems encountered under federal RICO, including determining the length of the limitations period and establishing the point at which the period will accrue. Thirty-five United States jurisdictions have RICO statutes; twenty-nine have provisions for bringing civil claims for relief.[244] Eleven with civil claims for

243 *Id.* at 154. It also, necessarily, reflected the "federal policies that lie behind RICO and the practicalities of RICO litigation." *Id.* at 156.

As with a criminal defense of statutes of limitation, a civil defendant who seeks to rely on a statute of limitations defense, because it is an affirmative defense, must raise it in his answer or the court will consider it waived. Robinson v. Johnson, 313 F.3d 128, 134 (3d Cir. 2002) ("Parties are generally required to assert affirmative defenses early in litigation, so they may be ruled upon, prejudice may be avoided, and judicial resources may be conserved."). The rule is variable. Its application turns on prejudice; absent prejudice, a court will recognize it even after trial. *See* Cetel v. Kirwan Fin. Grp., 460 F.3d 494, 506 (3d Cir. 2006). Rarely, a defendant can raise the issue under Rule 12(b)(6), if the plaintiff "pleads himself out of court" by alleging on the face of his complaint sufficient facts to show that his claim for relief is time-barred. Cancer Found., Inc. v. Cerberus Capital Mgmt., 559 F.3d 671, 674 (7th Cir. 2009) ("The statute of limitations for a civil RICO cause of action is a fairly generous four years. It begins to run when the plaintiffs discover, or should, if diligent, have discovered, that they had been injured by the defendants. A plaintiff does not need to know that his injury is actionable to trigger the statute of limitations—the focus is on the discovery of the harm itself, not the discovery of the elements that make up a claim. Dismissing a complaint as untimely at the pleading stage is an unusual step, since a complaint need not anticipate and overcome affirmative defenses, such as the statute of limitations. But dismissal is appropriate when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness." (citations omitted)); *accord* Richmond, Fredericksburg & Potomac R.R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993).

244 California RICO only allows criminal forfeiture. CAL. PENAL CODE §§ 186.3–186.5 (West 1999). Connecticut RICO, too, only allows criminal forfeiture. CONN. GEN. STAT. ANN. § 53-397 (West 2007). Michigan RICO allows civil *in rem* forfeiture, MICH. COMP. LAWS ANN. § 750.159m (West 2004), but no civil claim for relief. *Id.* at § 750.159u. Nebraska's "Public Protection Act" does not provide a civil cause of action. NEB. REV. STAT. § 28-1351 (Supp. 2010). New York RICO allows civil forfeiture, N.Y. PENAL LAW § 460.70 (McKinney 2008), and equitable relief initiated by the court, the attorney general, or a district attorney. N.Y. C.P.L.R. § 1353 (McKinney 1997). Virginia RICO only allows civil forfeiture. VA. CODE ANN. § 18.2-515(B) (2009).

relief do not include a special limitations period for civil RICO.[245] The other eighteen include special limitation periods in the text of RICO or elsewhere in their code.[246] Most provide for a five-year period. As with federal law, when the state legislature expressly provides a special statute of limitations, it governs. Thus, determining the proper limitations period is only an issue when the RICO provisions do not contain special provisions.

b. When an Express Limitations Period Does Not Exist

In eleven of the jurisdictions that have a civil RICO, but which lack an express statute of limitations for RICO, the legislature pro-

245 The jurisdictions are Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Minnesota, New Jersey, New Mexico, Pennsylvania, Puerto Rico and Rhode Island. For the citations, *see supra* note 14. In Colorado, a statute of limitations is present that refers specifically to civil actions under the Colorado RICO statute. *See* COLO. REV. STAT. ANN. § 13-80-103.8(1)(d) (West 2005) ("The following actions shall be commenced within five years after the claim for relief accrues, and not thereafter: . . . (d) All civil actions brought pursuant to article 17 of title 18, C.R.S.") (The Colorado RICO statute appears in article 17 of title 18). Nevertheless, §13-80-103.8's title is "Limitation of civil forfeiture actions related to criminal acts," so the five-year limitations period may only apply to civil forfeiture proceedings under Colorado RICO. Moreover, this statute of limitations provision has been in the Code since 1990, yet no Colorado case references it. *See* Todd Holding Co. v. Super Valu Stores, Inc., 874 P.2d 402, 405 (Colo. App. 1993) (indicating that no express statute of limitations governs Colorado RICO).

246 ARIZ. REV. STAT. ANN. §§ 13-2314.04(F), 13-2314(I) (2010) (three years after the violation was or should have been discovered or ten years after the events giving rise to the cause of action, whichever comes first; civil actions by the state must be commenced within seven years after actual discovery of the violation); DEL. CODE ANN. tit. 11, § 1505(f) (2007) (five years); FLA. STAT. ANN. § 895.05(10) (West 2000) (five years); GA. CODE ANN. § 16-14-8 (2011) (five years); LA. REV. STAT. ANN. § 15:1356(H) (2005) (five years); MISS. CODE ANN. § 97-43-9(8) (West 2011) (five years); NEV. REV. STAT. ANN. § 207.520 (LexisNexis 2006) (five years after the violation occurs or after the plaintiff sustains injury whichever is later); N.C. GEN. STAT. § 75D-9 (2011) (five years after violation of provision terminates or claim for relief accrues, whichever is later); N.D. CENT. CODE § 12.1-06.1-05(7) (2012) (within seven years after actual discovery of a violation); OHIO REV. CODE ANN. § 2923.34(J) (LexisNexis 2010) (within five years after the unlawful conduct terminates or the claim for relief accrues or within any longer statutory period of limitations that may be applicable); OKLA. STAT. ANN. tit. 22, § 1409(E) (West 2004) (no private civil claim for relief but five years for actions brought by the state); OR. REV. STAT. § 166.725(11) (2012) (five years); TENN. CODE ANN. § 39-12-206(h) (2010) (five years); UTAH CODE ANN. § 76-10-1605(9) (LexisNexis 2008) (three years); V.I. CODE ANN. tit. 14, § 607(h) (1996) (five years); WASH. REV. CODE ANN. § 9A.82.100 (7) (West 2009) (within three years after the pattern of criminal profiteering activity was or reasonably could have been discovered); WIS. STAT. ANN. § 946.88(1) (West 2005) (six years).

vides a general catchall limitations period.[247] In these eleven jurisdictions, the federal experience teaches that the courts should use the catchall limitations period, make an analogy to the state antitrust provision, or adopt the provision for liability based on a statute. Persuasive arguments exist for each of them. The principal determining factor should be the length of the period of the limitation. As the Court in *Malley-Duff* observed, "[It is necessary to avoid] the possibility of the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating an effective *remedy*."[248] No matter which one the court selects, it must afford the RICO claim for relief sufficient time for the required extended investigation, for a period of prudent decision-making, and for adequate time for careful research and drafting of what is often an extensive pleading. However apparently reasonable each one of the choices is, the choice of one or the other is not translucent. For example, often catchall limitations periods only apply when no other statute of limitations applies.[249] A party to a civil RICO suit who does not want the court to use the state catchall limitations period or another might plausibly argue that because another statute of limitations is a better fit for RICO, it applies.

i. Borrowing the Federal Period

Other than applying the catchall period, an outlier possibility exists for a party to argue and for state courts to borrow the four-year federal limitations period from *Malley-Duff*. This is the course chosen by a New Jersey court in *In re Integrity Insurance Co.*[250] In *Integrity*, the

247 *See* COLO. REV. STAT. ANN. § 13-80-102(1)(i) (West 2005) (two years); HAW. REV. STAT. ANN. § 657-1 (LexisNexis 2012) (six years); IDAHO CODE ANN. § 5-224 (LexisNexis 2010) (four years); 735 ILL. COMP. STAT. ANN. 5/13-205 (West 2011) (five years); IND. CODE ANN. § 34-11-1-2 (West 2011) (ten years); IOWA CODE ANN. § 614.1(4) (West 1999) (five years); N.J. STAT. ANN. § 2C:1-6(g) (West 2005) (five years); N.M. STAT. ANN. § 37-1-4 (LexisNexis 2010) (four years); 42 PA. CONS. STAT. ANN. § 5527(b) (West 2004) (six years); P.R. LAWS ANN. tit. 31, § 5294 (1991) (fifteen years); R.I. GEN. LAWS § 9-1-13 (West 1997) (ten years).

248 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 154 (1987) (emphasis added).

249 *See, e.g.*, IDAHO CODE ANN. § 5-224 (LexisNexis 2010) ("An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action shall have accrued."). How much flexibility a court has in choosing a statute of limitations to apply to a state RICO claim depends on the wording of the statutes. If, for example, a statute of limitations applies only to antitrust claims, it might be inappropriate to apply that statute to RICO claims if the statutes also have a catchall statute of limitations.

250 584 A.2d 286 (N.J. Super. Ct. Law Div. 1990).

court had to determine the appropriate limitations period for New Jersey state civil RICO claims.[251] Because New Jersey RICO closely resembles federal RICO (actually, substantial differences exist, for example, definition of person,[252] use of "incident" rather than "act" in "pattern,"[253] etc.), the court decided to borrow "the four year federal statute of limitations" that the Supreme Court borrowed from the federal antitrust statute in *Malley-Duff*.[254] In so doing, the *Integrity* court ignored the state catchall limitations period for the criminal code, not in favor of some other, more applicable, *state* law statute of limitations, but in favor of a *federal* limitations period—one that Congress did not enact, but the Supreme Court borrowed from another federal statute in default of congressional action.

The New Jersey state limitations period for claims for relief in the Criminal Code at issue reads, "[e]xcept as otherwise provided in this code, no civil action shall be brought pursuant *to this code* more than five years after such action accrues."[255] "[T]his code" in the catchall statute refers to the New Jersey Code of Criminal Justice where the statute appears and where the New Jersey RICO statute, including its civil remedies provisions, appears.[256] No other meaning easily comes to mind. Thus, this statutory period applies to New Jersey civil RICO, and it sets a five-year limitations period for its civil RICO claims for relief. Nevertheless, the court in *Integrity*, though aware of the provision, simply chose to ignore it.[257] The court also chose to ignore other state limitations periods and adopted the limitations period from federal RICO.[258] The decision is indefensible. The state legisla-

251 *See id.* at 286 ("There are apparently no reported decisions from New Jersey State Courts determining the applicable statute of limitations.").

252 Maxim Sewerage Corp. v. Monmouth Ridings, 640 A.2d 1216, 1221 (N.J. Super. Ct. Law Div. 1993) (declining to follow the federal enterprise-person rule based on inclusion of enterprise within the New Jersey RICO definition of "person").

253 State v. Ball, 661 A.2d 251, 263–64 (N.J. 1995) (noting that "incident" covers a broader spectrum than that within the federal "act"; relationship, but not continuity required, as in the federal act).

254 *Integrity*, 584 A.2d at 287. The court reasoned that because the state legislature borrowed Federal RICO's "structure, purpose and remedies," the court was justified in borrowing "the new federal statute of limitations as well." *Id.*

255 N.J. STAT. ANN. § 2C:1-6(g) (West 2005) (emphasis added).

256 *See* N.J. STAT. ANN. § 2C:41-4(c) (West 2005).

257 In a footnote, the court dismissed the catchall statute: "[a]ttention is directed to [the catchall statute] which may impose a five year statute of limitation. This court is not deciding the applicability of that statute to the case at bar." *Integrity*, 584 A.2d at 286 n.1. The court's conclusion begs the question: "Why not?"

258 The *Integrity* court noted that New Jersey had an antitrust act with a four-year limitations period. *Id.* at 287 (citing N.J. STAT. ANN. § 56:9-14 (West 2001)). Instead of analogizing New Jersey's RICO statute to New Jersey's antitrust statute (reproduc-

ture created a catchall limitations period to apply to certain civil actions, namely, New Jersey RICO, which the Code did not otherwise cover. Nevertheless, the court ignored the legislature's direction.

In construing another statute of limitation challenge, the New Jersey Supreme Court in *Jen Electric, Inc. v. County of Essex*[259] observed of the duty of every court in reading statutes:

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ing the Court's analysis in *Malley-Duff*), the court borrowed the federal limitations period and stated that the reason it adopted the federal limitations period was because no appropriate state law analogy existed. *Id.* at 288. The court's comment hardly withstands careful analysis.

259 964 A.2d 790 (2009). Far stranger still is the decision of the Third Circuit in Cetel v. Kirwan Fin. Grp., 460 F.3d 494, 505–10 (3d Cir. 2006). In *Cetel*, the circuit faced a claim for relief under N.J. Civil RICO. The district court followed *Integrity* (four years); plaintiffs on appeal urged general statute of limitation of New Jersey claims (six years). *Id.* at 510. No one argued the Code statute (five years). The *Cetel* court reasoned:

> To support this claim, plaintiffs rely on *State v. Ball*, in which, according to plaintiffs, the New Jersey Supreme Court declined to interpret NJRICO coextensively with federal interpretations of RICO, instead opting to interpret NJRICO as governed by state law principles. We disagree. A close reading of *Ball* suggests, contrary to plaintiffs' contention, that the New Jersey Supreme Court believed the New Jersey RICO statute was and should be consistent with the federal RICO statute. *Ball*, 661 A.2d at 258 ("[B]ecause the federal statute served as an initial model for [the NJRICO statute], we heed federal legislative history and case law in construing our statute."). Moreover, subsequent New Jersey cases belie plaintiffs' contention that the New Jersey RICO is somehow divergent from the federal RICO statute. In any event, nothing in *Ball*, or any other case, stands for the proposition that claims under the New Jersey RICO statute possess a six-year statute of limitations, as opposed to the commonly applied four-year limitations period for federal RICO claims. There is no evidence that the New Jersey RICO statute possesses a different statute of limitations from the federal RICO statute and we refuse to adopt such a rule. Thus, for the reasons above, and because plaintiffs were on notice of their claims, we will affirm the dismissal of the NJRICO claim on the ground of statute of limitations.

Id. at 510 (citations omitted).

While the text of its opinion reads as if the circuit had applied the *federal* antitrust period, it added a footnote arguing the New Jersey Supreme Court would follow the *Malley-Duff* analogy and adopt the *N.J.* antitrust period. *Id.* at n.11 (citing *Integrity*). In fact, the N.J. RICO statute differs from the federal statute explicitly in several respects. The *Ball* court in full observed:

> [T]he federal and New Jersey RICO statutes are similar. Indeed, as originally introduced in the Assembly in February 1980, the New Jersey RICO statute paralleled federal RICO. The Legislature, however, came to perceive purposes and goals to be achieved by the proposed anti-racketeering statute distinct from those of the federal statutory scheme. Consequently, in many respects our Legislature departed from the federal example. Nevertheless,

> [O]ur task is to determine the Legislature's intent . . . . In that task, we are guided by well-settled standards of statutory construction. As we recently noted, "[g]enerally, under those standards, the intent of the drafters is to be found in the plain language of the enactment[,]" and "[i]f the language is clear, then the interpretative process will end . . . ." We are guided by first principles: our analysis begins with the plain language of the statute. . . . That said, we also have made clear that "[t]hroughout, our analysis is informed by the injunction that words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language."[260]

In sum, *Integrity*'s decision is not consistent with the general teachings of New Jersey's own Supreme Court in *County of Essex*.

The ten jurisdictions which have civil RICO claims for relief do not provide special limitations periods for RICO. Each has a general state catchall statute of limitations. A party can make a credible argument, for example, for borrowing the state antitrust statute, but the court's choice is between it, the catchall period, and the period for liability on a statute. Going to federal law is indefensible. No court should follow the lead of *Integrity*.

> because the federal statute served as an initial model for our own, we *heed* federal legislative history and case law in construing our statute.

661 A.2d at 258 (emphasis added) (footnote ommited).

"Heed" does not mean follow without regard to the text of the NJ statutes. In fact, the N.J legislature staked out positions different from federal law, at least, on "enterprise," the enterprise-person identity rule, and "pattern," and the N.J. courts recognize the differences. *See id.* at 261, 263–65 (analyzing that "enterprise" need not have an ascertainable structure as at federal law; articulating that "incident" in "pattern" rather than "act," as in federal RICO, evinced "an intent to cover a broader spectrum of behavior"; describing "relationship" required, but not "continuity," as in federal law); Maxim Sewerage Corp., 640 A.2d at 1221 (presence of "enterprise" in the definition of "person" indicated an intent not to follow enterprise-person identity rule of federal law). How the circuit failed to see these differences when it read *Ball* is unexplained. Because the circuit cites *Integrity,* it is also chargeable with knowledge of the period of limitations set out in the N.J. Criminal Code (five), even though it was not argued; as with *Integrity,* it ignores the Code limitations and goes inexcusably to inapplicable case law. *Integrity* followed the *federal* antitrust position. The circuit cites *Integrity* for support of its prediction that the state supreme court would adopt the *state* antitrust statute. One does not follow from the other. *Cetel* offers no reason for this line of analysis. The circuit's opinion borders on incoherency. A five-year statute might have made a difference to some, if not all, of the plaintiffs. No thoughtful court should blindly follow the lead of *Integrity* or *Cetel.* They are wrongfully decided.

260 *Jen Elec., Inc.*, 984 A.2d at 709–10.

ii. Borrowing the State Antitrust Period

A second option for courts in states like New Jersey is to follow the Court's analysis in *Malley-Duff* on the state level, analogize the state RICO statute to the state antitrust statute, and adopt the limitations period from the antitrust statute. The idea is attractive, and a court should seriously consider this option. The policies behind the two statutes are similar. Thus, similar statutes of limitations are good policy. Nevertheless, whether this approach is appropriate, as always, depends on the phrasing of statutes. Take Illinois, for example. Illinois has a state antitrust statute with a treble damages provisions and a four-year statute of limitations.[261] So far, so good. The Illinois RICO statute contains a treble damages provision,[262] a liberal construction clause, and a requirement that courts read its provisions consistent with the federal statute.[263] So far, even better. Based on these provisions, the contention is open to a party credibly, if not powerfully, to argue, that, as the federal courts read the federal statute to adopt the antitrust statute of limitations, because of the similarity between antitrust and civil RICO, so, too, should the state court follow the Supreme Court's lead, and adopt the state antitrust limitations provision.

Nonetheless, powerful counter considerations argue against, at least in Illinois, adopting the state antitrust limitations period. First, the Illinois Appellate Court in *People ex rel. Fahner v. Climatemp, Inc.* held that treble damages under the state antitrust act are "penal."[264] Accordingly, the state could not bring both a treble damages claim for

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261 740 ILL. COMP. STAT. ANN. 10/7(2) (West 2010). This section, in pertinent part, provides:

> In an action for damages, if injury is found to be due to a violation of subsections (1) or (4) of Section 3 of this Act, the person injured shall be awarded 3 times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees.
>
> . . . .
>
> Any action for damages under this subsection is forever barred unless commenced within 4 years after the cause of action accrued . . . .

262 725 ILL. COMP. STAT. ANN. 175/6(c) (West 2009) ("Any person injured in his business, person[,] or property by reason of a violation of this Act may sue the violator therefor in any appropriate circuit court and shall recover threefold the damages he sustains and the cost of the action, including a reasonable attorney's fee.").

263 725 ILL. COMP. STAT. ANN. 175/8 (West 2009) ("It is the intent of the General Assembly that this Act be liberally construed so as to effect the purposes of this Act and be construed in accordance with similar provisions contained in Title IX of the Organized Crime Control Act of 1970, as amended (18 U.S.C. 1961–1968).").

264 People *ex rel.* Fahner v. Climatemp, Inc., 428 N.E.2d 1096, 1098 (Ill. App. Ct. 1981).

relief and a claim for civil penalties without subjecting the defendant to punishment twice for the same act.[265] While this decision did not involve the statute of limitations, its characterization of antitrust treble damages as a "penalty" might arguably extend to RICO along with adoption of its antitrust limitation period.[266] As these materials show—beyond any serious quibble—federal RICO is "remedial," not "penal." Thus, the extension of a "penal" characterization to state RICO is inconsistent with the legislature's intent to keep the construction of the two statutes parallel.

A second objection to adopting the antitrust limitations period for Illinois RICO is the Supreme Court's reliance in *Malley-Duff* on legislative history.[267] While the states may adopt the language and concepts from a federal act, they do not necessarily adopt legislative history. The Illinois statute is illustrative. Its scope is limited, focusing only on narcotics racketeering.[268] An argument that both acts run parallel strains each statute by suggesting that the antitrust laws, written for "legitimate" businesses that stray from the proper path but do not go entirely over the line, are the closest analogy to a RICO statute, limited to wholly illegitimate, narcotics-trafficking. Something is wrong with this picture.

Nevertheless, the most powerful objection to following the *Malley-Duff* approach in Illinois is that, when the Court decided *Malley-Duff*, federal law did not have a general catchall statute of limitations for civil actions.[269] In Illinois, the legislature provides a five-year catchall limitations period.[270] The Court in *Malley-Duff* would not have disregarded a federal catchall statute of limitations.[271] Moreover, and it is

265 *Id.* at 1099.

266 This is what the Seventh Circuit did in Tellis v. U.S. Fid. & Guar. Co., 805 F.2d 741 (7th Cir. 1986).

267 *See supra* note 235 and accompanying text.

268 *See* 725 ILL. COMP. STAT. ANN. 175/3 (West 2009). The statute is the "Narcotics Profit Forfeiture Act." *Id.* at 175/1.

269 *See supra* note 151.

270 735 ILL. COMP. STAT. ANN. 5/13-205 (West 2011):

> Except as provided in Section 2-725 of the "Uniform Commercial Code", approved July 31, 1961, as amended, and Section 11-13 of "The Illinois Public Aid Code", approved April 11, 1967, as amended, actions on unwritten contracts, expressed or implied, or on awards of arbitration, or to recover damages for an injury done to property, real or personal, or to recover the possession of personal property or damages for the detention or conversion thereof, and all civil actions not otherwise provided for, shall be commenced within 5 years next after the cause of action accrued.

271 See, for example, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377–82 (2004), where the Court was eager to apply 28 U.S.C. § 1658, the federal catchall

crucial, the Illinois antitrust statute of limitations, by its terms, only refers to "action[s] for damages *under this subsection*,"[272] where the catchall statute of limitations refers to "all civil actions not otherwise provided for."[273] Given restrictive antitrust precedent, the limited nature of Illinois RICO, and, most important, the language of the general statute of limitations, Illinois courts should not apply the reasoning of *Malley-Duff* and therefore should not adopt the state antitrust limitations period. Courts and attorneys in other states should carefully examine the language of each state statute before borrowing it.

iii. Borrowing the Limitations Period Based on the Alleged Predicate Offenses

States that choose not to rely on their catchall statute, antitrust, or liability on a statute will have little choice but to select a limitations period based on their evaluation of the character of RICO predicate offenses. The overwhelming problem with this approach, as federal courts found out pre-*Malley-Duff*,[274] is the lack of uniformity, certainty, and fairness. RICO claims would have different limitations periods based on which predicate acts plaintiffs alleged. Conceivably, the plaintiff might have two or more periods applicable to one RICO claim for relief where a plaintiff alleges different predicate violations. Litigation, however, should be simple and inexpensive. It ought not to involve "'uncertainty and time-consuming litigation;'"[275] it ought to be a "straightforward matter."[276] RICO is complicated enough as it is. Whichever statute of limitations applies, it should quickly cut off stale claims. It should not be an occasion for more costly and complicated litigation. For example, courts might face two or more competing limitations periods depending on the character of the predicate acts. In Colorado, for example, a three-year limitation period governs contract claims and fraud claims.[277] Nevertheless, a two-year period governs tort actions, including "tortious breach of contract" and "interference with relationships."[278] The two-year period also governs "actions against any public or governmental entity or any employee of

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statute of limitations and read it broadly to avoid many of the problems associated with borrowing state statutes of limitations for federal causes of action.

272 *See supra* note 261 (emphasis added).

273 *See supra* note 270.

274 *See supra* note 150–212 and accompanying text.

275 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987) (quoting Wilson v. Garcia, 471 U.S. 261, 272 (1985)).

276 *Id.* at 154 (citation omitted).

277 COLO. REV. STAT. ANN. § 13-80-101(1)(a)–13-80-101(1)(c) (West 2005).

278 *Id.* § 13-80-102(1)(a)

a public or governmental entity."[279] Tort actions involving "[a]ssault, battery, false imprisonment, [and] false arrest" and "[a]ll actions against sheriffs, coroners, police officers, firefighters, national guardsmen, or any other law enforcement authority" have a one-year limitations period.[280] Finally, a Colorado court would have to face the questionable application of the five-year limitations period found in § 13-80-103.8(1)(d).[281] Given the complexity, confusion, and uncertainty necessarily implicated by the interaction of so many potential limitations periods, state courts should learn from the experience of the federal courts and avoid borrowing a limitations period based on predicate acts. They should limit the range of choice to the catchall period, antitrust, or liability on a statute.

iv. Borrowing the Limitations Period for Penalties and Forfeitures

The Supreme Court teaches unquestionably that the treble damages provision in federal RICO is "remedial." It is beyond serious question. In *Malley-Duff*, specifically in the statute of limitation context, the Court emphasized the "remedial" character of RICO's treble damages. For example, the Court said, "RICO is designed to *remedy* injury caused by a pattern of racketeering."[282] Moreover, in taking its cue from Congress's modeling RICO on the Clayton Act, the Court observed,

> Both RICO and the Clayton Act are designed to *remedy* economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to *compensate the same type of injury*; each requires that a plaintiff show injury "in his business or property by reason of" a violation.[283]

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279 *Id.* § 13-80-102(1)(h).

280 *Id.* § 13-80-103(1)(a)–13-80-103(1)(c).

281 *Id.* § 13-80-103(1)(d). *But see* Rogers v. Nacchio, 241 F. App'x 602, 608–09 (11th Cir. 2007) (barring Colorado claims on statute of limitations grounds without discussion of these alternatives).

282 Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 149–50 (1987) (emphasis added).

283 *Id.* at 151 (emphasis added). In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the Court indicated that the treble damages provision of the Clayton Act is primarily "remedial." It said:

In a paragraph on the legislative history of RICO's treble damage provision, the Court referred to the treble damages provision as a "remedy" no less than eight separate times.[284] Moreover, the Court observed, "[A]pplication of a uniform federal limitations period

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> Notwithstanding its important incidental policing function, the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor *to gain compensation* for that injury.
>
> "Section 4 . . . is in essence a *remedial provision.* It provides treble damages to '[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . .' Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. . . . It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a multiple of the injury actually proved, is designed *primarily as a remedy.*"

Id. at 635–36 (emphasis added) (citation omitted) (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485–86 (1977)).

284 *Malley-Duff,* 483 U.S. at 151–52. While the Senate bill at that time did not have a treble damage provision, the Senate Committee characterized the RICO concept—using criminal and civil remedies, one punitive, the other remedial—in unequivocal terms. *See* S. REP. NO. 91-617, at 160 (1969) (emphasis added):

> Section 1964 provides civil remedies for the violation of section 1962 . . . . Subsection (a) contains broad *remedial provisions* for reform of corrupted organizations. Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing corrupting influence and make due provision for the right of innocent persons. . . . *[T]he action is remedial, not punitive* . . . .

The House Judiciary committee added the treble damage provision back to the Senate bill, reflecting how its sponsors had initially drafted it. *See Civil Fraud Action, supra* note 16, at 258–61 (quoting Senator Hruska: The "'criminal provision . . . [was] intended primarily as an adjunct to the civil provisions'" that he "'considered[ed] . . . the more important feature'" of the bill; it then included provisions for private equitable relief and treble damages). The House Report is not as elaborate—here as elsewhere—as the Senate Report. Nevertheless, it does not contradict the Senate Report on the remedial character of RICO's civil remedies, including the treble damage provision. *See* H.R. REP. NO. 91-1549, at 57–58 (1970). *See also* Sicolo v. Prudential Sav. Bank of Brooklyn, 157 N.E.2d 284, 286 (N.Y. 1959) ("The words 'penalty or forfeiture' when used in a Statute of Limitations refer to something imposed in a punitive way for an infraction of a public law and do not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such . . . . '[When] a statute gives *accumulative damages* to the party grieved, it is not a penal action.' It is the intrinsic nature of the exaction that counts and . . . [here the] suit is essentially one for compensation to a person injured through a defendant's fault. The successful plaintiff is awarded his proven damages with a minimum recovery of $1,000. That the recovery may exceed in some instances the actual loss does not make the liability truly penal in nature . . . ." (emphasis added) (quoting Huntington v. Attrill, 146 U.S. 657, 668 (1892)).

avoids the possibility of the application of unduly short state statutes of limitations that would thwart the legislative purpose of creating an effective *remedy*."[285]

In *Shearson/American Express Inc. v. McMahon*,[286] an opinion issued prior to *Malley-Duff*,[287] the Court again taught that RICO's treble damages provision is "remedial." In determining whether the plaintiff's RICO treble damage claim is subject to arbitration under the Federal Arbitration Act, the Court examined RICO's legislative history, including its reliance on the Clayton Act as a model.[288] The Court found that "[t]he legislative history of § 1964(c) reveals the same emphasis [as the Clayton Act] on the remedial role of the treble-damages provision."[289] In 2003, the Court again examined the character of RICO's treble damages provision; once again, teaching it is "remedial."[290] The debate over whether RICO's treble damages provision is "remedial" or "penal" played out in *State Farm* and *Tellis*[291] is yesterday's news. The Court has resolved the debate in favor of *State Farm*.

That federal RICO's treble damages provision is "remedial" argues powerfully that state RICO statutes are also remedial. Consider, for example, the Idaho state RICO statute. That statute does not specify a limitations period. To get the court to apply the short, two-year limitations period for "penalties and forfeitures,"[292] a defendant could argue that treble damages under Idaho RICO are "penal."[293] As with the federal statute, the more persuasive argument is that treble damages under Idaho RICO are "remedial." First, the section that provides for treble damages is entitled "Racketeering-Civil Remedies."[294] This contrasts to the previous section entitled, "Prohib-

285 *Malley-Duff,* 483 U.S. at 154 (emphasis added).

286 482 U.S. 220 (1987).

287 *Malley-Duff* was decided June 22, 1987, while *Shearson* was decided June 8, 1987.

288 *See Shearson*, 482 U.S. at 240–41.

289 *Id.* at 240.

290 PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406 (2003) ("Indeed, we have repeatedly acknowledged that the treble-damages provision contained in RICO itself is remedial in nature.")

291 *See supra* text accompanying notes 161–201 (analyzing the two decisions).

292 IDAHO CODE ANN. § 5-219(2) (2010) provides: "Within two (2) years: . . . 2. An action upon a statute for a penalty or forfeiture, where the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation."

293 Idaho RICO provides for treble damages: "A person who sustains injury to his person, business[,] or property by a pattern of racketeering activity may file an action in the district court for the recovery of three (3) times the actual damages proved and the cost of the suit, including reasonable attorney's fees." IDAHO CODE ANN. § 18-7805(a) (2004).

294 *Id.*

ited Activities-Penalties."[295] If treble damages were "penal," no serious reason suggests itself why a legislature would locate them in a section entitled "remedies" rather than the section entitled "penalties." Some say you cannot judge a book by its cover, but, in fact, titles on medicine vials, bottles of alcohol, etc., usually convey the accurate information. Without hesitation, we drink based on them every day. The legislature went to the trouble to title the section. Not taking it at its word is senseless.[296] Moreover, the exact quantum of damages caused by RICO violations may be difficult to discern. Thus, treble damages under both federal and Idaho RICO are not "penal" but "accumulative"—designed to compensate plaintiffs for injuries that legal damages do not adequately cover.[297] This analysis applies

295 IDAHO CODE ANN. § 18-7804 (2004).

296 At the beginning of the Republic, Chief Justice Marshall wisely described the process of statutory interpretation. He observed:

> It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.
>
> On the abstract principles which govern courts in construing legislative acts, no difference of opinion can exist. It is only in the application of those principles that the difference discovers itself.
>
> As the enacting clause in this case, would plainly give the United States the preference they claim, it is incumbent on those who oppose that preference, to shew [sic] an intent varying from that which the words import. In doing this, the whole act has been critically examined; and it has been contended with great ingenuity, that every part of it demonstrates the legislative mind to have been directed towards a class of debtors, entirely different from those who become so by drawing or indorsing bills, in the ordinary course of business.
>
> The first part which has been resorted to is the title. On the influence which the title ought to have in construing the enacting clauses, much has been said; and yet it is not easy to discern the point of difference between the opposing counsel in this respect. Neither party contends that the title of an act can controul plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived; and in such case *the title claims a degree of notice, and will have its due share of consideration.*

United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (emphasis added).

297 *See* Blakey, *Of Characterization*, *supra* note 29, for a full discussion of "accumulative" damages; *accord* Sicolo v. Prudential Sav. Bank of Brooklyn, 157 N.E.2d 284, 286 (N.Y. 1959) ("The words 'penalty or forfeiture' when used in a Statute of Limitations refer to something imposed in a punitive way for an infraction of a public law and do

equally to other state RICO statutes modeled after federal RICO and having similar treble damage provisions. Accordingly, courts should not apply the state limitations period for "penalties" to state RICO claims. They should limit the range of choice to the catchall period, antitrust, or liability on a statute.

v. Borrowing the Limitations Period for Liability on a Statute

An additional option exists for courts seeking a limitations period other than the catchall period for state RICO claims. Some states specify a limitations period for actions or liabilities created by a statute.[298] Pre-*Malley-Duff*, several federal courts borrowed state statutes of limitations for liabilities created by a statute and applied them to federal RICO claims.[299] This statute of limitations usually applies in situations where no liability would exist but for the statute.[300] Thus, it

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not include a liability created for the purpose of redressing a private injury, even though the wrongful act be a public wrong and punishable as such. . . . '[When] a statute gives *accumulative damages* to the party grieved, it is not a penal action.' It is the intrinsic nature of the exaction that counts and . . . [here the] suit is essentially one for compensation to a person injured through a defendant's fault. The successful plaintiff is awarded his proven damages with a minimum recovery of $1,000. That the recovery may exceed in some instances the actual loss does not make the liability truly penal in nature . . . ." (emphasis added) (quoting Huntington v. Attrill, 146 U.S. 657, 688 (1892))).

298 *See, e.g.*, IDAHO CODE ANN. § 5-218(1) (2010):

> Within three (3) years:
>
> > An action upon a liability created by statute, other than a penalty or forfeiture. The cause of action in favor of the state of Idaho or any political subdivision thereof, upon a surety bond or undertaking provided for or required by statute shall not be deemed to have accrued against any surety on such bond or undertaking until the discovery by the state of Idaho or any political subdivision thereof of the facts constituting the liability.

299 *See, e.g.*, Cullen v. Margiotta, 811 F.2d 698, 718 (2d Cir. 1987) (finding liability on statute of three years), *overruled on other grounds by* Lore v. City of Syracuse, 670 F.3d 127 (2d Cir. 2012); Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984) (finding liability on statute of three years). The circuit courts in *Cullen* and *Compton* did not explain in detail their reasons for choosing the state statute of limitations for liability created by statute.

300 *See* Gaidon v. Guardian Life Ins. Co. of Am., 750 N.E.2d 1078, 1082 (N.Y. 2001). According to the court in *Gaidon*,

> [The statute of limitations for liability created by statute] does not automatically apply to all causes of action in which a statutory remedy is sought, but only where liability "would not exist but for a statute." Thus, [the statute of limitations for liability created by statute] "does not apply to liabilities existing at common law which have been recognized or implemented by

does not apply to claims for relief that existed at common law but that the legislature subsequently codified.[301] RICO statutes create civil liability for engaging in a pattern of predicate acts by, through, or against an enterprise. Though many of RICO's predicate acts have common law origins, how Congress integrated them in the configurations of RICO is far more than a mere codification of their common law origins. Plaintiffs have to prove crucial additional elements to prevail on a RICO claim beyond those required simply to allege a common law claim for relief, for example, fraud. In short, RICO is a statutory creation, and it has no precise common law analogue. Thus, in addition to the catchall, the statute of limitations for liability created by statute is an appropriate choice for civil RICO claims where the legislature did not create a special RICO period of limitations.

Before courts apply this catchall limitations period to civil RICO claims, they must consider what other limitations periods are available. Borrowing the federal limitations period is inappropriate when the state provides a catchall period. Similarly, borrowing the limitations period from state antitrust laws may be inappropriate due to the scope of the state RICO statute, the language of the statutes of limitations, and the possibility of the application of restrictive antitrust precedent to RICO. Borrowing limitations periods based on the predicate offenses that the plaintiff alleges leads to complexity, lack of uniformity, uncertainty, and unfairness. Borrowing the statute of limitations for penalties and forfeitures is simply a mischaracterization of RICO's treble damages provision. The only statute of limitations (other than the antitrust provisions or the general catchall provision) that courts should appropriately borrow is the statute of limitations for liability created by statute. No common law analogue to civil RICO exists. Thus, when a state RICO statute does not provide for a special limitations period, courts should consider the state antitrust period, the statute of limitations for liability created by statute, or the state general catchall statute. Each of these three provisions provides

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> statute." When this is the case, the Statute of Limitations for the statutory claim is that for the common-law cause of action which the statute codified or implemented.

Id. (quoting Aetna Life & Cas. Co. v. Nelson, 492 N.E.2d 386, 388 (N.Y. 1986)); *see also* Shewry v. Begil, 27 Cal. Rptr. 3d 209, 213 (Cal. Ct. App. 2005) ("[A liability created by statute] is a liability that would not exist but for the statute."); State v. Ada Cnty. Dairymen's Ass'n, 159 P.2d 219, 220 (Idaho 1945) ("A 'statutory liability' is one that depends for its existence on the enactment of the statute, and not on the contract of the parties." (quoting Dietrich v. Copeland Lumber Co., 154 P. 626, 628 (Idaho 1916))).

301 *See Gaidon*, 750 N.E.2d at 1082.

an attractive uniform limitations period consistent with the remedial purposes of RICO. The main issue in the choice is the length of the limitation period; it must not be too short that it gives a plaintiff inadequate time to discover his injury, determine its relation to a pattern of unlawful conduct, select counsel, consider the law and facts, and draft an appropriate complaint, which are no easy tasks. Preparing for RICO litigation is not something a rational actor should undertake lightly. One should anticipate expensive and time-consuming motion practice. One should not think that merely adding a RICO count would secure a quick or more favorable settlement. Better to frontload the process and guarantee it is a wise decision. Deciding not to bring a RICO claim is equally as important as deciding to bring a RICO claim. Wisely deciding not to bring a RICO case takes a large load off the work of a putative defendant and the considered court. In sum, the period of limitations ought to give thoughtful plaintiffs ample time to make a wise decision.

C. Determining the Point of Accrual

The most carefully chosen limitations period is meaningless without reference to when it begins to run.[302] Thus, rules of accrual that specify when the limitations period begins must also further the goals of statutes of limitations generally.[303] In particular, accrual rules must provide plaintiffs with adequate time to sue, while at the same time ensuring that they act diligently, not recklessly sitting on their rights. In light of these considerations, a statute of limitations should begin to run as soon as events occur that enable a plaintiff to maintain a suit under the particular claim for relief, but no sooner.[304] This gives plaintiffs the full limitations period, as noted, to file their claim after it

302 Klehr v. A. O. Smith Corp., 521 U.S. 179, 199 (1997) (Scalia, J., concurring) ("[A]ny period of limitation is utterly meaningless without specification of the event that starts it running. As a practical matter, a 4–year statute of limitations means nothing at all unless one knows when the four years start running. If they start, for example, on the 10th anniversary of the injury, the 4-year statute is more akin to a 14-year statute . . . .").

303 *See supra* notes 196–212 and accompanying text.

304 Certainly, the statute of limitations should not begin to run before a plaintiff can legally sue. *See* Spannaus v. U.S. Dep't of Justice, 824 F.2d 52, 56 n.3 (D.C. Cir. 1987) ("That a statute of limitations cannot begin to run against a plaintiff *before* the plaintiff can maintain a suit in court seems virtually axiomatic."). In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997), the Court stated that "[a] limitations period ordinarily does not begin to run until the plaintiff has a 'complete and present cause of action.'" *Id.* at 195 (quoting Rawlings v. Ray, 312 U.S. 96, 98 (1941)). According to the Court, "[u]nless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for

arises. Unfortunately, this straightforward principle of accrual is too simple to apply in all situations. For instance, a plaintiff may be able *in theory* to sue, because the events comprising the claim for relief have occurred, but, *realistically*, the plaintiff may be unable to sue, because (through no fault of his own) he is unaware that he has suffered an injury, unware of its cause, or unaware of who did it.[305] In situations like this, fairness demands that the statute of limitations should not begin until the plaintiff discovers (or should have discovered through the exercise of reasonable diligence) his injury, its cause, and who did it.

Had Congress specified in the RICO statute when a civil claim for relief accrues, then courts would have followed Congress's direction. Congress, however, remained silent on the period of limitations as well as accrual. Thus, federal courts have had to decide not only the period of limitations, but also the appropriate point of accrual for civil RICO claims. Different federal courts developed several different accrual rules, including the last-predicate-act rule, the injury-discovery rule, the injury-and-pattern discovery rule, and the antitrust rule. This split among the lower federal courts undermines the certainty, uniformity, and fairness that the Court sought when it borrowed the four-year limitations period from the Clayton Act for civil RICO in *Malley-Duff*. Nevertheless, the Court in *Malley-Duff* avoided adopting a uniform accrual rule, even though it confronted the issue then and on two later occasions, first in *Klehr v. A. O. Smith Corp.*[306] and three years later in *Rotella v. Wood*.[307]

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limitations purposes until the plaintiff can file suit and obtain relief." *Id.* at 201 (quoting Reiter v. Cooper, 507 U.S. 258, 267 (1993)).

305 The classic example is medical malpractice. *See, e.g.*, Stoleson v. United States, 629 F.2d 1265, 1268 (7th Cir. 1980) (citations omitted), where the court observed,

> In the usual case, the fact of injury provides adequate notice of the cause of the injury and of the possibility that one's legal rights have been invaded. This general rule, however, is often inapplicable to medical malpractice claims. The reason for the exception is essentially the same as for the general rule, *i.e.*, a patient often has little or no reason to believe his legal rights have been invaded simply because some misfortune followed medical treatment. Sometimes a patient may remain unaware for many years that he has suffered injury or he may recognize his injury but not its cause. Indeed, the facts necessary to discover the causal relation between treatment and injury may be within the exclusive control of the physician or at least very difficult to obtain. In medical malpractice cases, therefore, the statute of limitations does not begin to run until after the patient discovers or in the exercise of reasonable diligence should discover his injury and its cause.

306 521 U.S. 179 (1997).

307 528 U.S. 549 (2000). In *Malley-Duff,* the Court expressly declined to decide when a civil RICO claim accrues. Agency Holding Corp. v. Malley-Duff & Assocs.,

1. The Last Predicate Act Rule and *Klehr v. A. O. Smith Corp.*

An accrual rule initially used by a handful of district courts was the last-predicate-act rule. The courts fashioned it from criminal conspiracy jurisprudence; under it, a civil claim for relief under RICO accrues when the last predicate act of racketeering occurred.[308] The last predicate act rule is not a rule of separate accrual.[309] As long as the defendant commits a predicate act within the four-year limitations period, the plaintiff can recover for each of the injuries he sustained as a result of the defendant's pattern of racketeering—regardless of when the injuries occurred or when the plaintiff discovered the injuries. A district court in the Seventh Circuit first used this accrual rule in *County of Cook v. Berger.*[310] The *Berger* court emphasized the "continuing" character of RICO, relying on a criminal case from the Southern District of New York that properly characterized criminal RICO as a "continuing offense" under a criminal statute of limitations.[311] The *Berger* court reasoned that because Congress designed civil RICO to remedy harms caused by a "continual and related" pattern of racketeering "it would be incongruous to bar . . . recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period."[312] Precisely as RICO defendants incur criminal liability for each predicate act in a continuing pattern of racketeering, so, too, should they be civilly liable for each predicate act in the pattern as long as the pattern continued into the applicable civil limitations period.

No circuit court adopted the *Berger* court's version of the last-predicate-act rule, but the Third Circuit in *Keystone Ins. Co. v. Houghton*[313] adopted a variation of the last-predicate-act rule, adding to it a discovery element. In *Keystone,* the court adopted an accrual rule that took into account the continuing nature of a RICO offense (i.e. its

Inc., 483 U.S. 143, 156–57 (1987) ("Because it is clear that Malley-Duff's RICO claims accrued within four years of the time the complaint was filed, we have no occasion to decide the appropriate time of accrual for a RICO claim."). In addition, the Court granted certiorari in a case before *Klehr* to deal with the accrual issue, but later dismissed the writ as improvidently granted. Grimmett v. Brown, 519 U.S. 233 (1997).

308 *See supra* note 85 and accompanying text.

309 *See infra* note 376.

310 648 F. Supp. 433 (N.D. Ill. 1986).

311 *Id.* at 434 (citing United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir. 1978)).

312 *Id.* at 435. Other district courts in the Seventh Circuit also applied the last-predicate-act rule. *See, e.g.*, Norris v. Wirtz, 703 F. Supp. 1322, 1326 (N.D. Ill. 1989) (collecting other cases). The Seventh Circuit later rejected the last-predicate-act rule cited in *Norris* in *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992).

313 863 F.2d 1125 (3d Cir. 1988).

pattern element).[314] It held that accrual did not occur and the statute of limitations start running until each of the elements of the claim for relief existed.[315] Nevertheless, it recognized that the plaintiff could recover from each act in the pattern that injured him as long as he sued within the period of limitations. Under the rule the court developed, the limitations period would start to run:

> [F]rom the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.[316]

The court carefully observed, "The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern" to extend the limitations period.[317] Similar to the version of the last-predicate-act rule used in *Berger*, under the *Keystone* accrual rule, the plaintiff can recover for each injury caused by the pattern of racketeering. This is so even if the injuries occurred or plaintiff did not discover them for more than four-years before he filed the claim. It is only necessary that the last predicate act occurred within the limitations period.[318]

Both the *Berger* and *Keystone* versions of the last-predicate-act rule offer substantial advantages over a simple discovery accrual rule. They appropriately recognize the continuous character of a RICO offense—criminally or civilly—in light of its pattern requirement. As a result, they do not start the limitations period running until the pattern of racketeering ends (*Berger*) or until the plaintiff reasonably discovers the last predicate act that marks the end of the pattern

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314 *Id.* at 1129–30.

315 *Id.* at 1130 ("It would appear fundamental that the four-year statute of limitations for civil RICO may not begin to run until each of the elements of the cause of action exist."). The court continued:

> Conceptually there is no requisite RICO "injury" until the damage impacting the plaintiff becomes part of a pattern of racketeering activity. Prior to that point there is no *RICO* injury and the statute of limitations may not begin to accrue. "Because a potential plaintiff has not been injured under RICO until the pattern element has been satisfied, it is inappropriate to start the limitations period before the pattern is fully developed."

Id. at 1131 (quoting Michael Goldsmith, *Civil RICO Reform: The Basis for Compromise*, 71 MINN. L. REV. 827, 879 (1987)).

316 *Id.* at 1130.

317 *Id.*

318 *Id.* at 1130–31.

(*Keystone*). Moreover, with either version of the last-predicate-act rule, no danger exists that the limitations period will start running before a RICO violation occurs; thus, plaintiffs can recover for each of his injuries caused by the pattern of racketeering. The *Keystone* court persuasively argued that this accrual rule was necessary to achieve the broad, remedial purposes of RICO, especially when the offense may harm many victims, and it is consistent with the text of RICO, in particular its liberal construction mandate.[319] In sum, the rule has much to recommend it. None of the alternative rules takes into consideration so many aspects of the statute so sensitively. Nevertheless, but for its ultimate rejection by the Court, it would stand high above its competitors in its persuasive character.

The last-predicate-act rule, however, has its critics who also make persuasive arguments, illustrating the need for a court carefully to balance the competing considerations. Those who oppose the rule argue that it focuses too much on the continuous nature of RICO and not enough on the injury component of a civil claim for relief.[320] They point out that civil RICO is essentially remedial.[321] The purpose of civil RICO is not to punish those who violate § 1962.[322] A person can engage in racketeering activity, but he does not incur civil liability unless the predicate acts injure a person "in his business or property."[323] Thus, while injury is irrelevant under criminal RICO, it is crucial under civil RICO, and the choice of a point for the running of the statute of limitation must consider the differences, that is, focus more on the injury factor. Because the last-predicate-act rule solely focuses on the continuous character of a RICO violation, it arguably violates the principle that a statute of limitations should begin to run as soon as the events occur that enable a plaintiff to sue.[324] For example, a defendant engages in a pattern of predicate acts in violation of 18 U.S.C. § 1962(c). His predicate acts injured people in their business or property. From their perspective, the RICO civil claim for relief is complete, and they can properly sue to recover for their injuries under civil RICO. Nevertheless, under the last-predicate-act rule,

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319 *Id.* at 1131–33.

320 *See* Paul B. O'Neill, *"Mother of Mercy, Is this the Beginning of RICO?": The Proper Point of Accrual of a Private Civil RICO Action*, 65 N.Y.U. L. REV. 172, 221–25 (1990) (criticizing the last predicate act rule).

321 *See supra* notes 29–33 (dealing with liberal construction), 39–43 (dealing with enforcement), and accompanying text.

322 To the critics of the last-predicate rule, that is the purpose of criminal RICO.

323 § 1964(c) (arguably only allowing recovery for injuries to business or property).

324 *See supra* note 232 and accompanying text.

because the defendant continues to commit predicate acts against the same or, more strikingly, other people, the statute of limitations does not start to run as to the people already injured, even though the events for a valid civil RICO claim for relief exist. Even if the injured parties are fully aware of their injuries, and of the presence of each of the elements of their RICO claim for relief, the statute of limitations does not run against them. Metaphorically, they can sit on their hands and watch the parade of predicate acts pass by whether they injure them or others, as long as the defendant continues to engage in his pattern of predicate acts. Thus, the argument goes, the period of limitations for them potentially extends indefinitely without a rationale for an extended time for those plaintiffs to sue. The extension, arguably, is unjustified as a matter of sound social policy. Those values behind a statute of limitations that focus on repose for the defendant or staleness from the perspective of the court receive, arguably, insufficient weight—indeed, no weight whatsoever. The treble damage suit is supposed to stimulate litigation, but the last predicate act rule cuts the other way. Understandably, the possibility that the limitations period could be extended indefinitely without any major countervailing benefits was the principal reason why the Court in *Klehr v. A. O. Smith Corp.*[325] rejected *Keystone*'s last-predicate-act rule. In *Klehr*, the Court granted certiorari to address the circuit split that developed on the appropriate accrual rule for civil RICO.[326] The only accrual rule that saved the plaintiff's claim in *Klehr* was *Keystone's* last-predicate-act rule.[327] The Court held that it was "not a proper interpretation of the law" for "two basic reasons."[328] First, the separate accrual rule "lengthens the limitations period dramatically," because a pattern of predicate acts "can continue indefinitely."[329] The Court concluded that Congress could not have contemplated so dramatic an extension of the limitations period.[330] Because the rule extended the period so long, it undermined the purpose of repose underlying statutes of limitations, heedlessly allowing plaintiffs to sit on their rights, while mem-

325 521 U.S. 179 (1997).

326 At the time, some circuit courts applied the injury-and-pattern-discovery rule, others applied the discovery rule, while only the Third Circuit applied the last-predicate-act rule from *Keystone*. *See id.* at 185–86. The Eighth Circuit also applied an injury-plus-source-plus-pattern rule. Klehr v. A.O. Smith Corp., 87 F.3d 231, 239 (8th Cir. 1996) (asserting plaintiffs' notice of fraud would also indicate the "existence, source, and pattern of the injury for their RICO claim"), *aff'd*, 521 U.S. 179 (1997) .

327 *Klehr*, 521 U.S. at 186.

328 *Id.* at 187.

329 *Id.*

330 *Id.* ("[T]he last predicate act rule creates a limitations period that is longer than Congress could have contemplated.").

ories fade and evidence erodes.[331] The second reason was that the *Keystone* rule was "inconsistent with the ordinary Clayton Act rule, applicable in private antitrust treble damages actions,"[332] under which the period runs from each injurious act.[333] Incongruently, the Court argued from the Clayton Act rule, but did *not* adopt it for civil RICO.[334] The Court merely used it to contrast with the last-predicate-act rule's perceived flaws. Specifically, the Court disapproved of how the last-predicate-act rule allowed a plaintiff to "use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period."[335] As a separate-accrual rule, the Clayton Act rule does not allow for recovery for injuries that occur outside the limitations

331 *Id.* ("It thereby conflicts with a basic objective—repose—that underlies limitations periods. Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, 'sleeping on their rights,' as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the 'memories of witnesses have faded or evidence is lost.' We cannot find in civil RICO a compensatory objective that would warrant so significant an extension of the limitations period, and civil RICO's further purpose—encouraging potential private plaintiffs diligently to investigate, suggests the contrary." (citations omitted) (quoting Wilson v. Garcia, 471 U.S. 261, 271 (1985)).

332 *Id.* at 188. The Court added:

> We recognize that RICO's criminal statute of limitations runs from the last, *i.e.*, the most recent, predicate act. But there are significant differences between civil and criminal RICO actions, and this Court has held that criminal RICO does not provide an apt analogy [Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 155–56 (1987)] (declining to apply criminal RICO's 5-year statute of limitations to civil RICO actions and noting "competing equities unique to civil RICO actions or, indeed, any other federal civil remedy").

Id.

333 *See infra* note 339 (setting out the accrual rule for claims under the Clayton Act).

334 *Klehr*, 521 U.S. at 188. The Court qualified its use of the analogy:

> We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a "pattern" of acts. Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action. As we said earlier, however, for purposes of evaluating the Third Circuit's rule we can assume *knowledgeable* parties. Hence the special problems associated with a discovery rule, are not at issue. And we believe, in these circumstances, the Clayton Act analogy is helpful.

Id. (cross references omitted).

335 *Id.* at 190.

period.[336] Thus, though the *Klehr* Court relied on a Clayton Act rule analogy to reject *Keystone*'s rule, it did not select the Clayton Act's rule—or any other accrual rule—for civil RICO claims.[337] In sum, the Court eliminated one possible accrual rule, but the Court left the circuit courts split, basically, between a version of the discovery rule and the injury-and-pattern discovery rule.

2. The Clayton Act Rule

While the majority in *Klehr* was reluctant to decide finally on an accrual rule for civil RICO, Justice Scalia in his concurring opinion argued for the adoption of the Clayton Act or the injury-occurrence accrual rule.[338] In *Zenith Radio Corp. v. Hazeltine Research, Inc.*,[339] the Court set out the accrual rule for claims under the Clayton Act:

> [A] cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. In the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those

336 *Id.* at 189–90.

337 *See id.* at 192–93 (declining to choose a single accrual rule for civil RICO). The Court explained its decision:

> [W]e believe we should not consider differences among the various discovery accrual rules used by the Circuits. The legal questions involved may be subtle and difficult. Compare [Klehr v. A.O. Smith Corp., 87 F.3d 231, 238 (8th Cir. 1996)] (claim accrues with discovery of existence *and source* of injury, plus pattern), with [Bivens Gardens Office Bldg, Inc. v. Barnett Bank, 906 F.2d 1546, 1554 (11th Cir. 1990, *abrogated by* Rotella v. Wood, 528 U.S. 549 (2000) (claim accrues with discovery of injury and pattern); see also [Cada v. Baxter Healthcare Corp, 920 F.2d 446, 451 (1990)] (describing differences among various discovery rules and doctrines of "equitable tolling" and "equitable estoppel"). And the facts of this case do not force focused argument as to how the traditional Clayton Act "injury" accrual rule, principles of equitable tolling, and doctrines of equitable estoppel should interact in circumstances where the application of one, or another, of these different limitations doctrines would make a significant legal difference. To say this is not, as the concurrence claims, to advocate a 'mix-and-match' statute of limitations theory. Rather, it is to recognize that the Clayton Act's express statute of limitations does not necessarily provide all the answers. We shall, at the very least, wait for a case that clearly presents these or related issues, providing an opportunity for full argument, before we attempt to resolve them.

Id. (citations omitted).

338 *Id.* at 198 (Scalia, J., concurring).

339 401 U.S. 321 (1971).

> damages, the statute of limitations runs from the commission of the act. However, each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial.[340]

The *Zenith* Court made one exception to this accrual rule. If a plaintiff cannot recover future damages, because they are too speculative, "the cause of action for future damages, if they ever occur, will accrue only on the date they are suffered; thereafter the plaintiff may sue to recover them at any time within four years from the date they were inflicted."[341] The Court reasoned that without this exception, plaintiffs could not prove future damages within the limitations period, they would be unrecoverable, and that outcome would be contrary to congressional intent.[342] Thus, unless an exception applies, under the Clayton Act rule, the statute of limitations begins to run from the date of the unlawful act that injures the plaintiff's business.[343] Thus, the Clayton Act accrual rule, as decided in *Zenith,* is a

340 *Id.* at 338–39 (citations omitted).

341 *Id.* at 339.

342 *Id.* at 340.

343 In *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1103–04 (2d Cir. 1988), the court suggests that the Clayton Act accrual rule includes a discovery principle. Since *Bankers,* the Second Circuit has uniformly applied the *Zenith* rule—the statute runs from the defendant's unlawful act. *See, e.g.*, Higgins v. N.Y.S.E., Inc., 942 F.2d 829, 832 (2d Cir. 1991). That said, an anomaly requires a comment: *In re* Copper Antitrust Litig., 436 F.3d 782 (7th Cir. 2006) (regarding antitrust and discovery rule). While Judge Wood is an extraordinarily careful jurist, her opinion in the *Copper Litigation* decision framed an accrual issue in an antitrust case as, "[w]hether the district court selected the proper accrual date depends on the application of the *discovery rule* to these facts." *Id.* at 789 (emphasis added) (citations omitted). The court continued:

> [P]laintiffs' antitrust claims are subject to a four-year statute of limitations. Generally, an antitrust "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by the discovery rule, which "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." "This principle is based on the general rule that accrual occurs when the plaintiff discovers that 'he has been* injured *and who* caused *the injury.'"*

Id. (emphasis added) (citations omitted). No other circuit court decisions take her position. Neither Judges Cudahy nor Rovner, who were also on the panel, and equally careful jurists, commented on Judge Wood's error. *See Klehr*, 521 U.S. at 189 ("[B]y the time civil RICO was enacted, the Clayton Act's accrual rule was well established." (citing Crummer Co. v. DuPont, 223 F.2d 238, 247–48 (5th Cir. 1955)); Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750–51 (9th Cir. 1936); Bluefields

"separate-accrual" rule. Each time the defendant injured the plaintiff by reason of a violation of the statute, he has a new claim for relief with a separate limitations period. Under the "separate-accrual," as applied to RICO, if a defendant injures a plaintiff multiple times by the same pattern of racketeering, he may only be able to recover for part of those injuries, depending on when he files his claim and various estoppel or tolling rules.

In spite of Justice Scalia's concurring opinion in *Klehr*, no circuit court currently applies the Clayton Act accrual rule to civil RICO.[344] That said, the pure Clayton Act or injury-occurrence rule remains an "arguable fit" for RICO. Congress, after all, modeled RICO on the Clayton Act. So far; so good. On the other hand, the Court applies the modeling argument in light of the presence of other fit-factors, as in *Malley-Duff* for the length of the limitations period, but not, as in *Tafflin* on the antitrust parallel on whether federal jurisdiction for RICO is, in reference to the states, "exclusive" or "concurrent." Antitrust is; RICO is not.[345] Thus, by itself, the modeling argument is plausible, but neither determinative nor persuasive.

Under the Clayton Act rule, a victim of a RICO violation has a four-year period within which he may sue for his injury to business or property. Moreover, if five years after a RICO violation, a plaintiff suffers injuries to his business or properties that previously were too speculative to prove, he could then sue for those injuries.[346] So far, so good. Nevertheless, considered as a whole, a "pure"—not carefully modified and tailored to RICO—Clayton Act or an injury-occurrence rule is not aptly suited to civil RICO, principally because it does not include a sufficient consideration of the pattern and enterprise elements, a point the Court alluded to in *Klehr*.[347]

First, under the pure Clayton Act or injury-occurrence rule, the statute of limitations for RICO could potentially begin to run against

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S. S. Co. v. United Fruit Co., 243 F. 1, 20 (3d Cir. 1917)); *accord* 1 CALVIN W. CORMAN, LIMITATION OF ACTIONS § 6.5.5.1 (1991) ("[S]uch accrual originates when a defendant commits an act resulting in injury to the plaintiff's business." (citing Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321 (1970)); 2 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 320b (2000) ("As a general rule, 'a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.'" (quoting *Zenith,* 401 U.S. at 338)).

344 Less than a handful of district courts take this position. *See, e.g.*, Gilbert Family P'ship v. Nido Corp., 679 F. Supp. 679, 686 (E.D. Mich. 1988); Wabash Publ'g Co. v. Dermer, 650 F. Supp. 212, 216–17 (N.D. Ill. 1986).

345 *See, e.g.*, Tafflin v. Levitt, 493 U.S. 455, 462–63 (1990).

346 *See supra* note 343 (collecting the relevant decisions).

347 *Klehr*, 521 U.S. at 188 ("[C]ivil RICO requires not just a single act, but rather a 'pattern' of acts.").

the possible RICO plaintiff before the plaintiff possesses a valid RICO claim, an absurd result.[348] Assume a racketeer bombs the plaintiff's business to show to *another* business his power in an extortion plot on the other's business. The possible RICO plaintiff knows he is injured, but not who did it. Nor does he know why the bomber did it. He has no reason to look for a pattern, an enterprise, etc. "to trade up" his claim for relief under the common law to a RICO claim for relief. Try as diligently as possible, he may never know who bombed him or why, particularly if the other business pays off the racketeer. Putting aside tolling doctrines that might take care of the "who," under the pure Clayton Act or injury-occurrence rule, the statute runs from the injury, not discovery of the injury and the perpetrator. Moreover, RICO requires a "pattern" of racketeering activity.[349] In *H. J. Inc. v. Northwestern Bell Telephone Co.*,[350] the Court indicated that two acts are "necessary," but not necessarily "sufficient" to form a "pattern."[351] Thus, the pure Clayton Act or injury-occurrence rule—unless modified, but then it would cease to be the Clayton Act rule—arguably starts the statute running on the plaintiff's injury, and it is quite possible that four years will pass before he knows that the racketeer was behind the series of bombings, either in the possible plaintiff's community or elsewhere. That information he may not know until the government indicts the bomber after the civil statute, but not the criminal statute, expires. Similarly, the defendant can injure the plaintiff before the defendant engages in sufficient predicate acts to constitute a "pattern."[352] The defendant could also direct the acts against businesses that are strangers to the possible RICO plaintiff. Moreover, if the perpetrator commits the predicate acts more than four years apart (nevertheless part of a related and continuing series, a theoretical, but not a practical possibility), a victim who the defen-

348 The general rule is that the statute of limitations does not begin to run until the plaintiff can sue. *See supra* note 304. Indeed, failing to give a plaintiff reasonable time to sue raises serious constitutional considerations. *See supra* note 145; *see also* Cullen v. Margiotta, 811 F.2d 698, 718 (2d Cir. 1987) (giving similar reason for finding liability on statute of three years), *overruled on other grounds by* Lore v. City of Syracuse, 670 F.3d 127 (2d Cir. 2012).

349 18 U.S.C. § 1962(a) (2006).

350 492 U.S. 229 (1989).

351 *Id.* at 237 ("'[T]hat while two acts are necessary, they may not be sufficient.'" (quoting Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 496 n.14 (1985))).

352 Thus, violating the basic principle that a statute of limitations should not begin to run until the events occur that enable the plaintiff to sue. *See* Cullen v. Margiotta, 811 F.2d 698, 718 (2d Cir. 1987) (finding liability on statute of three years), *overruled on other grounds by* Lore v. City of Syracuse, 670 F.3d 127 (2d Cir. 2012); *supra* note 348.

dant injures by the first predicate act stands barred from bringing a civil RICO claim. Even if a victim is injured by subsequent, pattern-forming predicate acts, the victim, unless the Court modifies the rule, will be unable to recover under RICO for his initial injury under the separate accrual rule (presumably part of the Clayton Act or injury-occurrence rule under consideration), even though it is part of the same "pattern." Nothing in the language of RICO, its legislative history, or its policies creates this artificial barrier to RICO recovery. The plaintiff is diligent in trying to vindicate his rights. The putative defendant can plausibly claim no warranted policy of repose. The court cannot legitimately complain of staleness. Thus, under the pure Clayton Act or injury-occurrence rule—and that is the rule at issue here—victims may not recover for their RICO injuries, even though they are part of the same pattern that injured them, and some victims with RICO injuries will not recover under RICO at all. In sum, unless the Court substantially modifies and tailors the pure Clayton Act rule or injury-occurrence to RICO, it is a poor fit for RICO, despite its modeling on the Clayton Act. To make it work, the Court must add discovery principles, including separate accrual, and tolling doctrines to the pure injury-occurrence rule, but then, the new rule morphs into something else and not the Clayton Act rule. We are back to some form of the discovery rule, which is where the circuits are now.

3. The Injury and Pattern Discovery Rule and *Rotella v. Wood*[353]

Under the injury-and-pattern discovery rule, "a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern."[354] Before *Rotella,* four circuit courts used some form of this rule for civil RICO.[355] The injury-and-pattern discovery rule is a good fit for civil RICO. It warrants careful consideration by any court considering the issue without binding precedent settling the question. Because it takes into account the pattern element of RICO, the statute of limitations does not run before a RICO violation actually occurs.[356] Moreover, unlike the last-

353 528 U.S. 549 (2000).

354 Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554–55 (11th Cir. 1990). As in the case of the Clayton Act rule and the discovery rule, this rule is also a separate accrual rule.

355 *See id.*; Klehr v. A.O. Smith Corp., 87 F.3d 231, 238 (8th Cir. 1996), *aff'd*, 521 U.S. 179 (1997); Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619–20 (6th Cir. 1994); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820–21 (10th Cir. 1990).

356 This action is in contrast to the Clayton Act rule. *See supra* notes 338–357 and accompanying text.

predicate-act rule, the injury-and-pattern discovery rule includes the doctrine of separate accrual. It does not permit plaintiffs to sit on their hands and watch the pattern parade pass by them; it does not let the heedless plaintiffs keep their claims for relief, while the interests of the defendants in repose or the courts in staleness languish. Once the plaintiff is aware (knows or should have known) that he has suffered an injury from a pattern of racketeering activity, he has his four-year limitations period (and no longer) within which to investigate his claim fully, do painstaking research on the law, draft his complaint (however complex) well, and to sue under RICO. To be sure, the rule frontloads the costs of RICO litigation, but the burden belongs there in the first instance. Not affording him adequate time raises the specter of hastily prepared RICO complaints or time-barring valid complaints. Neither the defendant nor the court should relish unnecessarily arguing over whether the plaintiff has a valid RICO, or has it, but did not draft it well enough to pass muster on its first iteration. That is the most time consuming, unnecessarily expensive, and ultimately frustrating aspect of RICO litigation. If a plaintiff's claim for relief is time-barred under the injury-and-pattern discovery rule, he did not exercise reasonable diligence to discover the elements of his claim or he was aware of his claim but heedlessly let it languish. No one interested in all facets of justice on the limitations issue should shed a tear for him.

Unfortunately, the Court in *Rotella v. Wood* rejected the injury-and-pattern discovery rule.[357] As in the situation in *Klehr* three years earlier, only one accrual rule in *Rotella* could save the plaintiff's claim (now the-injury-and-pattern discovery rule).[358] Once again, as in *Klehr*, the Court rejected the accrual rule but did not decide on any accrual rule for civil RICO.[359] The Court mistakenly rejected the injury-and-pattern discovery rule for three unpersuasive reasons. First, the Court found that the rule violated the policies behind statutes of limitations, including repose and curtailing stale claims[360] by, in many

357 *Rotella*, 528 U.S. at 551.

358 *Id.*

359 After the Court rejected the last-predicate-act rule in *Klehr* and the injury-and-pattern discovery rule in *Rotella*, some version of the discovery rule was the only one not rejected. *Id.* at 554. Nonetheless, the *Rotella* Court refused to "settle upon a final rule," leaving open the possibility of applying the injury-occurrence rule in a future case RICO. *Id.* at 554 n.2. It explained: "[T]he parties have not focused on this [injury-occurrence] option, and we would not pass upon it without more attentive advocacy." *Id.*

360 *Id.* at 555. The Court also argued that the rule would result in uncertainty "about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Id.*

circumstances, extending the limitations period "well beyond the time when a plaintiff's cause of action is complete."[361] Second, the Court found that the injury-and-pattern discovery rule was an unjustified extension of the traditional injury discovery rule.[362] When a statute does not specify when a claim for relief accrues, federal courts normally apply a discovery accrual rule.[363] Under this rule, the "discovery of the injury, not [the] discovery of the other elements of a claim, is what starts the clock."[364] Because the normal federal discovery rule governs other claims for relief where the elements of the claim are potentially difficult to ascertain (e.g., medical malpractice), that a RICO pattern is difficult to identify is not enough to justify departing from the normal discovery rule.[365] Third, the Court, again stressing the Clayton Act analogy, found that the injury-and-pattern discovery rule is inconsistent with the Clayton Act's injury accrual rule.[366] In particular, the Court argued that one of the purposes behind the civil

361 *Id.* at 558. Missing in the Court's analysis is a weighing of the cases where this would be true against the cases in which this would not be true. The Court is sacrificing the valid cases where this would not be true to protect interests of the defendant in cases where it would be true. By hypothesis, the plaintiff is a victim of RICO conduct and the defendant is a perpetrator of RICO conduct. The balance should go to the victims, not the perpetrator, unless the plaintiff intentionally waited until filing "late" to gain an unfair advantage (*e.g.*, waiting until an elderly exonerating witness died). That, however, is factoring in a value not present in the formulation of the present rule.

362 *Id.* at 555–57. The Court commented: "How long is too long is, of course, a matter of judgment based on experience, and it gives us great pause that the injury and pattern discovery rule is an extension of the traditional federal accrual rule of injury discovery, and unwarranted by the injury discovery rule's rationale." *Id.* at 555. *But see supra* note 261.

363 *Id.*

364 *Id.*

365 *Id.* at 555–57. Sadly, the Court here (and below) fails fully to justify its decision by looking at and evaluating the substantial differences between RICO and other claims for relief (*e.g.*, Congress's command that the statute receive liberal construction in favor of remedy, etc.) and saying why these differences do not tip the scale in favor of a different rule, save for only the Court's own *ipse dixit*. That is not how a Supreme Court opinion ought to read if the Court wants to persuade those who study the law, a goal the Court must meet if it is to remain legitimate in our society. The Court has in our tripartite form government only the power of its reasoning fully articulated by its pen, for, as noted long ago, it has neither the sword nor the purse. *See* FEDERALIST PAPERS No. 78 (Alexander Hamilton) in 43 GREAT BOOKS, *supra* note 5, at 230 ("The Executive not only dispenses honors, but holds the sword of the community. The Legislator not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary . . . [has] neither FORCE nor WILL but merely judgment").

366 *Id.* at 557.

provisions in RICO and the Clayton Act is "to supplement Government efforts to deter and penalize the respectively prohibited practices."[367] The Clayton Act's accrual rule better accomplishes this purpose by forcing plaintiffs to file their claims earlier, allowing the public benefit to accrue sooner.[368] Thus, the Court leaves civil RICO with some form of the discovery rule. The issue of which form of dis-

367 *Id.* The Court summarized its analysis:

> Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, "private attorneys general," dedicated to eliminating racketeering activity. . . . (civil RICO specifically has a "further purpose [of] encouraging potential private plaintiffs diligently to investigate"). The provision for treble damages is accordingly justified by the expected benefit of suppressing racketeering activity, an object pursued the sooner the better. It would, accordingly, be strange to provide an unusually long basic limitations period that could only have the effect of postponing whatever public benefit civil RICO might realize. The Clayton Act avoids any such policy conflict by its accrual rule that "[g]enerally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business," and the Clayton Act analogy reflects the clear intent of Congress to reject a potentially longer basic rule under RICO.

Id. at 557–58 (citations omitted).

368 *Id.* The Court summarized its judgment:

> In sum, any accrual rule softened by a pattern discovery feature would undercut every single policy we have mentioned. By tying the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery, the rule would extend the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete, as this case shows. Rotella does not deny that he knew of his injury in 1986 when it occurred, or that his civil RICO claim was complete and subject to suit at that time. But under Rotella's rule, the clock would have started only in 1994, when he discovered the pattern of predicate acts (his assumption being that he could not reasonably have been expected to discover them sooner). A limitations period that would have begun to run only eight years after a claim became ripe would bar repose, prove a godsend to stale claims, and doom any hope of certainty in identifying potential liability. Whatever disputes may arise about pinpointing the moment a plaintiff should have discovered an injury to himself would be dwarfed by the controversy inherent in divining when a plaintiff should have discovered a racketeering pattern that might well be complex, concealed or fraudulent, and involve harm to parties wholly unrelated to an injured plaintiff. The fact, as Rotella notes, that difficulty in identifying a pattern is inherent in civil RICO, only reinforces our reluctance to parlay the necessary complexity of RICO into worse trouble in applying its limitations rule. A pattern discovery rule would patently disserve the congressional objective of a civil enforcement scheme parallel to the Clayton Act

covery the rule takes and how the Court balances the character of RICO—in particular, the pattern requirement, though its weight is less after *Rotella*—the interests of the plaintiff in his claim for relief, the interests of the defendant in repose, and the interests of the court in staleness remains for decision in yet another RICO case.[369]

> regime, aimed at rewarding the swift who undertake litigation in the public good.

Id. at 558–59 (citations omitted). As if not to ignore completely the thrust of Rotella's major points, the Court concluded:

> We have already encountered his argument that differences between RICO and the Clayton Act render their analogy inapt, and we have explained why neither the RICO pattern requirement nor the occurrence of fraud in RICO patterns is a good reason to ignore the Clayton Act model. Here it remains only to respond to Rotella's argument that we ourselves undercut the force of the Clayton Act analogy when we held that RICO had no racketeering injury requirement comparable to the antitrust injury requirement under the Clayton Act. This point not only fails to support but even cuts against Rotella's position. By eliminating the complication of anything like an antitrust injury element we have, to that extent, recognized a simpler RICO cause of action than its Clayton Act counterpart, and RICO's comparative simplicity in this respect surely does not support the adoption of a more protracted basic limitations period.
>
> Finally, Rotella returns to his point that RICO patterns will involve fraud in many cases, when he argues that unless a pattern discovery rule is recognized a RICO plaintiff will sometimes be barred from suit by Federal Rule of Civil Procedure 9(b), which provides that fraud must be pleaded with particularity. While we will assume that Rule 9(b) will exact some cost, we are wary of allowing speculation about that cost to control the resolution of the issue here. Rotella has presented no case in which Rule 9(b) has effectively barred a claim like his, and he ignores the flexibility provided by Rule 11(b)(3), allowing pleadings based on evidence reasonably anticipated after further investigation or discovery. It is not that we mean to reject Rotella's concern about allowing "blameless ignorance" to defeat a claim; we simply do not think such a concern should control the decision about the basic limitations rule. In rejecting pattern discovery as a basic rule, we do not unsettle the understanding that federal statutes of limitations are generally subject to equitable principles of tolling, and where a pattern remains obscure in the face of a plaintiff's diligence in seeking to identify it, equitable tolling may be one answer to the plaintiff's difficulty, complementing Federal Rule of Civil Procedure 11(b)(3). The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule.

Id. at 559–61 (citations omitted).

369 The Court in *Rotella* bristled at Petitioner's hypothetical (calling it "speculation") and charred counsel because he "presented no case." *Id.* at 560. *But see id.* at 554 (citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), in which the Court did not present a case, but posed a hypothetical "pattern" composed of criminal acts, with up to ten years between them, extending indefinitely, without an intervening suit by the victim or a criminal prosecution by the government). Testing the possible scope of

rules by varying hypotheticals is the standard practice of law professors, as it is for judges in oral argument. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENTS § 3.3 (2d ed. 2003) ("In the 'hot' courts, the Socratic method comes storming back at you with a ferocity that that you have not experienced in years."); Phillip E. Areeda, *The Socratic Method (SM)*, 109 HARV. L. REV. 911, 922 (1996) (describing the task of the law professor as "framing questions, responding with more questions, and guiding discussion in a way that students will discover answers for themselves"). In fact, no practical alternatives exist for RICO and time-bars. While Congress enacted RICO in 1970, litigation in significant numbers under civil RICO did not begin until the after the Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Even then, the number and variety of cases involving time-bars is relatively miniscule on the criminal or civil side. In 2011, for example, the United States filed 79,197 criminal cases, 30 (.038%) of which were criminal RICO cases, an unusually low number. Meanwhile, plaintiffs filed 294,336 civil cases in federal court, only 917 (.31%) of which were civil RICO cases, about how they typically appear. ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 46–48, 80–82 tbls C-2, D-2 (2011), *available at* http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2011.aspx. Moreover, for the last eighteen years, the number of civil RICO complaints as compared to overall civil complaints became proportionally smaller. Between 1993 and 2011, the number of civil filings in federal district courts increased from 229,850 to 294,336, while the number of civil RICO cases filed remained effectively the same, increasing from 903 to only 917. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 1997 at 131–133 tbl. C-2A (1997), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness1997.aspx; ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, *supra*, at 46–48 tbl. C-2. In sum, despite popular myth, if these data are correct (they depend on counting only the count marked by plaintiff's counsel as the principle count, and they do not count counterclaims; thus, they may understate the real numbers, but by how many, we do not know) the federal courts do not face an inundation of RICO litigation, criminal or civil. Thus, we must carefully guard against generalizations from unrepresentative samples or samples that lack a statistically sufficient number for valid generalizations. Otherwise, our generalization will give rise to a logical fallacy. S. MORRIS ENGEL, FALLACIES AND PITFALLS OF LANGUAGE 74 (1994) (defining the "fallacy of hasty generalization" as the use of "an isolated or exceptional case . . . as the basis for a general conclusion that is unwarranted"); *accord* D. Q. MCINERNY, BEING LOGICAL 84 (2004) (describing the need for a large enough number of observations in order to make a "reliable generalization[ ]"). Nevertheless, we simply do not know how a representative sample of time-bar defenses in the context of civil or criminal RICO litigation would look, even if we could derive it from the current data. Impressionist generalizations by people familiar with RICO litigation across the country, at least, are possible. In fact, they are probably not terribly different from 1986 when I did a more systematic study on the civil side. *Equitable Relief*, *supra* note 29, at 619–22. If we look at reported decisions (concededly, "reported" is less than "filed," and we do not know if "reported" are representative of "filed;" likely as not, they are not representative, because they are generally invalid; valid RICO cases tend quickly to settle at least after general motion practice initiated by defense counsel, the plaintiff wins a motion for summary judgment against him, and the case is set for trial without publically reported decisions) from a *procedural perspective*, when courts dismiss civil RICO cases, they do it under pleading issues, since

Twombly in 2007 and *Iqbal* in 2009, generally for lack of "plausibility." *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (dismissing under pleading issue); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (dismissing under pleading issue). Alternatively, under Rule 9(b), courts dismiss pleadings that lack the "particulars" of fraud. Thus, these two pleading issues remain the grounds for most dismissals. From a *substantive perspective* (the categories are not mutually exclusive), since 1989, the date of the Court's decision in *H.J. Inc.*, the largest percentage of dismissals rest on a failure to plead a valid "pattern" under *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989). Two other common grounds for dismissal are failures to meet either the enterprise-defendant rule or current restrictive proximate cause standards under RICO. In sum, the problem is not, most assuredly, clients who strategically wait for the period of the limitations almost to run (however calculated) before filing, seeking to gain an unfair advantage because the defendant will lack the ability to prove his defense(s), but plaintiffs who either bring cases *too soon*, bring cases before they meet the "continuity" test for "pattern," lack learning in the substantive law, or misjudge the proximate cause issue. Courts must frame issues with the standard case in mind. Sweeting v. Am. Knife Co., 123 N.E. 82, 83 (N.Y. 1919) (Cardozo, J.) ("The average and not the exceptional case determine the fitness of the remedy."). The legal maxim is *Jus constitui oportet in his quae ut plurimum accident, non quae ex inopinato* (The law ought to be made with a view to the cases that happen most frequently, and not to those that are unexpected.). To this crucial point is the Court's wholly misleading use of an "indefinite" misunderstanding of "pattern" under the language of § 1961(5). On the contrary, § 1961(5) does not function as a traditional "definition" (either denotative (this and only this) or ostensive (this and this at least)), but as a *limitation*, as the Court itself recognized in *H.J. Inc.*, 492 U.S. at 237 ("[The definitions section] does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern . . . . It thus places an outer limit on the concept of a pattern of racketeering activity . . . ."). In fact, the Court also did not recognize this powerful point in either *Klehr* or *Rotella*, arguably recognizing silently that it would have impeded its analyses. Developing a coherent body of precedent requires attention to such detail. PAUL A. FREUND, THE SUPREME COURT OF THE UNITED STATES 188 (Meridian ed. 1961) (calling for "solidity and strength of workmanship" in the opinions of the Supreme Court). In sum, RICO does not authorize an "indefinite" pattern or validate a "pattern" with "acts occurring at up to 10-year" intervals. *Klehr*, 521 U.S. at 187. *H.J. Inc.* requires that a valid "pattern" have a logical connection ("relation") between the acts and that they reflect substantial duration ("continuity") or, depending on the circumstances, its threat. 492 U.S. at 239. Thus, RICO requires that the acts in the "pattern" reflect a logical relationship *and* substantial temporal extension. Only a fanciful imagination posits acts ten years apart having a logical connection between them *and* reflecting continuity. *But see supra* note 98. Few courts, at least on the civil side, would uphold it. For reprehensive ways court treat pattern questions, see, *e.g.*, Schlaifer Nance & Co. v. Estate of Andy Warhol, 119 F.3d 91, 97–98 (2d Cir. 1997) (holding that plaintiff did not plead a pattern since "[e]ven if there were actionable fraudulent activity, the fraudulent acts were either not sufficiently related or continuous to sustain a RICO conspiracy claim"); Feinstein v. Resolution Trust Corp., 942 F.2d 34, 44–45 (1st Cir. 1991) ("[The] plaintiffs' RICO claim founders on the bald assertion that these two episodes, nearly two years apart in time, hundreds of miles apart in space, and involving two largely distinct groups of participants were part of a unitary scheme."). In sum, the Court's misleading illustra-

4. Discovery Rule

The discovery rule is the judicially formulated general federal accrual rule, and courts usually apply it when a statute does not specify, as too often they do not, when a claim for relief accrues.[370] Under the discovery rule, as usually applied to civil RICO, a claim for relief accrues when the plaintiff knows (or should have known) of his injury.[371] The usual form of the rule also includes the separate accrual doctrine, that is, for each "new and independent injury" that the plaintiff suffers, a separate claim for relief and a separate period of the statute of limitations accrues.[372] In *Compton v. Ide*,[373] the Ninth

tion of an "indefinite" pattern, crucial to its argument, is unpersuasive, particularly in its ignoring the distinct possibility of an intervening suit by the victim or, equally or more plausibly, an indictment by the government; it is purely and solely notional. To borrow a phrase from Judge Learned Hand, "[i]t is an unreal dream." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Policy ought not to perch so precariously on such a gossamer web of imagination. Even then, the Court could easily have remedied the supposed defect by adding to its rule the doctrine of separate accrual, as the lower courts have done with some regularity in RICO litigation. *See infra* note 376. That alone would disincentivize the plaintiff from a late filing, one of the Court's central concerns to the exclusion of the justness of the claim. Changing the point of accrual itself is hardly necessary to remedy an unlikely distortion in the operation of the rule. In addition, the hypothetical fails to include any evaluation of whose conduct in fact makes the "pattern" "indefinite;" it focuses on the victim's conduct in waiting to file his suit, and it ignores the defendant's conduct in creating a pattern of repetitive, lengthy criminal conduct of a RICO dimension. On the Court's supposition, he is an ongoing, serial offender, for whom little regard is justly due. Contouring a time bar is a matter of balancing many interests, as these material amply show. The Court does not strike *any* balance here. In brief, the Court's evaluation of its analysis is considerably less than persuasive. As Judge Learned Hand described Justice Cardozo: "like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it himself." LEARNED HAND, THE SPIRIT OF LIBERTY 131 (Irving Dillard ed., reprt. 3d ed. 1989) (1974). These two opinions do not reflect Cardozo's estimable standards of analysis. Equally important, Judge Hand also said of criticisms of the judiciary: "Let . . . [us] be severely brought to book, when . . . [we] go wrong, but by those who will take the trouble to understand." *Id.* at 110. This Article seeks to understand. As Hand again commented, "it is also fair to ask that before the judges are blamed they should be given credit of having tried to do their best." *Id.* Neither of these opinions is characteristic of Justice Souter or Justice Breyer, both of whom are generally careful and thoughtful. Justices (as well as judges) have too little time to do the most demanding work. Time pressures alone can produce less than stellar work. In fact, it is remarkable how well the Court does its work. It deserves and merits our respect and gratitude. A professor writes at times and places of his or her own choosing. The judiciary does not. *See infra* notes 625–27.

370 *See, e.g.*, La Porte Constr. Co., Inc. v. Bayshore Nat'l Bank, 805 F.2d 1254, 1256 (5th Cir. 1986).

371 *See, e.g.*, Grimmett v. Brown, 75 F.3d 506, 510 (9th Cir. 1996).

372 *Id.*

Circuit was the first circuit to face the issue and to adopt the discovery rule. Finding no authority for when a civil RICO action accrues, it imposed the general accrual rule that the period runs from when the plaintiff knows (or has reason to know) of his injury.[374] In *Bankers Trust Co. v. Rhoades*,[375] the Second Circuit further developed the rule by duly modifying it by the separate accrual doctrine.[376] Even though the Court in *Rotella* refused to anoint the discovery rule in light of

373 732 F.2d 1429 (9th Cir. 1984), *abrogated on unrelated grounds by* Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987) (adopting a uniform four-year limitations period for civil RICO claims).

374 *Id.* at 1433.

375 859 F.2d 1096 (2d Cir. 1988).

376 The opinion provides this succinct explanation of the separate accrual rule:

> [A] plaintiff's action accrues against a defendant for a specific injury on the date that plaintiff discovers or should have discovered that injury. At a later date, when a new and independent injury is incurred from the same violation, the plaintiff is again "injured in his business or property" and his right to sue for damages from that injury accrues at the time he discovered or should have discovered that injury.

Id. at 1103 (citations omitted). Relying on the Court's analysis of the antitrust accrual rule in *Zenith*, the *Bankers Trust* court also held that RICO plaintiffs could recover for future damages, but only those damages that were not too speculative; otherwise, the claim for relief for them did not accrue until they suffered the damages. *Id.* at 1104 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971)).

Not all circuit courts agree with the Second Circuit's interpretation of *Zenith*. In *Grimmett*, the Ninth Circuit observed:

> [W]e disagree with the Second Circuit's interpretation of *Zenith*. *Zenith* dealt with lost future profits, which cannot be calculated until they are incurred—the uncertainty arose because future market conditions, upon which damages depended, had yet to unfold. In *Bankers Trust,* however, the RICO plaintiff had sustained a definable injury—the uncertainty in that case involved whether and to what extent the known injury would be mitigated by a bankruptcy court. In one, the injury is speculative because it is not known whether it will occur at all; in the other, the injury has occurred and is known, but it is speculative whether the damages might be reduced or even eliminated by alternative recovery efforts. We believe it would be error to equate the two.

Grimmett, 75 F.3d at 517.

In sum, the court draws a distinction between uncertainty as to the *fact* of damages, which is fatal to the claim, and uncertainty as to the *extent* of damages, which is not fatal. Instead, the court usually uses another measure of the damages. Thus, the *fact* of damages must not be speculative, but the court used a relaxed standard for proving the *amount* of damages, as a defendant should not be able to profit from an uncertainty created by his own illegal conduct. *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981) (accepting uncertainty as to the amount of damages in an antitrust setting). Before the 1971 *Zenith* decision referred to above, the Court had previously heard the matter, and in the course of remanding the case to the Seventh Circuit, the Court recognized that the amount of damages in an anti-

Justice Scalia's support of the injury-occurrence rule, that is, the pure Clayton Act rule; in contrast, the circuits uniformly follow the duly modified discovery rule for civil RICO.[377]

The discovery/separate accrual rule is eminently preferable to the pure Clayton Act or injury-occurrence rule. To be sure, RICO took the Clayton Act's language to implement the treble damage concept in its version of a private enforcement mechanism. At the same time, the objectives are kindred: a marketplace where freedom, not collusion, is the goal (antitrust) and violence and fraud are the exception, not the rule (RICO). The parallelism is substantial, and readily conceded, but crucial differences remain; they come to the forefront, too, at the point of accrual. While I briefly considered the evaluation of the choice of law problem facing state courts under state RICO statutes without special statutes of limitation and an evaluation of the two individual accrual rules already rejected by the Court, they merit a more extensive review at this point against the backdrop of either the pure Clayton Act or injury-occurrence rule or a modified (separate accrual) discovery rule. First, the *substantive* elements to which the Clayton Act adds its treble damage remedy are distinctly dissimilar from RICO's substantive elements, in particular in RICO's unique requirements of "enterprise" and "pattern," for which the antitrust statutes have no counterpart. For that matter, neither does medical malpractice, the *Rotella* Court's invocation of it as an analogy to the contrary notwithstanding.[378] Second, having differing substantive elements is only one aspect of the difference. However disparate the substantive elements, proof of them is where the theoretical becomes the

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trust setting will be unclear, but that this does not prevent recovery. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 123–24 (1969).

377 *See* Cetel v. Kirwan Fin. Grp., 460 F.3d 494, 507 (3d Cir. 2006); Living Designs, Inc. v. E.I. Dupont De Nemours & Co., 431 F.3d 353, 365 (9th Cir. 2005); Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n, 377 F.3d 682, 688 (7th Cir. 2004); Taylor Grp. v. ANR Storage Co., 24 F. App'x 319, 325 (6th Cir. 2001); Pac. Harbor Capital, Inc. v. Barnett Bank, N.A., 252 F.3d 1246, 1251 (11th Cir. 2001) (assuming that the discovery rule applies without deciding); Love v. Nat'l Med. Enters., 230 F.3d 765, 774–75 (5th Cir. 2000); Lares Grp., II v. Tobin, 221 F.3d 41, 44 (1st Cir. 2000); Lanza v. Merrill Lynch & Co. (*In re* Merrill Lynch Ltd. P'ships Litig.), 154 F.3d 56, 58 (2d Cir. 1998) (citing *Bankers Trust Co.*, 859 F.2d at 1102); Detrick v. Panalpina, Inc., 108 F.3d 529, 537 (4th Cir. 1997); *see also* Chalabi v. Hashemite Kingdom of Jordan, 503 F. Supp. 2d 267, 273 (D.D.C. 2007) (citing Rotella v. Wood, 528 U.S. 549, 555 (2000)); Wal-Mart Stores, Inc. v. Watson, 94 F. Supp. 2d 1027, 1033 (W.D. Ark. 2000) (demonstrating application of the discovery rule by a district court within the Eighth Circuit). *But see* Cory v. Aztec Steel Bldg., Inc., 468 F.3d 1226, 1234 (10th Cir. 2006) (declining to decide between discovery rule or injury occurrence rule).

378 *See Rotella*, 528 U.S. at 556.

practical, thinking becomes doing. Proof of injury to business or property is relatively straightforward. It is, after all, injury to *your* business or property.

Typically, the rest of the story is hardly straightforward in a sophisticated RICO case. A private investigation is largely limited to searching public electronic databases, asking questions, often of witnesses who do not want "to get involved," and seeking access to books and papers. Other people have no duty to cooperate with you. Developing investigative hypotheses are easy enough; they require only experience in the fields of endeavor and imagination. (That said, imagination is often in scarce supply.) In any event, proof of them—that will stand up in court—is another matter. Suspicion is not enough. Under Rule 8, allegations must ring "plausibly."[379] A plaintiff is, of course, as *Rotella* indicates, free to plead, under Rule 11(b)(3), facts on evidence reasonably anticipated upon further investigation after discovery. Nevertheless, those facts are likely limited to electronic or paper records (e.g., daily diaries, travel records, and routine e-mails, toll records, etc.) or other matters required by normal accounting standards for regularly run businesses (e.g., requisition requests or justifications, cancelled checks, check ledgers, account books, and accountant's or tax consultant's papers, etc.). Absent a whistle-blower—the unusual case in white-collar fraud—to establish the inner workings of conspiracies, as a rule, requires the plaintiff to rely on circumstantial evidence.[380] In sum, in modern times, the pirates of white-collar crime do not sign "articles of agreement" or a

379 Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556–58 (2007).

380 *See* Blumenthal v. United States, 332 U.S. 539, 556–58 (1947) (asserting that because "[s]ecrecy and concealment are essential features of [a] successful conspiracy," circumstantial evidence is admissible to prove a conspiracy); *see also* Hamling v. United States, 418 U.S. 87, 124 (1974) ("[T]he jury was entitled to conclude that the individual petitioners, as corporate officials directly concerned with the activities of their organizations, were aware of the mail solicitation scheme, and of the contents of the brochure. The evidence is likewise sufficient to establish the existence of a conspiracy to mail the obscene brochure. The existence of an agreement may be shown by circumstances indicating that criminal defendants acted in concert to achieve a common goal."). Nevertheless, circumstantial evidence, in white-collar type offenses, often points in different directions; unlawful conspiracy, yes; but also, routine lawful conduct. For example, prosecutors have found proof of knowledge or belief of the stolen character of property in fencing investigations and trials particularly vexing. Ostensibly, the transaction looks no different than a lawful exchange of property. How do you show the state of mind of the fence? In a narcotics investigation and trial, the character of the drugs usually speaks for itself; the offender seldom has a similar lawful transaction to act as a front for his unlawful conduct. Circumstantial evidence alone is seldom sufficient to point to criminality. Additional evidence is

pirate's code.[381] The tools of private civil investigation compared to

necessary. *See generally*, G. Robert Blakey & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. LAW REV. 1511, 1562–92 (1974).

381 That criminals would sign articles of agreement is—to say the least—counter-intuitive. Yet eighteenth century pirates apparently drafted, signed, and posted them, usually on the door of the grand cabin. They used them to settle among them the basic exigencies of their voyages, including leadership roles, discipline, specifications for each crewmate's share of treasure, and compensation for the injured. Few articles survive, as the pirates typically destroyed them before capturing naval crews could seize them. CHARLES JOHNSON, A GENERAL HISTORY OF THE ROBBERIES & MURDERS OF THE NOTORIOUS PIRATES 180–81, 278, 314 (David Cordingly, ed. 1998) (1724) collects or reconstructs "Articles of Agreement" for several infamous pirates; they are absorbing to read. At first, historians thought of Johnson's book, an instant best seller, as a mixture of fact and fancy. Time corroborated most of his stories. Thus, we may safely say, "[T]he majority of facts in Johnson's History have proved to be accurate." David Cordingly, *Introduction* to JOHNSON, *supra*, at vii, ix.

The nearest equivalent in modern times is street gangs that have written codes of conduct. The extensive code of the Latin Kings is illustrative. *United States v. Olson*, 450 F.3d 655 (7th Cir. 2006) (affirming RICO murder and drug convictions) describes the Latin Kings' code:

> The Latin Kings are a national criminal organization (often called the "Nation") based in Chicago, with chapters in many states. The chapters follow a written Constitution and Manifesto (collectively, the "Manifesto") that set forth the rules for membership and a code of conduct to which members must adhere. The Manifesto describes, among other things, the hierarchy that rules the national and local chapters of the organization, the colors and symbols that are to be worn and displayed by members, and certain hand gestures that indicate allegiance to the group. A five-pointed crown is the national emblem of the Latin Kings; black and gold are the official colors of the group. According to the Manifesto, a fist on the heart is the national salute, a gesture meaning, "I die for you." Another Latin Kings gesture known as "the crown" involves displaying the fingers of one hand in a configuration that resembles a crown. The Latin Kings have a national flag, several official prayers, and a set of trial procedures to be used when a member commits an offense. The Latin Kings code of honor denies membership to anyone who has killed a member of the group or killed a relative of a member. The Manifesto also ostensibly excludes as members rapists and men who are addicted to heroin.
>
> On the national level, the Latin Kings are led by an executive committee known as the Crown. The Crown is headed by the Sun King, a leader chosen by the Crown as a whole. The Crown has the authority to make laws for the entire Latin Kings organization, which is further subdivided into chapters. Each chapter is led by an Inca who has the authority to make rules for his own chapter but not for the Nation. So long as he abides by the Nation's laws, the Inca has absolute authority over his chapter and also bears responsibility for the actions of his chapter. Next in command at the chapter level is the Cacique (also called the Casinca), whose duty is to make certain that the Inca's orders are carried out. The Cacique takes on the Inca's role if the Inca is imprisoned or dies, although the Inca retains ultimate

> authority if his absence is due to imprisonment. The Inca and Cacique are elected by the members of the chapter. Each chapter also has an Enforcer, a Treasurer and a Secretary, each appointed by the Inca and Cacique. The Enforcer is in charge of "security" for every member of the chapter and ensures that members obey the Nation laws and the orders of the Inca and Cacique. Any member who publicly discredits the Inca or Cacique may be charged with conspiracy and treason. Latin Kings may not wear anything that can be construed as being an emblem of another organization. Members are admonished to protect the lives and reputations of all other Nation members, not to discuss Nation business with outsiders, and not to submit to lie detector tests. The Nation is apparently wary of the press but not entirely opposed to publicity; one rule forbids giving press interviews on Nation business without prior approval. According to the Manifesto, any member who cooperates with the police will be expelled from the group. In practice, that expulsion invariably is accompanied by beatings (called "violations" in Latin Kings parlance) and is sometimes accomplished by murder. The Manifesto also mandates that "No King shall stand idle when another King is in need of assistance."

Id. at 661–62.

In October 1968, William G. Lambert, an investigative reporter for *Life* Magazine, learned from a government official of a financial relationship between Justice Abe Fortas and Louis Wolfson, the financier. Lambert pieced together that Mr. Fortas accepted a $20,000 fee from Wolfson's family foundation. In fact, the contract required Wolfson, through the front of the Foundation, to pay $20,000 a year for Fortas's life and then for his wife's life for unspecified advice. According to Lambert's *Life* article, Fortas received the money and kept it for eleven months, but returned it after a grand jury indicted Wolfson on stock fraud. William Lambert, *The Justice . . . and the Stock Manipulator*, LIFE, May 9, 1969, at 32, 35. Attorney General John Mitchell gave the article to Chief Justice Earl Warren. Fortas resigned from the Court nine days after the article appeared. Lambert won the George Polk award for the article. The story of the agreement and the resignation is told in ROBERT SHOGAN, A QUESTION OF JUDGMENT (1972) and LAURA KALMAN, ABE FORTAS (1990). Depending on your perspective, the Fortas contract is one of the nearest examples of a white-collar-crime pirate's agreement in modern history.

The successful use of RICO against urban street gangs begins in the early 1990s. Matthew Purdy, *Using the Racketeering Law to Bring Down Street Gangs*, N.Y. TIMES, Oct. 19, 1994, at A1; *see, e.g.*, United States v. Wong, 40 F.3d 1347, 1365 (2d Cir. 1994) (considering application of Juvenile Delinquency Act to RICO for Asian street gang engaged in extortion, armed robbery, kidnapping, and murder). It continues. *See, e.g.*, United States v. Palacios, 677 F.3d 234, 238 (4th Cir. 2012) (upholding prosecution of member of street gang La Mara Salvatrucha or MS-13 under RICO and murder under 18 U.S.C. § 1959(a)(5) and the imposition of life sentence). *But see* United States v. Nascimenito, 491 F.3d 25, 51 (1st Cir. 2000) (upholding a RICO prosecution of non-economic activity against vigorous challenges on commerce grounds; "[w]e add only that while this case may venture near the outer edge of conduct encompassed by the RICO statute, Stonehurst's activities do not cross that line"). *See generally* Jessica M. Vaughn & Jon D. Feere, *Taking Back the Streets: ICE and Local Law Enforcement Target Immigrant Gangs*, CENTER FOR IMMIGRATION STUDIES 4–5 (2008) ("The most notorious [street gang] is MS-13 . . . . The history of MS-13 is . . . unique,

public criminal investigation are a pale image of its public twin where law enforcement has extraordinary techniques to gather pre-indictment evidence of sophisticated crime (e.g., informants, wiretaps, grand juries, and plea-bargaining to switch insider witnesses, etc.).[382]

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and its proclivity for violence is . . . unprecedented, but many of the activities, traits, and mind-sets of its members are fairly typical of other immigrant gangs. MS-13 is considered by law enforcement to be the fastest-growing and most violent street gang in the United States. Wherever MS-13 goes, violence follows. Gang members have carried out beheadings and grenade attacks in Central America and have hacked people with machetes in cities along the East Coast in the United States. According to the FBI, MS-13's motto is, 'Mata, Viola, Controla,' or, 'Kill, Rape, Control.' By some accounts, MS-13 has 'mushroomed into the size of a small army.' The FBI estimated in 2005 that there were approximately 10,000 'hardcore' members of MS-13 in the United States. Estimates of the number of gang members in Central America and Mexico range from 50,000 up to 300,000 members. A significant percentage are [sic] part of MS-13. The exact meaning and origin of the gang's name are unclear. The name 'Mara Salvatruchas' has been translated as meaning a 'gang' (*mara*) of 'street-tough Salvadorans' (*salvatruchas*). The '13' represents the letter 'M' which indicates an allegiance to the Mexican Mafia, the southern California prison gang."). Gang prosecutions under RICO also now focus on prison gangs. *See, e.g.*, United States v. Stinson, No. 07-50408, 2011 U.S. App. LEXIS 17979 (9th Cir., Aug. 26, 2011) (upholding convictions under § 1962(d) and the imposition of life sentences); Tori Richards, *Aryan Brotherhood Leaders are Convicted in Murders*, N.Y. TIMES (July 29, 2006), http://www.nytimes.com/2006/07/29/us/29aryan.html?pagewanted=print ("[The] trial testimony painted a picture of a ruthless cadre of villains who routinely ordered assassinations of rivals and their own member for such perceived ills as disrespect, homosexuality or failing to follow orders . . . . A parade of former Aryan Brotherhood member testified about life in the gang and how they used methods like lip reading, invisible ink or lawyer mail privileges to pass messages that ordered killings.").

382 JEFF COEN, FAMILY SECRETS (2009) and ANTHONY M. DESTEFANO, THE LAST GODFATHER (2006) graphically bring out the indispensable role that these crucial techniques uniquely play in sophisticated investigations, particularly the role of plea bargaining to switch insider witnesses. In fact, criminal RICO prosecutions did not begin with regularity until around 1975, but since then, they are running at the rate of about 125 per year. Roughly thirty-nine percent are in the organized crime area (not Mafia alone, but also drugs, gambling, labor racketeering, etc.), while forty-eight percent have been in the white-collar crime area (corruption of government, general fraud in the private sector, securities and commodities fraud, etc.). Thirteen percent fall into other categories (violent groups, including terrorists, white-hate, anti-Semitic, etc.). *See* G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposal for Reform: "Mother of God–Is This the End of RICO?,"* 43 VAND. L. REV. 851, 1020 (1990). These modern successes in the organized crime area were not characteristic of those prosecutions that came before the innovations of 1968 (*e.g.*, wiretapping) and the early 1970s (*e.g.*, witness protection program, RICO, sentencing guidelines, etc.). Consider a statement of President Richard M. Nixon supporting the enactment of RICO: "[n]ot a single one of the Cosa Nostra Families has been destroyed." President Richard M. Nixon, Statement in Justification, S. Rep. No. 91-617, at 45 (1969) (quoting H.R. Doc. No. 91-105, at 2 (1969) (reporting out the Organized Crime Control Act)). Then, the estimated number of

Private civil investigation is at an almost disabling disadvantage when it must fathom the existence and character of a wide variety of kinds of "enterprise(s)." As if that were not enough, it must also determine the contours of a particular "pattern," which include possibly many types of criminal acts (e.g., violence, the provision of illegal persons, goods, and services, corruption, and fraud). Significantly, too, they include offenses aimed at third parties, not all of whom are of a mind "to get involved," precisely the issue faced in any criminal investigation, but without the added benefit of pre-charge compulsory process; the private investigation must take place *before* access to even the limited character of modern civil discovery.[383] Typically, the most sophis-

made-members (not counting associates) was 3,000 to 5,000. *Id.* at 36. As of 1999, the estimated number is 1,150, 750 of which reside in New York City. Rick Hampson, *Death of the Mob*, USA Today, July 28, 1999, at 1A (reporting current data on the various families, etc.). Most of the families in cities, outside of NYC and Chicago—to the degree that they even exist—are "little more than street gangs;" in fact, the American Mafia, previously a national problem, is now largely "a two-city phenomenon . . . ." *Id.* The mob is still involved in organized crime, but it no longer possesses its vice-like grip on labor unions, including its traditional redoubts, the Teamsters, Laborers, Longshoremen, and the Hotel and Restaurant Employees. *Id.* The ubiquitous skim is gone from places such as the Las Vegas casinos. In short, while the sun is still in the sky, it is in fact twilight for the mob, as it was in the 1960s. *See generally*, JAMES B. JACOBS ET AL., BUSTING THE MOB (1994) (showing the downfall of organized crime); JAMES B. JACOBS ET AL., GOTHAM UNBOUND (1999); JAMES B. JACOBS, MOBSTERS, UNIONS, AND FEDS (2006). For the general history of the Mafia and its prosecutions in the United States, but in New York City in particular, see THOMAS REPPETTO, AMERICAN MAFIA (2004); THOMAS A. REPPETTO, BRINGING DOWN THE MOB (2006); SELWYN RAAB, FIVE FAMILIES (2005). The tools and successes of private enforcement are as ineffective as public enforcement prior to the 1970s, and they are slowly declining in light of the tightening of the limitations on civil RICO and the rising standards of federal civil pleading. *See, e.g.*, Michael Goldsmith, *Judicial Immunity for White-Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1 (1993) (demonstrating this decline).

383 Even then, as Judge Patrick E. Higginbotham says it well:

> The rules of civil procedure adopted in 1938 implemented a profound change in the role of pleading in defining issues for trial. In the main, the complaint became an ignition point for discovery. Issues were to be "defined" by discovery, not pleading. Our reverential treatment of the large achievements of the 1938 rules may not have fully counted its price, or at least the price over time seems to have gone up as pretrial process dwarfs actual trials. We do not fully understand the extent of these difficulties or their cause. It does remain clear that ready access to the discovery engine all the while has been held back for certain types of claims. An allegation of fraud is one. Rule 9(b) demands a larger role for pleading in the pre-trial defining of such claims.
>
> That said, the requirement for particularity in pleading fraud does not lend itself to refinement, and it need not in order to make sense. Directly

> put, the who, what, when, and where must be laid out *before* access to the discovery process is granted. So today we neither set springs for the unwary nor insist on "technical" pleading requirements. We remind that this bite of Rule 9(b) was part of the pleading revolution of 1938. In short, we apply the rule with force, without apology. At the same time, we read Rule 9(b) as part of the entire set of rules, including Rule 8(a)'s insistence upon "simple, concise, and direct" allegations.

Williams v. WMX Techs., Inc., 112 F.3d 175, 178 (5th Cir. 1997).

Under Rule 9(b), while each person need not make a false representation, the pleader must distinguish between the roles various individuals play in a "fraudulent scheme." Swartz v. KPMG LLP, 476 F.3d 756, 764–65 (9th Cir. 2007) (quoting Moore v. Kayport Package Express, Inc., 885 F.2d 531, 541 (9th Cir. 1989)). Pleading fraud in a "pattern" with particularity in reference to the conduct of third parties, however—either as a perpetrator or as a victim—is problematic. Circuit court decisions reflect varying attitudes on pleading fraud against third parties who do not join the RICO claim for relief, sometimes within the same circuit. *Compare* Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 778 n.5 (7th Cir. 1994) (holding that Rule 9(b) requires the delineation of roles, but that the court will relax the rule when the pleader makes allegations of fraud against a third party or where the defendant uniquely has the information), *with* Miller v. Gain Fin., Inc., 995 F.2d 706, 709 (7th Cir. 1993) (holding that under Rule 9(b), the court requires particularity in the pleading of details of third party transactions and requires more than a statement that a third party engaged in "'similar business transactions' with 'similar results'"); *accord* Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 986, 989 (10th Cir. 1992) (holding that under Rule 9(b), the court requires the pleading of the details of the claim for relief).

Pleading a "pattern" is even more challenging when the pleader must plead it with particularity under Rule 9(b). If the pleading standards were not taxing enough, substantively, the decisions often contradict each other (sometimes within the same circuit) on whether pleading patterns involving multiple victims is even possible. The decisions confuse "standing" to plead another as a victim in a "pattern" for liability purposes, that is, solely to establish the existence of the pattern, not to recover damages for the injury to the victim, where a pleading of facts about another does not implicate prudential considerations or case and controversy concerns. If the pleader sought to recover another's damages, of course, he would lack "standing" to recover such damages, and his pleading would raise prudential considerations or case and controversy concerns, but that is not the pleading faced by the courts. *Compare* Howard v. Am. Online Inc., 208 F.3d 741, 747 (9th Cir. 2000) (citing Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 n.4 (9th Cir. 1992) (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985) ("[T]he plaintiff only has standing if . . . he has been injured in his business or property by the conduct constituting the violation."))) (holding that only acts directed at plaintiff are available for liability for "pattern"), *with* Ticor Title Ins. Co. v. Florida, 937 F.2d 447, 450 (9th Cir. 1991) (holding that three forgeries in thirteen months, only one of which was aimed at plaintiff, were sufficient for a "pattern"); *accord* Terminate Control Corp. v. Horowitz, 28 F.3d 1335, 1347 (2d Cir. 1994) (dictum) (indicating that injuries against others could be counted to form a pattern); Town of Kearny v. Hudson Meadows Urban Renewal Corp., 829 F.2d 1263, 1268 (3d Cir. 1987) ("[T]he injury which confers standing on a RICO plaintiff is injury flowing from the commission of the predicate act, not injury

ticated RICO litigation also cuts across several states. Out-of-state investigations require either or both the employment of national investigative agencies and counsel in other states, multiplying investments of time and money. Finally, after the investigation concludes, with the research completed on the relevant circuits' RICO jurisprudence, often a counter-intuitive and contradictory body of law, drafting a claim for relief faces exacting standards of detailed factual pleading ("plausible" under Rule 8; particularity under Rule 9(b)). For example, the first tendency of most plaintiffs' attorneys—without solid experience in RICO litigation—is to sue the deepest pocket, which usually is the "enterprise," while RICO commonly precludes it. That tendency alone accounts for the continued presence of enterprise-person issues frequently appearing in the reported civil RICO decisions. The multi-part test for "pattern" under *H.J., Inc. v. Northwestern Bell Telephone Co.*[384] makes abundant sense on reflection, given the various functions "pattern" plays in the contours of the three substantive standards of RICO, but it is as if it were a good wine: you have to cultivate a refined judgment about it; it is hardly intuitive. Reading more than a few cases is necessary to acquire the connoisseur's cognition for "pattern." As wine experts are not legion, so, too, neither are RICO experts. That factor alone accounts for the presence of pattern issues still frequently appearing in reported cases. Nevertheless, while these factors are formidable, they are hardly insuperable. Putting to one side the required financial resources, the principal limiting factor in developing a complex RICO complaint is time—time to come to the conclusion that the injury is possibly cognizable under RICO, time to conduct an adequate pre-complaint factual investigation, time to do legal research, and, finally, time to draft a complaint that will pass muster under the inevitable and vigorous challenges under Rules 12(b) and 9(b). A private litigant faces those substantial hurdles in bringing a sustainable civil RICO with its four-year term (currently of

flowing from the pattern of such acts."); Marshall & Ilsley Trust Co. v. Pate, 819 F.2d 806, 809 (7th Cir. 1987) (holding that you can count injuries against others in establishing a "pattern"). The decisions also split between the D.C. Circuit and the Second, Third, and Seventh Circuits on whether a victim must plead a complete "pattern" against himself or whether he need only plead a "pattern" against himself and others. *Compare* Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639, 883 F.2d 132, 138 (D.C. Cir. 1989) (holding that a plaintiff must establish a pattern against himself), *rev'd. on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (en banc), *with Terminate Control Corp.*, 28 F.3d at 1347 (allowing a pattern against himself and others); *Town of Kearney*, 829 F.2d at 1268 (permitting a pattern against himself and others); *and Marshall & Ilsley Trust Co.*, 819 F.2d at 809 (holding that a pattern against himself and others is permissible).

384 492 U.S. 229, 236–49 (1989).

an uncertain accrual), while public authorities, with infinitely more resources and far more powerful investigative tools, face a five-year term (a pure event plus the set number). In sum, a pure Clayton Act rule would grievously hobble private civil RICO. To be reasonably workable, the Court would have to retool the Clayton Act rule prudently with concepts of discovery, separate accrual, etc. Then, of course, it would not be the Clayton Act rule. In fact, it would make more sense for the Court to leave in place the federal discovery rule, modified by the separate accrual doctrine, as the lower courts administer it now.

One additional point requires mention. Unless the Court adds a special qualification, the statute of limitations could begin to run under the pure Clayton Act rule or the discovery rule before a plaintiff could bring a civil claim under RICO, a fundamental objection to any rule. That said, at least one circuit court articulates a way around this troubling defect in each of the present rules. In *Limestone Development Corp. v. Village of Lemont*,[385] Judge Posner, writing for the court, did not in fact confront a situation where the plaintiff discovered his injury more than four years before the defendant committed enough predicate acts to constitute a pattern.[386] Nevertheless, as Judge Posner suggested, even if it were the case, the plaintiff would still be able to recover for his initial injury under RICO, because of the "continuing violation" doctrine.[387] The court began its analysis by terming the "continuing violation" doctrine misnamed. According to Judge Posner, "[t]he office of the . . . doctrine is to allow suit to be delayed until a series of wrongful acts blossoms into an injury on which suit can be brought. It is thus a doctrine not about a continuing, but about a cumulative, violation."[388] As an example, Judge Posner used a sexual harassment claim: "The first instance of a coworker's offensive words or actions may be too trivial to count as actionable harassment, but if they continue they may eventually reach that level and then the entire series is actionable."[389] Once the plaintiff can sue, the victim can recover for each of the instances of harassment that make up the claim for relief, regardless of when they occurred.[390] Judge Posner suggested that this principle applies to RICO.[391] Thus, by relying on the "continuing violation" doctrine, a RICO plaintiff would not have

385 520 F.3d 797 (7th Cir. 2008).
386 *Id.* at 802.
387 *Id.*
388 *Id.* at 801 (citation omitted).
389 *Id.*
390 *See id.*
391 *Id.* at 801–02.

to sue until enough predicate acts accumulate to form a cognizable pattern.[392] When that occurs, the plaintiff could recover for each injury that resulted from that pattern, even if the plaintiff had discovered them more than four years before he filed his claim for relief.[393] In sum, the option outlined in *Limestone Development* delays, in effect, the accrual of a RICO claim for relief until a cognizable pattern of racketeering in fact occurs, thus demonstrating that with knowledge, sensitivity, creativity, and a little bit of tinkering, a court can make any accrual rule workable. The only problem with Judge Posner's eminently workable and imaginative suggestion is that it looks too much like the injury-and-pattern discovery rule squarely rejected by the Court in *Rotella*.

Prior to *Rotella*, four circuits applied the injury-and-pattern discovery rule of accrual for civil RICO.[394] After *Rotella*, in *Taylor Group v. ANR Storage Co.*,[395] the Sixth Circuit adopted the injury discovery rule. Noting that it used to apply the injury-and-pattern discovery rule, the court merely adopted the discovery rule without providing an underlying rationale.[396] In *Pacific Harbor Capital, Inc. v. Barnett Bank, N.A.*,[397] the Eleventh Circuit "assume[d], without needing to decide, that the statute of limitations period starts from the date of discovery of the injury."[398] While this language leaves open the possi-

392 *See id.*

393 *See id.*

394 *See, e.g.*, Klehr v. A.O. Smith Corp., 87 F.3d 231, 238 (8th Cir. 1996) (quoting Assoc. of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (8th Cir. 1995), *aff'd on other grounds*, 521 U.S. 179 (1997)); Caproni v. Prudential Sec., Inc., 15 F.3d 614, 619–20 (6th Cir. 1994), *abrogated by* Rotella v. Wood, 528 U.S. 549 (2000); Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820 (10th Cir. 1990), *abrogated by Rotella*, 528 U.S. 549; Bivens Gardens Office Bldg., Inc. v. Barnett Bank, 906 F.2d 1546, 1554 (11th Cir. 1990), *abrogated by Rotella*, 528 U.S. 549.

395 24 F. App'x 319, 325 (6th Cir. 2001) (barring RICO claims based upon alleged fraudulent misrepresentations of the amount of money plaintiffs could receive for allowing their property to be used as a storage reservoir because the claim was filed seven years after the limitations period accrued).

396 *Id.* at 325 n.1. The Sixth Circuit previously argued for a liberal accrual rule. *See, e.g.*, Agristor Fin. Corp. v. Van Sickle, 967 F.2d 233, 238–42 (6th Cir. 1992) (emphasizing the need for a discovery rule—either the injury-and-pattern or the injury-discovery rule—because a straight injury rule could destroy a plaintiff's claim if they never discover their injury).

397 252 F.3d 1246 (11th Cir. 2001).

398 *Id.* at 1251. The analysis in the appeal turned on when the plaintiff should have known of the injury, implying that "should have known" is an element of the Eleventh Circuit's rule. Moreover, the district courts are adopting the injury-discovery rule. *See* Bocciolone v. Solowsky, No. 08-20200-CIV, 2009 WL 936667, at *6 (S.D. Fla. Apr. 6, 2009); Union Pac. R.R. Co. v. Paragon Labs., Inc., No. 06-60873-CIV, 2006 WL 3709619, at *4 (S.D. Fla. Dec. 14, 2006).

bility of adopting the pure Clayton Act rule, the court's failure to mention it suggests its preference for the injury discovery rule. In addition, earlier Eleventh Circuit decisions stress the need for a more expansive discovery rule to "properly advance[ ] the broad remedial nature of civil RICO."[399]

The remaining two circuits have not yet adopted a new accrual rule. The Eighth Circuit has not considered the question, but the district courts are following the injury discovery rule.[400] In *Dummar v. Lummis*,[401] the Tenth Circuit found it "unnecessary . . . to choose between the two rules," because in the appeal before it both the injury and its discovery occurred simultaneously.[402]

D. Tolling of Civil Statutes of Limitations

1. Tolling

"Tolling doctrines stop the statute of limitations from running even if the accrual date has passed."[403] While statutes of limitation tip

399 *Bivens Gardens Office Bldg., Inc.*, 906 F.2d at 1555 (adopting the injury-and-pattern discovery rule because of the expansive nature of RICO and because the rule delays accrual until the civil plaintiff discovers that they can bring a RICO claim), *abrogated by Rotella*, 528 U.S. 549.

400 *See, e.g.*, Bendzak v. Midland Nat'l Life Ins. Co., 440 F. Supp. 2d 970, 979–80 (S.D. Iowa 2006) (noting the lack of a ruling by the appellate court following *Rotella*, but adopting the injury-discovery rule given its relationship with the injury-and-pattern discovery rule that was previously applied by the Eighth Circuit).

401 543 F.3d 614 (10th Cir. 2008). Its statement about not choosing was but an echo of its holding two years earlier in *Cory v. Aztec Steel Building, Inc.*, 468 F.3d 1226, 1234 (10th Cir. 2006) ("The statute of limitations for a RICO action is four years. While the Supreme Court has not settled upon a definitive rule for when the limitations clock starts running, it has announced two possibilities: either when the plaintiff knew or should have known of his injury (the injury-discovery rule); or when the plaintiff was injured, whether he was aware of the injury or not (the injury-occurrence rule). We need not choose between these rules today because the result is the same no matter which rule is applied." (citations omitted)).

402 *Dummar*, 543 F.3d at 621. The appeal concerned the estate of Howard Hughes, the billionaire recluse who lived in Las Vegas, NV. The plaintiff alleged that he was entitled to a portion of the Hughes estate. *Id.* at 616. He claimed that in late 1967 he picked up a semiconscious and bloodied man on the side of a Nevada road who identified himself as Howard Hughes. *Id.* at 617. After the billionaire's death in 1976, the plaintiff received a handwritten "will" from Hughes that identified him as a one-sixteenth beneficiary of the billionaire's estate. *Id.* Thirty years after a trial that invalidated the will, but after receiving information regarding misconduct related to the first trial, Dummar filed the suit. *Id.* His claim for relief was time-barred. *Id.* at 621.

403 Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450 (7th Cir. 1990). *Cada* is an enormously important decision. The Supreme Court knows of it, and it frequently

the balance in favor of defendants, tolling doctrines reset the balance when circumstances beyond the plaintiffs' control prevent them from filing suit within the limitations period. Thus, in the civil RICO context, even though the four-year period accrues and four years pass, one of two doctrines, grounded in equity, can save the claim for relief from time-barring: (1) equitable estoppel and (2) equitable tolling.[404]

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cites it. In fact, as of February 16, 2013, the Court itself had cited *Cada* five times; lower court decisions and other legal materials have cited it 2389 times. It has graced five separate Supreme Court cases, three times in the majority opinion, once in a dissent, and once in both the majority opinion and the dissent. *See* Holland v. Florida, 130 S. Ct. 2549, 2561, 2570 n.2 (2010) (referring to *Cada*'s statement that a court "'must . . . distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations'" and concluding that *Cada* relies "on a distinction between accrual rules and tolling that we have since disregarded" (quoting *Cada*, 920 F.2d at 450)); John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 133 (2008) (citing *Cada* for equitable tolling doctrine); Wallace v. Kato, 549 U.S. 384, 401–02 (2007) (Breyer, J., dissenting) ("Where a 'plaintiff because of disability, irremediable lack of information, or other circumstances beyond his control just cannot reasonably be expected to sue in time,' courts have applied a doctrine of 'equitable tolling.' The doctrine tolls the running of the limitations period until the disabling circumstance can be overcome . . . [which] is why the limitations period does not run against a falsely arrested person until his false imprisonment ends. His action has certainly accrued because . . . he can file his claim immediately if he is able to do so." (citations omitted)); Klehr v. A.O. Smith Corp., 521 U.S. 179, 184 (1997) ("[The statute of limitations had run] unless [the plaintiffs's] claim had accrued within the four years prior to filing . . . or unless some special legal doctrine nonetheless tolled the running of the limitations period or estopped [the defendant] from asserting a statute of limitations defense." (citing Holmberg v. Armbrecht, 327 U.S. 392, 396–97; Bailey v. Glover, 88 U.S. 342, 349–50 (1874); *Cada*, 920 F.2d at 450–51)); United States v. Ibarra, 502 U.S. 1, 4 n.2 (1991) ("Principles of equitable tolling usually dictate that when a time bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped." (citing *Cada*, 920 F.2d 446)). Even discounting *Cada*'s citations in the district courts of the Seventh Circuit, the sheer number of citations is impressive. Typically, the courts of appeals and the district courts cite it, follow it, or distinguish it. That said, two circuit courts of appeals disagree with it, the Third and the Ninth Circuits. *See* William A. Graham Co. v. Haughey, 646 F.3d 138 (3d Cir. 2011), *cert. denied* 132 S. Ct. 456; Socop-Gonzales v. INS, 272 F.3d 1176 (9th Cir. 2001) (en banc).

404 Other tolling doctrines delay or extend the period of a statute of limitations under federal or state law. Often, no difference exists, because, as a default rule, in the absence of directions from Congress, federal claims for relief adopt state tolling laws. *See* Johnson v. Ry. Express Agency, Inc., 421 U.S. 454, 463–64 (1975). State law is merely a guide, however, and "considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." *Id.* at 465. Thus, plaintiffs toll the statute of limitations for (1) **duress**, *see, e.g.*, Overall v. Estate of Klotz, 52 F.3d 398, 404–05 (2d Cir. 1995) (denying plaintiff's pleading for duress tolling in a case alleging assault and battery,

The tolling doctrines provide an avenue to prevent injustice on a case-by-case basis.[405] Courts argue, however that the use of the doctrines "must be guarded and infrequent," because "[t]o apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation."[406] While important, to what degree the Court should use them to avoid the difficult issues surrounding accrual in RICO claims for relief remains an open question. Indeed, apparently, the lower courts do not fully understand the doctrines, nor have the appellate courts fully developed them.

Moreover, the greatest confusion is not in substance, but in labels or classification.[407] In *Cada v. Baxter Healthcare Corp.*,[408] Judge Posner

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false imprisonment, and intentional infliction of emotional distress, because defendant's conduct did not "constitute[ ] a continuation of the underlying tort," as required by state law); *see also* R.L. v. Voytac, 971 A.2d 1074, 1086 (N.J. 2009) (stating that duress usually requires more than a single threat by the defendant at the time of the injury); (2) **incompetence**, *see, e.g.*, Ferguson v. State, 677 S.E.2d 600, 601 (S.C. 2009) (tolling the statute of limitations only when incompetence prevents timely filing); Commonwealth v. Stacey, 177 S.W.3d 813, 817 (Ky. 2005) (allowing for tolling if the incapacitation preventing a timely filing was "both beyond the petitioner's control and unavoidable despite due diligence"); (3) **infancy**, *see, e.g.*, Shelnut v. Dep't of Human Servs., 9 So. 3d 359, 366 (Miss. 2009) (tolling statutes of limitation until the child is no longer a minor); and (4) **incarceration**, *see, e.g.*, Rose v. Hudson, 63 Cal. Rptr. 3d. 248, 255–56 (Ct. App. 2007) (tolling the statute of limitations for up to two years if the claimant is incarcerated). Such incapacities have deep roots. *See* HOLLAND, 292 *supra* note 42 ("[The period of running] may be interrupted, or prevented from running by various causes, such as the minority, imprisonment, or absence from the country of the person who would otherwise be affected by it.")

405 *See, e.g.*, *Rotella*, 528 U.S. at 560–61 (2000) (explaining how "equitable principles of tolling" can remedy the occasional civil RICO case where the plaintiff is unable to plead fraud with particularity or where the plaintiff was unaware of the required pattern element of the RICO claim).

406 Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000); *see also Rotella*, 528 U.S. at 561 ("The virtue of relying on equitable tolling lies in the very nature of such tolling as the exception, not the rule."). The concomitant vice of the exception to the rule is its reliance on the judgment of district courts to apply the exception and not the general rule when they are arguably generally inhospitable to complex litigation and in particular to RICO.

407 *Cada*, 920 F.2d at 452 ("Many cases . . . fuse the two doctrines, presumably inadvertently.").

408 *Id.*

In *Jay E. Hayden Foundation v. First Neighbor Bank, N.A.*, 610 F.3d 382 (7th Cir. 2010), Judge Posner writes a mini treatise on the relation between RICO, its period of limitations, and various tolling doctrines. For this reason, it warrants careful analysis. A foundation created by Jay Hayden, the estates of his mother, and another woman brought suit under RICO against a bank, two law firms, and seven persons connected with either the firms or the bank. *Id.* at 383. Not sued was Robert Cochonour, the

principal offender in the swindle (the bank, the law firms, and the individuals were at least in a conspiracy with him), who eventually went to prison over the looting of Hayden's estate. *Id.* Cochonour, the executor (and subsequently an Illinois state judge), plead guilty to looting the estate of more than $100,000 between 1985 and 1990, for which he went to prison (probably the reason he was not sued; by the time he got to prison, he was in all likelihood penniless). *Id.* at 384. While the fraud began in 1985, the plaintiffs argued that they, suitably diligent, did not learn of it until May 5, 2004, four years before they filed suit; but if the court rejected that argument, the plaintiffs also argued that the defendants prevented them from obtaining information essential to the filing of a complaint that would withstand dismissal. *Id.* The time-bar arguments required the court to assess the period of limitations, the point of accrual, and the contours of equitable estoppel. The defendants argued in the alternative, assuming the court rejected their time-bar arguments, that the complaint did not plead a valid association-in-fact enterprise, a point not necessary to resolve if the complaint was time-barred.

First, the court found that the defendants could raise the running of the period of limitation, an affirmative defense that the defendants must usually plead and prove, on the face of the complaint, "if it is plain," under a Rule 12(b) motion to dismiss. *Id.* at 383 (citing Jones v. Bock, 549 U.S. 199, 214–15 (2007)). The period of limitations was four years. *Id.* (citing Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 156 (1987)). The court did not explicitly decide at first whether the point of accrual was discovery, actual or reasonable, or event; it went immediately to equitable estoppel. *Id.* at 385. Recognizing that a "plaintiff [prevented by the defendant] from obtaining information that he needs . . . to be able to file a complaint that will withstand dismissal is forbidden[ ] under . . . equitable estoppel[ ] to plead the statute of limitations for the period in which the inquiry was thwarted," *id.* (citing *Cada*, 920 F.2d at 450–52) (other citations omitted), "[b]ut if the obstructive behavior occurs *after* the plaintiff's inquiry has reached the point at which he has discovered[, or by exercise of reasonable diligence would have discovered,] that he has a claim . . . , the defendant's obstructionism has no causal significance, and so is not a ground for an estoppel." *Id.* (citations omitted). So, too, the defendant's behavior has no significance if it was ineffectual in preventing the plaintiff from learning the truth. *Id.* The court then recognized a split in the circuits on estoppel and due diligence as a defense where the defendant's conduct was deliberate. *Id.* (Some think that it makes a difference on due diligence and do not permit the deliberate defendant to raise the plaintiff's lack of due diligence; they reason that if the defendant's conduct is deliberate and the plaintiff's conduct is only negligent, it is not a defense, "just as a plaintiff's contributory negligence is not a defense to an intentional tort." *Id.* at 585–87 (referring to Shropshear v. Corp. Counsel of Chicago, 275 F.3d 593, 597 (7th Cir. 2001))). The court then recognized that the Court in *Klehr*, 521 U.S. at 193–96, required due diligence for RICO, even though the defendant's conduct was deliberate, because, the Court taught, RICO protects not only private rights, but serves "important public purposes." *Id.* at 385–86. Rightly, as a lower court, the court did not second-guess the appropriateness of the Court's balancing of the plaintiff's negligence against the defendant's deliberate conduct, and how it struck the balance against a plaintiff whose enforcement role Congress had favored. *See supra* notes 29, 42. The court then observed:

> The plaintiffs mistakenly contend that a limitations period does not begin to run until the precomplaint investigation is complete, which may

> not have been until 2005, three years before they sued. Actually it starts running when the prospective plaintiff discovers (or should if diligent have discovered) both the injury that gives rise to his claim and the injurer or (in this case) injurers. The plaintiffs had discovered or should have discovered these things by the summer of 2003. Armed with the information obtained by then they should have been able to complete well within the four-year statutory period an investigation that would have unearthed enough facts to enable them to file a suit that would withstand dismissal. They could then have used pretrial discovery to beef up their claim. A plaintiff is not required to have collected, *before* he files suit, all the evidence he needs in order to win the suit. Otherwise the civil procedure rules would have to authorize precomplaint discovery rather than just pretrial discovery. . . . [T]he injury arising from the first predicate act to injure the plaintiff . . . starts the limitations period running, rather than the injury from the last predicate act, which might occur decades after the first. And the victim doesn't have to know he's been injured by a RICO violation, which is to say by a *pattern* of racketeering activity (that is, a series of predicate acts). The scope and nature of his legal claims are what he has four years to discover, or more (through invocation of tolling doctrines) if he really needs it. For remember that it's the discovery of the injury (and injurer), not of the facts that establish a particular legal theory, that starts the limitations period running; the limitations period is the time allowed to the plaintiff for determining the specific violation upon which to base a suit. . . . [W]e said that the defendants' obstructive behavior may have prevented the plaintiffs from obtaining enough information before 2005 to know they'd sustained a legal injury and by whom it had been inflicted. But that did not automatically give them four more years to sue. Tolling doctrines need not extend the date on which the statute of limitations begins to run; for as soon as the tolling events cease—in a case of equitable estoppel, as soon as the defendants' obstructive behavior ceases—the plaintiffs should get to work and file suit as soon as is practicable, in order to minimize the inroads that dilatory filing makes into the policies served by statutes of limitations. . . .
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> In a RICO case . . . the plaintiff should not be entitled to an automatic extension of the statute of limitations by the length of the period of concealment by the defendants. The injury on which the present suit is based occurred many years before the statute of limitations would have run had it not been for that concealment, for otherwise the plaintiffs would have discovered the fraud; and it is discovery that starts the limitations period running. To litigate a claim so long after the events giving rise to it is bound to be difficult because of lost evidence and faded memories, and the difficulty would be needlessly augmented had the plaintiff no duty of alacrity once the facts that the defendants had improperly concealed are at last in the open. By 2005 the plaintiffs knew *so* much that they did not need three more years to complete their precomplaint investigation and file suit.

Id. at 386–88 (citations omitted).

Unnecessarily, "for the sake of completeness," the court went on—always a bad idea—to deal with the RICO enterprise issue. *Id.* at 388. Until that point, the court's decision was impeccable, but now that changes. First, the court rightly commented that *Boyle v. United States*, 129 S. Ct. 2237, 2244 (2009), made problematic the Seventh

did yeoman service for the law in a cogent opinion that reviewed the doctrines and marked off the content, differences, and labels between equitable estoppel and equitable tolling. *Cada* involved a potentially time-barred claim for relief in which the defendant Baxter Healthcare

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Circuit's extensive jurisprudence sharply distinguishing between a conspiracy and an enterprise and insisting on a substantial degree of structure in an association-in-fact enterprise. *Id.* (citing, *inter alia*, Stachon v. United Consumers Club, Inc., 229 F.3d 673, 675 (7th Cir. 2000)). Yet expressing Posner's evident disappointment with the decision, the court sullenly observed, "But . . . *Boyle* . . . throws all in doubt." *Id.* "[While] *Boyle* requires . . . 'purpose, relationship[,] . . . and longevity' . . . [t]he only difference the Court suggested between . . . a minimal RICO enterprise and a conspiracy is that conspiracy 'is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy.'" *Id.* at 388–89 (citing *Boyle*, 129 S. Ct. at 2246). Glumly, the court then conceded that the facts before it met the *Boyle* test, "if *Boyle* is taken at face value . . . ." *Id.* at 389. How else, one wonders, should a lower court take a Court's considered opinion? Surely, Judge Posner was aware that the Supreme Court knew precisely what it did when it rejected the *Bledsoe* line of case requiring an "ascertainable structure" as a surrogate for an organized crime limitation. *See supra* note 46. The court again should have said only enough to decide the appeal. Unwisely, the court then commented, "the RICO offense is *using* an enterprise to engage in a pattern of racketeering activity . . . [, an] element . . . conspicuous by its absence from this case." *Id.* (citations omitted). It went on:

> Conceivably the defendants who were officers of the bank that is alleged to have assisted Cochonour in his fraud were using the bank (an enterprise) to commit fraud—but that is not alleged. The enterprise alleged is the conspiracy led by Cochonour, who was not using an entity separate from himself (as the bank officers were), for he was the leading conspirator—yet he is not even a defendant.
>
> A bank could be accused of fraud without also being accused of conducting itself through a pattern of racketeering activity. The defendants did not use the conspiracy (the enterprise); they were the conspiracy.

Id. On the contrary, an association-in-fact can be *both* a conspiracy *and* an enterprise. That is, after all, the point of *Boyle*. The evidence that showed one showed the other between *Turkette* and *Boyle*. *See supra* note 46. They used the "enterprise" by engaging in the conspiracy. Moreover, the court failed to recognize that the estate that the conspiracy looted was—albeit not alleged—itself an "enterprise." *Cf.* Handeen v. Lemaire, 112 F.3d 1339, 1351 (8th Cir. 1997) (holding bankruptcy estate is an enterprise). I would have to look at the complaint to see if in fact the plaintiffs plead the enterprise well, but Judge Posner shows so little inclination to give the plaintiff's complaint the benefit of a liberal construction, even under *Twombly* or *Iqbal*, that I have no faith in his opinion at this point. In sum, he would have been better off if he did not write more than he had to write to resolve the appeal. As in Field Marshal Montgomery's "Operation Market Garden" in World War II, the additional analysis was "a bridge too far." Each of us has a bad day once in a while. Even Homer nodded. *See* HORACE, ARS POETICAL, 359 (trans. A.S. Kine, 2005), *available at* http://www.poetryintranslation.com/PITBR/Latin/HoraceArsPoetica.htm (last visited March 12, 2013). ("And yet I'm displeased too when great Homer nods.").

fired Cada, allegedly in violation of the Age Discrimination in Employment Act.[409] The district court granted summary judgment.[410] The court of appeals affirmed, but only after dealing with "fascinating and important questions regarding statutes of limitations generally and the age discrimination statute of limitations in particular."[411] Cada was the manager of Baxter's "creative services" department, the principal function of which was to create the catalog of Baxter's drug products, the so-called "armamentarium."[412] He reported to Jim Becks on the catalog project, but otherwise to Jim Stauner.[413] Baxter promoted Becks to vice-president in 1987, and he secured a comprehensive report from Cada on the project. In connection with the president and other vice presidents, he used it to decide to reorganize the project, but not to retain Cada in charge of it.[414] Becks met with Cada to inform him of the reorganization and to tell him that he assumed Cada planned to retire because he was approaching 65. Cada responded that he did not plan to retire.[415] Becks then told Cada that Baxter would let him go two weeks after his replacement came on board, probably in July. Cada contended he did not believe Becks had the authority to fire him and that he was not sure that Becks planned to fire him or sought to urge his early retirement.[416] Immediately after the meeting, Cada did two things: he went to human resources and obtained outplacement and benefit forms, which he filled out a few days later, and he tried to see Stauner, whom he considered his supervisor.[417] He was unable to see him until May 22 and when he did, he confirmed that Baxter had fired him and that he (Stauner) could do nothing about it.[418] On July 7, Cada's replacement appeared, a young woman whom Cada considered relatively inexperienced. Cada filed with the Equal Employment Opportunity Commission a complaint on March 4, 1988, which was more than 300 days after his meeting with Becks on May 5, 1987, but less than 300 days after his meeting with Stauner on May 22, 1987.[419] The administrative statute of limitations was 300 days.[420]

409 *Cada*, 920 F.2d at 448.
410 *Id.*
411 *Id.*
412 *Id.*
413 *Id.*
414 *Id.*
415 *Id.*
416 *Id.* at 449.
417 *Id.*
418 *Id.*
419 *Id.*
420 *Id.*

This relatively simple set of facts raised a relatively complex set of issues. First, what was the point of "accrual," that is, the point from which the 300-day period started to run, the decision by Baxter to fire Cada,[421] Becks' meeting with Cada, or Staumer's meeting with Cada? Second, if it were the meeting with Becks, that is, beyond the 300-day period, could Cada's complaint survive under the doctrines of "discovery," "equitable estoppel," or "equitable tolling?" In turn, Judge Posner considered each doctrine. According to the *Cada* opinion, the Court settled the point of accrual in *Delaware State College v. Ricks*[422] at the date of the discriminatory conduct, not the termination of employment. Thus, the 300-day period started to run, arguably, on the date that Becks met with Cada and fired him.[423] In that vein, Baxter argued that a reasonable person would have known that he fired him (Cada) at the Becks meeting.[424] Responding, Cada said he sincerely believed that Becks did not have authority to fire him or he did not know it was discriminatory until he met his replacement.[425] The court rejected this line of analysis, holding that the plain fact of adverse action governed for the point of accrual, not how the action

421 The court did not consider the decision to fire him, but in terms of its consideration of the other issues, it would have rejected it, because Baxter did not *communicate* it to Cada. That said, *Cada* was mistaken to the degree it analyzed the accrual date of the *running* of the period of limitations as opposed to the *tolling* of the period under the discovery doctrine, which *tolls* the period, but it does not postpone the *running* of the period of limitations. The matter is usually one of semantics, but it is determinative in other situations. *See infra* note 428.

422 449 U.S. 250, 256–57 (1980) ("The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."). In *Ricks*, the plaintiff argued that discrimination motivated the college not only in denying him tenure, but also in terminating his employment; in effect, he claimed a "continuing violation" of the civil rights laws; thus, the limitations periods did not commence to run until his one-year "terminal" contract expired. *Id.* at 257. The Court found that the complaint did not support his argument; moreover, mere continuity of employment—without more—was, the Court found, insufficient to prolong the life of a claim for relief for employment discrimination. *Id.* If Ricks intended to complain of a "discriminatory discharge," as well as a "discriminatory" denial of tenure, he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment. *Id.* Nevertheless, the complaint alleged no facts supporting his argument; thus, his claim for relief for a "discriminatory act" under the civil rights statutes accrued at the point of the "discriminatory" denial of tenure, not the end of his employment contract. *Id.* at 259.

423 *Cada*, 920 F.3d at 449.

424 *Id.*

425 *Id.*

appeared to a reasonable person or Cada individually.[426] In fact, Becks had authority to fire Cada, and he fired him in the meeting.[427] Nevertheless, pinpointing the day of the adverse action was only the beginning of the court's analysis. To see if it should bar Cada's claim for relief, it then turned to the "discovery rule" and the two tolling doctrines. In terms of "accrual,"[428] in accord with general federal

426 *Id.* ("The statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. *Ricks* does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall. The point was not that when Ricks was denied tenure he knew his days were numbered. The point was that the denial of tenure was an adverse personnel action forbidden if done for discriminatory reasons; it was irrelevant that the full consequences of the action were not felt till later, when Ricks, unprotected by tenure, was let go upon the expiration of his employment contract.").

427 *Id.* at 450 ("Becks was authorized to fire Cada and . . . he did so at the May 5 meeting. By Cada's own version of the meeting of May 22 with Stauner, Stauner merely made clear at that meeting that Becks had been acting within his actual authority when he fired Cada. The May 5 meeting was the equivalent of the tenure vote in *Ricks*. It was the making and communication to Cada of the decision to fire him effective within a few weeks after Cada's replacement came on board.").

428 *Id.* at 450. Here is a point of controversy. Posner's language is salient. He comments:

> We must first distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations, then between two doctrines of tolling, last between different kinds of information that Cada may or may not have possessed. Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured. The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into statutes of limitations in federal-question cases . . . in the absence of a contrary directive from Congress. The discovery rule is implicit in the holding of *Ricks* that the statute of limitations began to run "at the time the tenure decision was made *and communicated* to Ricks." If Cada did not discover that he had been injured, i.e., that a decision to terminate him had been made, until May 22, the statute of limitations did not begin to run till that day and his suit is not time-barred.

Id. (citations omitted); *see also* Merck & Co. v. Reynolds, 130 S. Ct. 1784, 1793 (2010) ("[T]he 'discovery rule' . . . [is] a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it.").

In *Graham Co. v Haughey*, 646 F.3d 138 (3d Cir. 2011), Judge Smith, however, rightly argues that Posner (and the Supreme Court by implication) has it "backwards." *Id.* at 149 ("[A]ccrual is defined in terms of the objective existence of a viable cause of action, not in terms of whether the limitations clock has started . . . [, that is,] a running clock is not the sine qua non of accrual."). In *Graham*, the court was not concerned with "claim-accrual" for the period of the running of a statute of limitations, but "claim-accrual" for the period of time from which pretrial interest runs.

common law, in absence of direction from Congress, the injury-discovery rule applied to determine the date of accrual.[429] The plaintiff filed the claim in *Cada* 300 days beyond the accrual date, and he knew or should have known of the time and place of his adverse action; the discovery-injury rule was of no help. Thus, the application, if appropriate, by the court of one of the two tolling doctrines was crucial to keeping his claim for relief alive.[430]

According to *Cada*, a court uses the doctrine of "equitable estoppel" when the defendant's actions prevent the plaintiff from suing in

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The different perspective led the court to engage in more precise and more persuasive analysis. The court stated that "[g]iven the unimportance of the difference between tolling and delayed accrual to the outcomes of . . . [many decisions on the statute of limitations] and the consequent failure of so many courts to recognize the distinction, . . . [their discussion is] nonbinding obiter dicta." *Id.* The court continued:

> Accrual happens at the moment when events fulfilling all the elements of a cause of action have transpired. . . . [K]nowledge of an invasion of one's rights is not something that a plaintiff must prove to prevail. . . . In order to defer accrual, the discovery rule would have to add an additional component to the substantive definitions of the claims to which it applies. That simply cannot be right. Rules regarding limitations periods do not alter substantive causes of action. Accordingly we do not think the discovery rule should be read to alter the date on which a cause of action accrues.
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> Since it cannot be an accrual doctrine, the discovery rule must instead be one of the legal precepts that operate to toll the running of the limitations period after the cause of action has accrued, as sundry cases have stated. . . .
>
> To cast the discovery rule as changing the date of accrual, so as to delay the onset of interest charges, would warp its fundamentally plaintiff-friendly purpose. The rule . . . is grounded in the notion that it is unfair to deny relief to someone who has suffered an injury but who has not learned of it and cannot reasonably be expected to have done so. Treating the discovery rule as altering the date of accrual would turn it in a means for defendants to protect themselves from having to fully compensate plaintiffs' losses and disgorge their own wrongful gains. . . [, allowing them in effect] to benefit from an interest-free loan. . . .
>
> We hold that the "accrual" of a cause of action occurs the moment at which each of its component elements has come into being as a matter of objective reality . . . .

Id. at 149–50 (citations omitted). *Graham*, not *Cada*, correctly states the rationale and the operation of the discovery rule on the date of accrual.

429 *Cada*, 920 F.2d at 450. Thus, Posner's statement of the discovery rule is imprecise.

430 *Id.* ("Tolling doctrines stop the statute of limitations from running even if the accrual date has passed.").

time.[431] The doctrine, therefore, bars the defendant from using the statute of limitations as a defense.[432] Plaintiffs benefit from equitable estoppel against the defendant in two fact-patterns: (1) **speaking**: if the defendant tells (words or conduct) the plaintiff he will not plead the statute of limitations as a defense; or (2) **conduct**: if the defendant fraudulently conceals an element of the claim for relief from the plaintiff. Each fact-pattern represents a subset of the doctrine of "equitable estoppel." Additionally, either the defendant may conceal

431 *Id.* "Equitable estoppel" is a doctrine in equity that is not limited to the context of the statute of limitations. Nevertheless, in the context of the statute of limitations, "fraudulent concealment" by the defendant—a subset of the set "equitable estoppel"—enables the plaintiff to gain a tolling of the statute of limitations. In terms of equitable principles, a defendant is "estopped" by his fraudulent misrepresentations or conduct from pleading the statute of limitations defense when the plaintiff is untimely in filing his action because of the defendant's fraudulent misrepresentations or other conduct in reference to the plaintiff.

In his COMMENTARIES ON EQUITY JURISPRUDENCE, Justice Joseph Story traces the roots of the principles of equity in American jurisprudence to English and Roman materials. 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 4–25 (Jairus W. Perry ed., 12th ed. 1877). As a standard of right or wrong conduct in equity's eyes, illustrative of those principles, he affirms that "where once a fraud had been committed . . . the person who committed the fraud [is] precluded from deriving any benefit from it . . . ." *Id.* § 193 at 192. Broadly, no man can benefit from his own wrong. *See, e.g.*, New York Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886) (Field, J.) ("It would be a reproach to the jurisprudence of the country, if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had willfully fired."); Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (holding that a murderer cannot inherit from his victim and listing as "fundamental maxims of the common law" that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime . . . [u]nder the civil law, evolved from the general principles of natural law and justice by many generations of jurisconsults, philosophers, and statesmen, one cannot take property by inheritance or will from an ancestor or benefactor whom he has murdered."); *see also* Reeb v. Econ. Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975) ("'[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principle has been applied in many diverse classes of cases in both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.'" (citing Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232–33 (1959) (Black, J.))). *Reeb* was termed a "seminal case" by *Vaught v. R.R. Donnelley & Sons Co.*, 745 F.2d 407, 410 (7th Cir. 1984). The Third, Seventh, Tenth and Eleventh Circuits follow *Reeb*. *See* Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1389 (3d Cir. 1994); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1531–32 (11th Cir. 1992); *Vaught*, 745 F.2d at 410–12; Wilkerson v. Siegfried Ins. Agency, Inc., 683 F.2d 344, 345 (10th Cir. 1982).

432 *See Cada*, 920 F.2d at 450–51.

the claim for relief actively or the fraud itself may act as self-concealing fraud.[433]

The Supreme Court first recognized the doctrine of "fraudulent concealment" in *Bailey v. Glover*.[434] In *Bailey*, an assignee in bankruptcy brought a claim for relief to set aside fraudulent conveyances made by the defendant. The defendant allegedly avoided payment on a debt by fraudulently filing for bankruptcy, despite his considerable wealth.[435] The assignee filed the suit after the two-year limitations period accrued.[436] The Court, however, equitably found it "unreasonable"[437] not to toll the limitations period when "the fraud has been concealed, or is of such character as to conceal itself . . . until the fraud is discovered by . . . the party suing . . . ."[438] To be sure, suits deserve "speedy dispositions,"[439] and those who participate in bankruptcy transfers deserve not to be "harassed"[440] by suits filed long after the settlement of the estate. Nevertheless, defendants cannot benefit from a limitations period by fraudulently concealing their wrongdoing. To hold otherwise would "make the law which was designed to prevent fraud the means by which it is made successful and secure."[441] Thus, the doctrine of equitable estoppel protects the plaintiff's right

433 *Id.*

434 88 U.S. 342, 343 (1874).

435 *Id.* at 342–343.

436 *Id.* at 344.

437 *Id.* at 345.

438 *Id.* at 349–50.

439 *Id.* at 346, 347 ("[Bankruptcy law envisions] speedy sales, reasonable compromises, and efforts to adjust differences . . . [; instead] the estate is wasted in profitless litigation . . . and [on] the fees of the officers who execute the law.").

440 *Id.* at 347 ("[Bankruptcy law tells you that] no suit [filed] two years after the cause of action [is valid, and participants] shall . . . [not be] harassed by suits when the cause of action has accrued more than two years . . . [afterwards]. Within that time the estate ought to be nearly settled up and . . . discharged, and we close the door to all litigation not commenced before it has elapsed.").

441 *Id.* at 349, 347–48 ("[W]hen the object of the suit is to obtain relief against a fraud, the bar of the statute does not commence to run until the fraud is discovered or becomes known to the party injured by it. . . . In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. . . . [W]here the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered . . . .").

to file a claim for relief in the same way statutes of limitation protect a defendant's right to repose.[442]

Equitable estoppel based upon fraudulent concealment assumes that the plaintiff has discovered, or should have discovered, his injury.[443] For equitable estoppel to apply in this situation, therefore, the defendant must mislead the plaintiff actively to believe that he will not use the statute of limitations defense. As such, the plaintiff's untimely claim must result from the plaintiff's reasonable reliance on the defendant's concealment.[444] Where the defendant does not actively mislead the plaintiff, but the fraud is self-concealing, the plaintiff can still plead fraudulent concealment, and he gets the benefit of equitable estoppel.

Traditionally, the two forms of fraudulent concealment affected how long courts tolled the statute of limitations. When a defendant takes active steps to mislead the plaintiff, he commits an intentional tort. As such, the statute of limitations tolls until the plaintiff discovers—not should have discovered—the fraud; on the other hand, in the case of a self-concealing fraud—when the defendant does not actively conceal from the plaintiff the crucial information—the statute of limitations tolls until the plaintiff discovered or should have discovered the fraud.[445] Thus, when the defendant commits no intentional

442 *See id.* at 349–50 ("[Statutes of limitation] were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. . . . [I]n construing this statute of limitation passed by the Congress of the United States as part of the law of bankruptcy, we hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." (emphasis removed)).

443 *Cada*, 920 F.2d at 451.

444 *See id.*; *see also, e.g.*, Pearl v. City of Long Beach, 296 F.3d 76, 81 (2d Cir. 2002) (distinguishing equitable estoppel, which requires active steps to prevent the plaintiff from bringing a claim, from equitable tolling, which does not require active efforts from the defendant).

445 See Davenport v. A.C. Davenport & Son Co., 903 F.2d 1139 (7th Cir. 1990), *overruled on other grounds by* Short v. Belleville Shoe Mfg. Co., 908 F.2d 1385, 1389 (7th Cir. 1990), for the following explanation of equitable tolling:

> Under the federal doctrine of equitable tolling two types of fraudulent behavior toll the running of the statute of limitations in securities actions.

tort, the plaintiff cannot sleep on his rights—due diligence is required.[446]

Following the Court's decision in *Klehr*,[447] a plaintiff in a civil RICO suit no longer can rely on either form of fraudulent conceal-

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> In the first type, the statute may be tolled "where the fraud goes undiscovered even though the defendant does nothing to conceal it." Here, however, the plaintiff's due diligence in attempting to discover the fraud is imperative. In the second type, the statute of limitations is tolled if the fraud remained undisclosed because the defendant took additional affirmative steps after committing the fraud to keep it concealed. Here the plaintiff is relieved from his obligation to use due diligence to discover the fraud. Where active concealment exists, the statute is tolled until there is actual discovery of the fraud.
>
> The allegations in plaintiff's amended complaint do not provide a basis for tolling the limitations statute under either type of federal equitable tolling. Plaintiffs fail the first test because their amended complaint contains no allegations that the plaintiff made inquiries or otherwise exercised due diligence to determine the "true value" of the A.C. Davenport stock or verify any other alleged fraudulent representations made in connection with the 1978 stock redemption. The amended complaint's allegation of due diligence based upon "the self concealing nature of the fraud, her lack of sophistication, and the fact that the people upon whom she would reasonably depend to ferret out the fraud were themselves the perpetrators . . ." is insufficient to satisfy the rule's due diligence requirement. The plaintiff's lack of sophistication is irrelevant to our inquiry. "The statute begins to run when a reasonable person would have appreciated the need for further inquiry." An objectively reasonable person would have appreciated the need long before 1984.
>
> Since the plaintiff fails to allege due diligence, the remaining tolling exception requires her to plead active concealment of the fraud. . . . Plaintiff's allegation that Miller's and Kravets' "ongoing subsequent failure to disclose facts material to the sale of plaintiff's stock while continuing to act in a fiduciary capacity . . . [lulled the] plaintiff so as to prevent her from uncovering the defendant's fraudulent acts" is insufficient to trigger the "active concealment" tolling rule. While the plaintiff's allegation appears to be based on Illinois decisions holding that the silence of a fiduciary constitutes concealment, the federal doctrine of equitable tolling does not ascribe to this rule and clearly requires the defendants to take "additional affirmative steps after committing the fraud to keep it concealed." Since the plaintiff fails to allege either "due diligence" or "active concealment" federal equitable tolling will not preserve her claim.

Id. at 1142 (alternation in original) (citations omitted).

446 Thus, a close relationship exists between a plaintiff performing "due diligence" and when a plaintiff "should have discovered" his injury. For the injury-discovery rule, when the court determines that the plaintiff did not perform "due diligence," it is typically only another way of saying that the plaintiff "should have discovered" his injury. *See generally* Mathews v. Kidder, Peabody & Co., 260 F.3d 239, 256 (3d Cir. 2001) (citing Davis v. Grusemeyer, 996 F.2d 617, 624 (3d Cir. 1993)).

447 Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997).

ment *unless* he exhibits due diligence in trying to discover the facts composing his claim for relief. In *Klehr*, the plaintiffs—dairy farmers—purchased silos from the defendants.[448] Through advertisements, the defendants claimed the silos stored cattle feed to produce "healthier cows, more milk, and higher profits."[449] In reality, the silos malfunctioned, resulting in lost profits for the plaintiffs.[450] Additionally, plaintiffs claimed that they filed suit twenty years after purchasing the silo, because the defendants verbally misrepresented the quality of the feed and installed a device that hid the moldy feed character.[451] While these actions qualified as active fraudulent concealment, the Court held that a civil RICO plaintiff had to display "reasonable diligence" to toll the limitations period.[452] The Court narrowed the use of fraudulent concealment for civil RICO by imposing a requirement of "due diligence" upon plaintiffs, even when the defendant actively conceals the injury, because (1) antitrust precedent supported the due diligence requirement, and (2) similar to the antitrust provisions, civil RICO claims for relief seek to encourage investigation by private prosecutors, not only to punish defendants.[453] Whatever the reason,

448 *Id.* at 183.

449 *Id.* at 183–84.

450 *Id.* at 184.

451 *Id.*

452 *Id.* at 194.

453 *Id.* at 194–95. In fact, the law needs a substantial reformulation of the "reasonable discovery" or "due diligence" rules. The Court itself ought to undertake this formidable task. It can only be adumbrated here. Because these rules were judicial creations, they are subject to reformulation by the court that formulated them, arguably as a general matter, but certainly in the area of RICO. With details that need not tarry us, traditionally, at common law, "a plea of the contributory negligence of the plaintiff is, if supported, fatal to his right of action," HOLLAND, *supra* note 42, at 137. Along with "assumption of the risk" and "the fellow servant rule," these concepts were inartfully termed by Prosser, in the sexist language of the times, as the "three wicked sisters." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 80, at 573 (5th ed. 1984). Thus, early American courts privileged the interest of entrepreneurs to the detriment of those whom they injured, in particular employees. *See generally*, MORTON J. HOWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, 85–108 (triumph of negligence over ownership as the principle immunity/liability), 201–09 (triumph of contract over ownership as the principle of immunity/liability) (1977). So, too, the use of "reasonably know" or "due diligence" as a mechanism to unconditionally limit suits for various types of liability, significantly for intentional behavior, as in RICO, through the use of time-bars, in effect, makes contributory negligence a fatal bar to intentional, reckless, or negligent unlawful behavior, similarly privileging the interests of perpetrators over the interests of victims. The result is indefensible, as so baldly stated. Ironically, the rules of admiralty, from the beginning and until now, reflect a regime of comparative fault. *Compare* II JAMES KENT, COMMENTARIES ON AMERICAN LAW 505–25 & 516 n.a (tracing the history of maritime law from its earliest

the result disadvantages "negligent" plaintiffs under civil RICO when defendants who have committed an *intentional* fraud and *actively* misrepresented elements of the claim, making it harder to plead equitable estoppel based upon fraudulent concealment. To be sure, a court has to reach a balanced decision. Nevertheless, how *negligent* conduct can offset *intentional* conduct is not explained by the Court. The Court recognizes that it wants to encourage the enforcement of the statute, but every time an offender walks scot-free, the incentive to engage in RICO conduct goes up, hardly a good result. The Court exacts a high price from deterrence of RICO conduct to pay for encouraging private enforcement. It looks more like discouraging needed civil RICO litigation.

While the misleading actions of the defendant trigger equitable estoppel, the plaintiff's own actions determine if equitable tolling is appropriate. Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim."[454] Significantly, unlike equitable estoppel in the statute of limitations con-

origins in Roman law down to the time of Alexander Hamilton, as a leader of the American bar; describing the Roman "spirit of equity, in all its purity and simplicity . . . [.as] pervad[ing] those ancient institutions.") (Legal Classics Library reprinted ed. 1986) (1827) *with* United States v. Reliable Transfer Co., 412 U.S. 397, 441 (1975) (altering the an old rule of arbitrary allocation in favor of an allocation proportionate to comparative degree of fault). Surely, that approach could be adapted to the issue of accrual and delayed suit. At a minimum, "reasonable" discovery or "due diligence" ought to mean more than merely negligent behavior; the standard ought to be raised to at least reckless conduct. Moreover, a showing of substantial prejudice in fact, relating to the delay, ought to be required of the defendant before the court stops dead a plaintiff's suit for intentional behavior of a RICO dimension. We can learn from Roman law. *See* HOLLAND, *supra* note 42, 137 ("The question [of contributory negligence] is treated in the Digest not as causation but as one of *set-off*, in which the negligence of the plaintiff balances that of the defendant") (emphasis added)). *Mutatis mutantas,* the concept of set-off where the conduct of the plaintiff, however minimally at fault, does not flatly bar his suit, but is a set-off against the conduct of the defendant, however maximally at fault, moves in the direction of more complete justice between the parties. The one-size-fits-all legal rules take hold for considerations of efficiency only in a scheme of winner-take-all, hardly a scheme of justice. Instead, we need a return to a balance of the interests between the victim, the perpetrator, and society, sensitively evaluated by the court and the jury on a case-by-case basis rather than simply decided on a winner-take-all legal rule. It is time for a return to a more equitable form of justice.

454 Cada v. Baxter Healthcare Corp., 920 F.2d 446, 451 (7th Cir. 1990) (citing Holmberg v. Armbrecht, 327 U.S. 392, 397 (1946)). The Court in *Holmberg* spoke to the issue:

> If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. . . . The rub comes when

> Congress is silent . . . . Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. . . .
>
> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. . . . We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights.
>
> Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief. Such statutes have been drawn upon by equity solely for the light they may shed in determining that which is decisive for the chancellor's intervention, namely, whether the plaintiff has inexcusably slept on his rights so as to make a decree against the defendant unfair. "There must be conscience, good faith, and reasonable diligence, to call into action the powers of the court." A . . . court may dismiss a suit where the plaintiffs' "lack of diligence is wholly unexcused; and both the nature of the claim and the situation of the parties was [sic] such as to call for diligence . . ." A suit in equity may fail though "not barred by the act of limitations . . . ."
>
> Equity eschews mechanical rules; it depends on flexibility. Equity has acted on the principle that "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties." And so, a suit in equity may lie though a comparable cause of action at law would be barred. If want of due diligence by the plaintiff may make it unfair to pursue the defendant, fraudulent conduct on the part of the defendant may have prevented the plaintiff from being diligent and may make it unfair to bar appeal to equity because of mere lapse of time.
>
> Equity will not lend itself to such fraud and historically has relieved from it. It bars a defendant from setting up such a fraudulent defense, as it interposes against other forms of fraud. And so this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and "remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party."
>
> This equitable doctrine is read into every federal statute of limitation. If the Federal Farm Loan Act had an explicit statute of limitation for bringing suit under § 16, the time would not have begun to run until after petitioners had discovered, or had failed in reasonable diligence to discover, the alleged deception by Bache which is the basis of this suit.

327 U.S. at 395–97 (citations omitted).

The Fifth and Seventh Circuit question, however, whether *Holmberg*'s decision to read equitable tolling into every federal statute of limitations remains viable in light of cases requiring courts to apply state tolling provisions as well. *See* Smith v. City of Chicago Heights, 951 F.2d 834, 839 (7th Cir. 1992) (citing Johnson v. Ry. Express

text, a plaintiff pleading equitable tolling does not have to show wrongdoing on the part of the defendant. A plaintiff arguing for the application of the equitable tolling doctrine knows—or should know—of his or her injury, but "cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant."[455] In addition, another important distinction

Agency, 421 U.S. 454, 463–64 (1975)) ("Without expressly overruling *Holmberg* or commenting on its continued vitality, *Johnson* and subsequent cases have held that, when a federal court borrows a state statute of limitations, it should borrow any applicable state tolling provisions as well . . . ."); *see also* Ashafa v. City of Chicago, 146 F.3d 459, 464 n.1 (7th Cir. 1998) (questioning the continued validity of *Holmberg* in light of cases requiring courts to apply state equitable tolling provisions in § 1983 claims); FDIC v. Dawson, 4 F.3d 1303, 1309 (5th Cir. 1993) ("[T]he continued vitality of *Holmberg* . . . is in doubt . . . ." (citing Bd. of Regents v. Tomanio, 466 U.S. 478 (1980); Johnson v. Ry. Express Agency, 421 U.S. 454 (1975); Smith v. City of Chicago Heights, 951 F.2d 834 (7th Cir. 1992))).

455 *Cada*, 920 F.2d at 451.

In civil RICO ligation, procedural problems also complicate filing timely RICO claims using equitable tolling. When the predicate acts are fraud-based, courts often dismiss civil RICO claims, because of a failure to comply with Rule 9(b) (requiring a party to plead fraud with particularity). *See, e.g.*, DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990) (requiring the "who, what, when, where, and how" of the alleged fraud). Pleading fraud with particularity also applies to fraud in the concealment. Davis v. Grusemeyer, 996 F.2d 617, 624–27 (3d Cir. 1993). In addition, a plaintiff may have to establish for his pattern that the defendant committed fraud against others unrelated to him. Circuit courts here disagree. *Compare* Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 778 n.5 (7th Cir. 1994) (holding that Rule 9(b) requires the delineation of roles, but it may be relaxed when alleging fraud against a third party or information uniquely in hands of the defendant), *with* Michaels Bldg. Co. v. Ameritrust Co., 848 F.2d 674, 679 (6th Cir. 1988) (emphasizing the need to read Rules 8 and 9 in harmony amidst the backdrop of Rule 8's demand for "simplicity in pleading"), *and* New England Data Servs., Inc. v. Becher, 829 F.2d 286, 290–92 (1st Cir. 1987) (applying Rule 9(b), but holding that a court may determine whether discovery is necessary in civil RICO cases involving mail or wire fraud when necessary information is in the exclusive control of the defendant), *with* Farlow v. Peat, Marwick, Mitchell & Co., 956 F.2d 982, 989–90 (10th Cir. 1992) (holding that plaintiffs must know their claim before filing in order to protect defendants from "the threat of treble damages and injury to reputation" (quoting Cayman Exploration Co. v. United Gas Pipe Line, 873 F.2d 1357, 1362 (10th Cir. 1989))). Should the RICO plaintiff fail to plead fraud with particularity, they may also violate Rule 11 and face sanctions. At the same time, a tension exists between equitable tolling and FED. R. CIV. P. 15 (amending and supplementing pleadings), making it difficult for civil RICO plaintiffs either to file a civil RICO claim or benefit from equitable tolling. If a plaintiff files suit without a civil RICO allegation with the aim to add the allegation after discovery, they run the substantial risk that a court will deny their motion to amend under the FED. R. CIV. P. 15. On the other hand, waiting to file suit until facts underlying the RICO claim emerge risks the running of the limitations period. Further, if the court finds that the plaintiff slept on his rights or did not perform due

between the two doctrines—that equitable estoppel involves a deceptive party and that equitable tolling deals with "two innocent parties"—affects, significantly, how long courts will extend the limitations period.[456] Equitable estoppel tolls the statute of limitations for the amount of time the defendant fraudulently conceals his intention to plead the statute of limitations defense; otherwise, "the defendant would obtain a benefit from his inequitable conduct . . . ."[457] Equitable tolling, on the other hand, tolls the statute of limitations, not because of any wrongdoing by the defendant, but because the plaintiff lacks necessary information to bring a claim. According to *Cada*, the doctrine "gives the plaintiff extra time *if he needs it*."[458] To benefit from the equitable tolling doctrine, therefore, the plaintiff must "bring suit within a *reasonable time* after he has obtained, or by due diligence could have obtained, the necessary information."[459] In other words, if a plaintiff discovers the information necessary to file a claim against the defendant shortly after the statute of limitations began to run, he might not benefit from the equitable tolling doctrine—"the negligence of the party invoking the doctrine can tip the balance against its application . . . ."[460] This sliding-scale rule encourages swift action on the part of the plaintiff for the same reasons, so

diligence, the statute of limitations will not equitably toll. Accordingly, filing a complaint too early without the RICO claim risks a denial of a Rule 15 motion for leave to amend; nevertheless, filing too late forces the RICO plaintiff into the complexities of statutes of limitations and equitable tolling.

In *Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001), the court sets out procedural issues relating to "inquiry notice," which has an objective and a subjective component, that is, the allocation of the burden of coming forward with the necessary evidence. The court first considers the objective component. Inquiry notice arises when the plaintiff has sufficient information to alert him of "storm warning" of culpable activity. *Id.*; *see also* Benak *ex rel* Alliance Premier Growth Fund v. Alliance Capital Mgmt., L.P., 435 F.3d 396, 400 (3d Cir 2006) (citing *In re* NAHC, Inc. Sec. Litig., 306 F.3d 1314, 1325 (3d Cir. 2002)). The defendant has the burden of coming forward with evidence to show the existence of the "storm warnings." *Matthews*, 260 F.3d at 252. This saddles an investor, for example, with responsibilities like reading prospectuses, reports, and other information related to his investments. *Id.* It also assumes knowledge of publically available news articles and analysts' reports. *Benak*, 435 F.3d at 400. Then, the court considers the subjective component. In the face of these storm warnings, the plaintiff had the burden to come forward with evidence to show that he exercised reasonable diligence, but he was unable to find and avoid the storm. *Mathews*, 260 F.3d at 252; *Benak*, 435 F.3d at 400.

456 *Cada*, 920 F.2d. at 452.

457 *Id.*

458 *Id.* (emphasis added).

459 *Id.* at 453 (emphasis added).

460 *Id.*

Cada says, that statutes of limitation exist in the first place: "certainty, accuracy, and repose."[461]

In *Cada*, neither tolling doctrine saved the plaintiff's late claims. No fraudulent concealment by the defendant existed to justify estopping Baxter from pleading the statute of limitations. In fact, the concealment alleged by Cada—"the reorganization of the creative services department . . . [as] a ruse to conceal the plan to fire him because of his age"—simply covered up the substantive wrong, and it was not an attempt to misdirect Cada into thinking Baxter would not plead the statute of limitations.[462] Additionally, Cada did not file his claims within a *reasonable* time upon gathering the necessary information to file suit; thus, equitable tolling afforded him no relief.[463]

Despite the apparently unequivocal distinction made by *Cada* between the two tolling doctrines,[464] many circuits confuse the terminology; thus, they add one more wrinkle to an already tangled statute of limitations labyrinth.[465] For example, in *Oshiver v. Levin, Fishbein, Sedran & Berman*,[466] the Third Circuit read *Cada* correctly, but retained its own terminology ("equitable tolling" for "equitable estoppel") and blends the tolling doctrines with the discovery-event rule.[467] *Oshiver* involved claims of discriminatory failure to hire when a law

461 *Id.*

462 *Id.* at 451.

463 *Id.* at 453 (refusing to apply equitable tolling to the late-filed claim because the plaintiff received all the information necessary to make the claim eight months before the limitations period ran out—an unreasonable amount of time in the circumstances).

464 Circuits do often make the key distinction between the two tolling doctrines. *See, e.g.*, Chung v. U.S. Dep't of Justice, 333 F.3d 273, 278–79 (D.C. Cir. 2003) ("[T]he two doctrines, although functionally similar, 'have distinct criteria'—the former revolving around the conduct of the defendant and the latter around the circumstances of the plaintiff." (citing Currier v. Radio Free Europe/Radio Liberty, Inc., 159 F.3d 1363, 1367 (D.C. Cir. 1998))); EEOC v. Ky. State Police Dep't, 80 F.3d 1086, 1095 (6th Cir. 1996) (distinguishing between the active steps by the defendant required for equitable estoppel and due diligence but lack of awareness for equitable tolling); *see also* Pecoraro v. Diocese of Rapid City, 435 F.3d 870, 875 (8th Cir. 2006) (outlining the proper elements for equitable tolling); Schrader v. Royal Caribbean Cruise Line, Inc., 952 F.2d 1008, 1013 (8th Cir. 1991) (defining equitable estoppel properly).

465 *See, e.g.*, Stark v. Dynascan Corp., 902 F.2d 549, 551 (7th Cir. 1990) (talking inadvertently about "equitable tolling" when the defendant engages in fraudulent concealment, i.e., equitable estoppel, prior to Judge Posner's seminal clarification of the two doctrines in *Cada*).

466 38 F.3d 1380 (3d Cir. 1994).

467 *Oshiver* comes well before the Judge Smith's exhaustive and persuasive analysis in *William A. Graham Co. v. Haughey*, 646 F.3d 138, 149 (3d Cir. 2011), of the discovery doctrine and the theories of equitable estoppel and equitable tolling.

firm hired a male attorney as an associate after dismissing the plaintiff—a female attorney—on the condition that "the firm would contact her if either additional hourly work or an associate position became available."[468] The plaintiff filed her claim after the 300-day limitations period; thus, she needed the discovery-event rule or one of the two tolling doctrines to pursue her claim.[469] The Third Circuit rejected her "discovery-event" argument, stating that she failed to "exercise reasonable diligence" ("reasonably" she should have known of her claim).[470] Nevertheless, it muddied the water by insisting on calling "equitable estoppel" an instance, in *Cada*'s lexicon, of "equitable tolling."[471] While the court accurately defines the discovery-event rule,[472] it mistakenly qualifies it as a tolling doctrine that tolls the accrual date until discovery of the injury.[473] Additionally, the court mistakenly applies "equitable tolling" in three circumstances: "(1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum."[474]

Thus, the court incorrectly uses the term "equitable tolling" as an umbrella doctrine that includes "equitable estoppel." This misapplication of both the discovery-event rule and the two tolling doctrines is representative of the confusion among circuits and underscores the need for authoritative clarification, which can only come from the Supreme Court.[475]

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468 38 F.3d at 1384.

469 *Id.* at 1385.

470 *Id.* at 1386, 1391.

471 *Id.* at 1387 (observing that the doctrine of "equitable tolling" may excuse the plaintiff's failure to comply with the statute of limitations when it appears (1) the defendant actively misleads the plaintiff on the reason for her discharge and (2) the deception caused the failure to comply with the statute of limitations). Following *Cada*'s lexicon this is "equitable estoppel." *See* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–51 (7th Cir. 1990).

472 *Oshiver*, 38 F.3d at 1385 ("[T]he accrual date is not the date on which the wrong that injures the plaintiff occurs, but the date on which the plaintiff *discovers* that he or she has been injured.").

473 *Id.* at 1386 ("[T]he discovery rule *functions to delay* the initial running of the statutory limitations period . . . ." (emphasis added)). In fact, the discovery does not toll or delay accrual, it is simply an accrual rule to determine when the statute of limitations begins to run. While accrual and tolling are closely connected, the Third Circuit erroneously equates them.

474 *Id.* at 1387.

475 *See also, e.g.*, Rx.com v. Medco Health Solutions, Inc., 322 F. App'x 394, 398 (5th Cir. 2009) (confusing equitable tolling with equitable estoppel by applying equi-

In addition to the two equity-based tolling doctrines—equitable tolling and equitable estoppel—the RICO plaintiff's claim may toll during parallel criminal litigation. RICO encourages private prosecutions; thus, tolling the statute of limitations during parallel criminal proceedings minimizes the burdens of private litigation by making available the benefits of the government's litigation. The government has access to superior evidence gathering tools (e.g., grand jury subpoenas, immunity techniques, electronic surveillance, etc.); when it uses them, it can develop evidence of the inside working of associations-in-fact, illicit or licit, and their machinations, whether organized crime or white-collar crime. Criminal investigations can also affect civil investigations by enforced delay. Traditionally, courts determine whether to stay civil proceedings by evaluating a number of equitable factors: (1) the extent to which the defendant's Fifth Amendment rights would be implicated; (2) the potential prejudice to plaintiffs if the civil trial is delayed; (3) the burdens on the defendant from civil proceedings; (4) the efficient use of judicial resources; (5) the interests of non-parties in the civil litigation; and (6) the public interest in the outcome of both civil and criminal proceedings.[476] Thus, courts stay civil proceedings on a case-by-case basis when justice so requires.[477]

Accommodation is crucial between criminal and civil justice. Delaying the running of the statute of limitations while criminal investigations run their course is salient. The need is pressing in the RICO area given the complexity of criminal and civil RICO investigations. The remedy is manifest. For example, because RICO borrows the stat-

table tolling when a "plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights" (quoting United States v. Patterson, 211 F.3d 927, 930–31 (5th Cir. 2000))); Vistamar, Inc. v. Fagundo-Fagundo, 430 F.3d 66, 71–72 (1st Cir. 2005) (purporting that the two doctrines are distinct, but applying equitable tolling when the defendant actively misleads the plaintiff); Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) (labeling both doctrines as equitable tolling by applying them both as a result of the defendant's wrongful conduct and when circumstances made it impossible for the plaintiff to file a timely claim) (quoting Alvarez-Machain v. United States, 107 F.3d 696, 700 (9th Cir. 1996))); Miranda v. B & B Cash Grocery Store, Inc., 975 F.2d 1518, 1532 (11th Cir. 1992) (confusing the definition of equitable tolling as a doctrine that triggers upon wrongful action by the defendant that induces the plaintiff to delay filing suit); Richardson v. Frank, 975 F.2d 1433, 1435, 1437 (10th Cir. 1991) (using the terms interchangeably with no distinction between the doctrines).

476 *See, e.g.*, Keating v. Office of Thrift Supervision, 45 F.3d 322, 324–25 (9th Cir. 1995).

477 *See* United States v. Kordel, 397 U.S. 1, 12 n.27 (1970) ("Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action . . . .").

ute of limitations period from the Clayton Act, courts should similarly incorporate its tolling and suspension provisions.[478] As the Court stated in *Johnson v. Railway Express Agency, Inc.*[479] "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application."[480] Thus, RICO's period of limitations should also include its tolling provisions—specifically those relating to staying civil proceedings during parallel criminal prosecutions.[481]

Additionally, RICO case law persuasively argues for the adoption of the Clayton Act statutory tolling provisions regarding parallel criminal proceedings, an issue not yet faced by the Court. In *Agency Hold-*

478 *See, e.g.*, Pension Fund-Mid-Jersey Trucking Indus. v. Omni Funding Grp., 687 F. Supp. 962, 965 (D.N.J. 1988) (absorbing for civil RICO the Clayton Act's tolling provision that tolls its civil suit for one year following the pendency of a parallel criminal proceeding).

479 421 U.S. 454 (1975).

480 *Id.* at 464. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilberston*, 501 U.S. 350 (1991), *superseded by statute on unrelated grounds*, Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. 102-242, 105 Stat. 2236, the Court faced the issue of determining the appropriate period of limitations for the implied claim for relief under § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891 (15 U.S.C. § 78j (b)). It borrowed the express statute of limitations in securities statutes for §§ 9 and 18 of the Act. In reaching its judgment, it found that each was "an integral element of a complex web of regulations . . . intended to facilitate" related goals. *Id.* at 360. In fact, the Court thought that the "scheme" of a period of limitations (one year discovery) and repose (three year period) "represent[ed] an indivisible determination by Congress as to the appropriate cut off point for claims under the statute." *Id.* at 362 n.8. Similar comments are appropriate here for civil RICO on the period of limitations under the Clayton Act and its integral tolling provisions.

481 *See generally* Sheldon R. Shapiro, Annotation, *Provision of § 5(b) of Clayton Act (15 U.S.C. § 16(b)) Suspending Statute of Limitations on Private Antitrust Actions During Pendency of Government Antitrust Proceedings, as Applicable to Those Other than Defendants in Government Proceedings*, 9 A.L.R. FED. 803 (1971); Sheldon R. Shapiro, Annotation, *What Constitutes Termination of Pendency of Government Antitrust Proceedings Within Meaning of § 5(b) of Clayton Act (15 U.S.C. § 16(b)), Suspending Statute of Limitations on Private Antitrust Actions During Pendency of Government Proceedings and for One Year Thereafter*, 9 A.L.R. FED. 823 (1971).

While RICO arguably absorbed the tolling provisions of the Clayton Act when it borrowed the four-year period of limitations, it does not follow that civil RICO must also adopt the unalloyed Clayton Act's injury-occurrence accrual rule. The policy rationales supporting the relevant tolling provisions apply equally to the aims and rationales behind both antitrust claims and RICO private claims for relief. As to accrual rules, RICO's pattern requirement, and the different character of the predicate crimes involved for RICO and for antitrust claims for relief, persuasively argue against the full absorption of the Clayton Act in the accrual context. *See supra* notes 338–352 and accompanying text.

ing Corp. v. Malley-Duff & Associates, Inc.,[482] the Court applied the four-year statute of limitations period to RICO claims, because of the Act's close relation with the antitrust statute:

> Both statutes bring to bear the pressure of "private attorneys general" on a serious national problem for which public prosecutorial resources are deemed inadequate . . . . Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury "in his business or property by reason of" a violation.[483]

Given the close nature of the two statutes and their similar aims, it makes eminent good sense that RICO claims for relief should toll in the same manner as antitrust claims for relief during parallel criminal prosecutions. Not only do the parallels between RICO and the Clayton Act lend themselves to the absorption of the relevant tolling provision, but also the policy rationales behind the tolling provisions in the Clayton Act strongly resemble the important considerations that accompany civil RICO suits. In *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*,[484] the Court examined the underlying policies behind the provision of the Clayton Act that tolls the statute of limitations for one year following the termination of parallel government proceedings.[485] With that tolling provision, "Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions."[486] While government actions are "necessarily restricted to the requirements of due process,"[487] delay does not necessarily harm private actions. Thus, because "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws,"[488] public policy favors tolling the statute of limitations for the pendency of government proceedings plus one year for private prosecutors to take advantage of such proceedings. Private prosecutors similarly use RICO claims as a powerful weapon against malefactors, and they need the benefit, if any, of the government's proceedings.

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482 483 U.S. 143 (1987).
483 *Id.* at 151.
484 381 U.S. 311 (1965).
485 *Id.* at 317–18.
486 *Id.* at 317.
487 *Id.* at 318 (quoting *Emich Motors Gorp.* v. *Gen. Motors Corp.*, 340 U. S. 558, 569 (1951)).
488 *Id.*

2. Laches

Laches is a doctrine in equity that bars a plaintiff's claim if the plaintiff's tardiness unjustly prejudices the defendant. A party raising the laches defense must prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense."[489]

Historically, in line with the rule of *nullum tempus occurit regi*, the doctrine of laches was not applicable to the United States unless otherwise directed by Congress. The Court first discussed the rationale behind adopting this rule in *United States v. Thompson*.[490] In that case, the government sued the defendant—the superintendent of Indian affairs in Minnesota—for converting over $10,000 of federal money into personal profit. The government did not file the case within the six-year statute of limitations period established by the Minnesota state statute.[491] While the lower court barred the suit in favor of the defendant, the Court was "at a loss to imagine the reasoning by which the result announced was reached."[492] The Court went on to explain that as "[t]he king was held never to be included" in statutes of limitation or laches, so too, does the national government fall outside its scope.[493] First, the government serves to protect the public interest; thus, "the public should not suffer by negligence of his servants."[494] Additionally, if the United States was subject to the varied statutes of limitations of each state, "[t]he government of the Union would in this respect be at the mercy of the States."[495] As such, the Court held that the national government, unless otherwise specified by Congress, falls outside the scope of statutes of limitation or laches.[496]

489 Costello v. United States, 365 U.S. 265, 282 (1961); *see also* United States v. Admin. Enters., Inc., 46 F.3d 670, 673 (7th Cir. 1995) (denying the defense of laches because the claim may have satisfied the first element of laches—unjustifiable delay—but did not satisfy the second—prejudice to the defendant from the unjustifiable delay).

490 98 U.S. 486 (1878).

491 *Id.* at 486.

492 *Id.* at 488.

493 *Id.* at 489.

494 *Id.*

495 *Id.* at 491.

496 *Id.*; *see also* Block v. North Dakota *ex rel.* Bd. of Univ. and Sch. Lands, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting) (reciting the history and rationale behind the *nullum tempus occurrit regi* principle). The Ninth Circuit considers *Block* abrogated, albeit on unrelated grounds. *See* Fadem v. United States, 52 F.3d 202, 206 (9th Cir. 1995) ("[W]e hold that the statements in *Block* . . . that the QTA's statute of limitations is jurisdictional in nature have no continuing validity after the Court's

Nevertheless, the Court allowed for an exception to the general rule that the government is immune from the doctrine of laches or statutes of limitation. In *United States v. Beebe*,[497] the Court reaffirmed its earlier stance on the rule,[498] but weakened its force by "justly and wisely" applying laches against the United States.[499] In *Beebe*, the government filed suit on behalf of private citizens that failed to bring suit themselves, to set aside an allegedly fraudulently obtained patent.[500] The government's role in the case was not to protect a public right or interest, but a private right between two citizens.[501] In such circumstances, courts can and should subject the government to equitable doctrines, including laches. Accordingly,

> [W]hen the government is a mere formal complainant in a suit, not for the purpose of asserting any public right or protecting any public interest, title, or property, but merely to form a conduit through which one private person can conduct litigation against another private person, a court of equity will not be restrained from administering the equities existing between the real parties by any exemption of the [g]overnment designed for the protection of the rights of the United States alone.[502]

The policy behind immunizing the government from a laches or a statute of limitations defense is based upon the courts' protection of a public right in the hand of the government. If the government seeks to protect a private right, the public would not suffer from the negligence of governmental officers; thus, it removes the rationale and the rule for the doctrine exempting the sovereign from the defense of laches or statutes of limitation.[503]

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decision in *Irwin*." (citing Washington v. Garrett, 10 F.3d 1421, 1437 (9th Cir. 1993) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 89 (1990)))).

497 127 U.S. 338 (1888).

498 *Id.* at 344 ("The principle that the United States are not bound by any statute of limitations, nor barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce a public right, or to assert a public interest, is established past all controversy or doubt." (citing United States v. Nashville, C. & St. L. Ry. Co., 118 U.S. 120, 125 (1886))).

499 *Id.* at 348.

500 *Id.* at 342.

501 *Id.* at 346.

502 *Id.* at 347.

503 *See also* United States v. Insley, 130 U.S. 263, 265–66 (1889) (rejecting a plea to apply laches against the government because the United States held the land in dispute for public purposes; thus, supporting the exception in *Beebe* that applying laches is appropriate when "the case [does] not involve any question of governmental right or duty." (citations omitted)).

Over one hundred years later, the Court still applies the same principle with relation to the statute of limitation and laches. In *United States v. Summerlin*,[504] the Court reaffirmed its position that neither a statute of limitations nor a laches defense applies against the government when acting in its sovereign capacity. There, the government, through the Federal Housing Administrator, became the assignee of a claim against the administratrix of J.F. Andrew's estate.[505] Mr. Andrew executed a promissory note under the National Housing Act, and upon default, the note found its way to the Federal Housing Administrator. After Mr. Andrew's death, the administratrix, by publication, gave notice to creditors to bring claims against the estate within eight months, as is required by state law.[506] The government, however, filed its claim eleven months after the administratrix published the notice.[507] Despite the late filing, the Court reversed the lower court's holding that the government's claim was too late.[508] The Court held that not only is it "well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches," but that "[t]he same rule applies whether the United States brings its suit in its own courts or in a state court."[509] So long as the government "becomes entitled to a claim, acting in its governmental capacity,"[510] then neither statutes of limitation nor laches bars the claim.[511]

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504 310 U.S. 414 (1940).

505 *Id.* at 414–15.

506 *Id.* at 415–16.

507 *Id.*

508 *Id.* at 418.

509 *Id.* at 416 (citing Davis v. Corona Coal Co., 265 U.S. 219, 222–23 (1924)).

510 *Id.* at 417.

511 The Court also reaffirmed the principle in *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 290 (1983), stating that "[t]he judicially-created rule that a sovereign is normally exempt from the operation of a generally-worded statute of limitations has retained its vigor because it serves the public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." The Court did hold, however, that this principle does not apply to states, and states "must fully adhere" to generally worded statutes of limitations. *Id.*

For further discussion of the *nullum tempus occurit regi* doctrine, see *United States v. California*, 332 U.S. 19, 40 (1947), *superseded on other grounds by statute*, Submerged Lands Act, ch. 65, 67 Stat. 29 (1953) (applying the *nullum tempus* doctrine in a dispute over land under the Pacific Ocean off the California coastline; "[t]he Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes . . . ."); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 129, 132 (1938) (championing the doctrine, because of its preservation of public rights where the

While most circuits, as required, continue to adhere to the Court's doctrine,[512] other circuits question the breadth of the *nullum tempus occurit regi* principle and argue for a more limited rule. In *Farmers Home Administration v. Muirhead*,[513] for example, the Fifth Circuit advocates for a more narrow use of the principle that immunizes the government from the equitable defense of laches. In that case, defendants executed promissory notes in favor of the Farmers Home Administration ("FmHA")—a nationwide federal loan program.[514] After sending two notices of acceleration and a demand for payment, the FmHA initiated foreclosure proceedings.[515] The Fifth Circuit held statutes of limitations—state or federal—and the defense of laches not to run against the federal government. Despite this ruling, that court commented on its disagreement with the principle in the context of federal loan programs.[516] The Fifth Circuit argued that the *nullum tempus* rule "is far more appropriate to essential sovereign

United States sought to recover a deposit from a foreign government with a New York bank after the local six year statute of limitations passed).

512 *See, e.g.*, Kingman Reef Atoll Invs., L.L.C. v. United States, 541 F.3d 1189, 1199 (9th Cir. 2008) (stating that negligence of government officers cannot result in the government losing valuable rights held for the people (citing United States v. California, 332 U.S. 19, 40 (1947), *superseded on other grounds by statute*, Submerged Lands Act, ch. 65, 67 Stat. 29 (1953))); United States v. Murdock Mach. & Eng'g Co. of Utah, 81 F.3d 922, 931 (10th Cir. 1996) (applying the principle that the government is not only immune from "suit" but from legal proceedings in law or equity unless it so consents); United States *ex rel.* Siller v. Becton Dickinson & Co., 21 F.3d 1339, 1345–46 (4th Cir. 1994) (applying the "'great principle of public policy' protecting the public interest from official negligence" when the government acts as a litigant prosecuting false claims in addition to when it acts in its administrative capacity (quoting Brock v. Pierce Cnty., 476 U.S. 253, 260 (1986))); United States v. Alvarado, 5 F.3d 1425, 1426–28 (11th Cir. 1993) (upholding the long-standing federal common law rule that the United States is not bound by laches or statutes of limitation unless otherwise explicitly directed by Congress in a foreclosure action by the United States on behalf of the Farmers Home Administration); Dole v. Local 427, Int'l Union of Elec., Radio & Mach. Workers, 894 F.2d 607, 608–10 (3d Cir. 1990) (holding that no statute of limitations applies to suits filed by the Secretary of Labor on behalf of the United States under the Labor-Management Reporting and Disclosure Act, so long as the suit was brought for a *public purpose* or by the Secretary in his *governmental capacity*); United States v. Brown, 835 F.2d 176, 180 (8th Cir. 1987) (following the Court's decision in *Guaranty Trust* that "laches cannot be asserted against the sovereign" (citing Guar. Trust Co. v. United States, 304 U.S. 126, 132 (1938))); United States v. Hughes House Nursing Home, Inc., 710 F.2d 891, 895 (1st Cir. 1983)) ("A virtually unbroken line of authority . . . holds that a private defendant cannot assert laches against the government.").

513 42 F.3d 964 (5th Cir. 1995).

514 *Id.* at 964–65.

515 *Id.*

516 *Id.* at 967.

functions than to the federal government's role as a lender to veterans, small business owners, farmers, and disaster victims among others."[517] The court argued that public policy supports running the statute of limitations and allowing for the defense of laches against the federal government in its role as lender. In these circumstances, the court posited, the new rule would encourage the government to act promptly, and it could not enforce ancient mortgages.[518] While the Fifth Circuit adhered to the ancient principle, it introduced a more limited view—exemption from the statute of limitations and defense of laches only for *essential sovereign functions*. How the *essential sovereign functions* doctrine will modify laches in the RICO context remains unknown, but the doctrine is spreading to other circuits,[519] and it may mark the end of the broad reign of *nullum tempus occurit regi*.

More significant, other decisions move beyond dicta, squarely break with precedent, and restrict the government's exemption from laches. The Seventh Circuit in *National Labor Relations Board v. P*I*E Nationwide, Inc.*,[520] for example, holds that laches applies to suits by the government. "Following dictum in *Occidental Life Ins. Co. v. EEOC* . . . laches is generally and we think correctly assumed to be applicable to suits by government agencies as well as by private parties."[521] In *United States v. Administrative Enterprises, Inc.*,[522] the Seventh Circuit suggests the application of laches to the government is a "completely unsettled" question,[523] a dubious proposition at best in light of the unbroken line of Supreme Court decisions from the founding of the United States. The case involved a summons issued by the Internal Revenue Service that the United States sought to enforce three and a half years after its issuance.[524] The summons was not subject to a statute of limitations; thus, the appellants had to rely on the doctrine of laches.[525] While the court denied the defense, because the alleged

517 *Id.*

518 *Id.*

519 *See, e.g.*, United States v. Peoples Household Furnishings, Inc., 75 F.3d 252, 257 (6th Cir. 1996) (questioning the ancient policy considerations behind the federal common law rule exempting the federal government from statutes of limitations and the defense of laches in certain contexts; "[w]e doubt that the foundations of the republic would crumble if the government were now to be held to the same timetables as everyone else in suing to renew its money judgments.").

520 894 F.2d 887 (7th Cir. 1990).

521 *Id.* at 894 (citing EEOC v. Vucitech, 842 F.2d 936, 942 (7th Cir. 1988)).

522 46 F.3d 670 (7th Cir. 1995).

523 *Id.* at 672.

524 *Id.* at 671.

525 *Id.* at 672.

unjustifiable delay did not prejudice the defendant,[526] it introduced a new exception to the *nullum tempus* doctrine: prejudicial instances of egregious delay.[527] The court relied in the main on its own earlier rulings to buttress its new exception.[528] While the Seventh Circuits continues the tradition of the Fifth Circuit in swimming against the expansive doctrine exempting the government from the defense of laches, the overwhelming majority of circuit court decisions continue to follow the federal common law supported now by centuries of precedent.

E. Case Study: Time-bars in Florida Under RICO

Famously, Justice Holmes argued in dissent in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[529] that "a general common law" did not exist. Only the law of a particular jurisdiction was "law." He wrote:

> The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. It may be adopted by statute in place of another system previously in force. But a general adoption of it does not prevent the State Courts from refusing to follow the English decisions upon a matter where the local conditions are different.[530]

Without passing on the general cogency of Justice Holmes's positivist's predilections, his point that you need to look at a body of law within a particular jurisdiction ultimately to evaluate how legal ideas work themselves out makes eminent good sense. The best state jurisdiction to examine to see how the RICO idea and time-bars interact is Florida.

Florida was one of the first to enact RICO-type legislation *and* to make a major effort to implement it. The legislature enacted the legislation in 1977. It included in its statute provisions that not only pro-

526 *Id.* at 673.

527 *Id.*; *see also* Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 278–79 (2d Cir. 2005) (applying laches against the government based upon the exceptions outlined by the Seventh Circuit).

528 *Id.*; *see* Martin v. Consultants & Adm'rs, Inc., 966 F.2d 1078, 1090–91 (7th Cir. 1992); NLRB v. P*I*E Nationwide Inc., 894 F.2d 887, 893–94 (7th Cir. 1990); *In re* Lapiana, 909 F.2d 221, 224 (7th Cir. 1990); United States v. Lindberg Corp., 882 F.2d 1158, 1163–64 (7th Cir. 1989); EEOC v. Vucitech, 842 F.2d 936, 942–43 (7th Cir. 1988).

529 276 U.S. 518 (1928).

530 *Id.* at 533–34 (Holmes, J., dissenting) (citations omitted).

vided for a period of limitations, but also for the point of accrual. When it passed its RICO legislation, it also passed theft and fencing legislation that contain similar provisions providing a period of limitations and point of accrual. In addition, though remarkably few know it, the Florida legislation, not federal RICO, served as the principal model for most of the subsequent state RICO legislative efforts.[531] In 1986, the Florida legislature revisited its state RICO legislation. In response to criticisms from the business community, it removed the private civil RICO claim for relief for damages and placed it in separate legislation; it took similar action with the civil remedies for theft. The new legislation is the Civil Remedies for Criminal Practices Act.[532] The result is two similar statutes, but not an identical item of RICO-type legislation.

Florida RICO's statute of limitation provides:

> Notwithstanding any other provision of law, a criminal or civil action or proceeding under this act may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of this

531 The Florida Legislature drafted Florida RICO not only to follow the federal model, but also to improve on it. In fact, Florida RICO is a superior embodiment of the concepts behind RICO to RICO itself. It is anything but a carbon copy. Senator Edgar Dunn was the moving force in that project of codification *and* reform when I worked for him in 1977. Thus, Florida RICO, not RICO, became the template for drafting state RICO legislation after 1977, most of which I consulted on with people in an attorney general's office or the legislature itself. For six state RICO statutes that have special provisions for a statute of limitations (not all do) that apply this reform language to criminal and civil actions, see DEL. CODE ANN. tit. 11, § 1505(f) (2007); LA. REV. STAT. ANN. § 15:1356(H) (2005); MISS. CODE ANN. § 97-43-9(8) (West 2011); OR. REV. STAT. § 166.725(11) (2011); TENN. CODE ANN. § 39-12-206(h) (2010); and WIS. STAT. ANN. § 946.88(1) (West 2005). For the six states/territories that use the same language to determine the period of limitations for RICO civil actions, see MICH. COMP. LAWS ANN. § 750.159s (West 2004); N.C. GEN. STAT. § 75D-9 (2011); OHIO REV. CODE ANN. § 2923.34(J) (LexisNexis 2010); OKLA. STAT. ANN. tit. 22, § 1409(E) (West Supp. 2012); UTAH CODE ANN. § 76-10-1605(9) (LexisNexis 2008); and V.I. CODE ANN. tit. 14, § 30-607(h) 1996.

532 1986 Fla. Laws 2033. Originally, Florida placed the limitations provision in a single section of its RICO statute. In 1986, the legislature transferred Florida RICO's civil damages provisions to another portion of the Florida code by the Civil Remedies for Criminal Practices Act, FLA. STAT. ANN. §§ 772.101–772.19 (West 2011). Consequently, similar language now appears and applies to criminal actions under Florida RICO at § 895.05(10) (West 2000) and applies to civil actions at § 772.17. Ironically, I taught at the law school at Florida State University that summer in Tallahassee, a walking distance from the legislature, and helped in the design of the reform legislation.

> act, the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) [aggrieved person for equity] or subsection (7) [state for threefold damages] which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.[533]

The Florida legislature in its Florida Civil Remedies for Criminal Practices Act provided for a similar provision. It provides:

> Notwithstanding any other provision of law, a civil action or proceeding under this chapter may be commenced at any time within 5 years after the conduct in violation of a provision of this act terminates or the cause of action accrues. If a criminal prosecution or civil action or other proceeding is brought or intervened in by the state or by the United States to punish, prevent, or restrain any criminal activity or criminal conduct which forms the basis for a civil action under this chapter, the running of the period of limitations prescribed by this section shall be suspended during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.[534]

Florida Civil Theft Act had a similar, but not identical, provision. It provides:

> Notwithstanding any other provision of law, a criminal or civil action or proceeding under ss. 812.012–812.037 [theft] or s. 812.081 [trade secrets] may be commenced at any time within 5 years after the cause of action accrues; however, in a criminal proceeding under ss. 812.012–812.037 [theft] or s. 812.081 [trade secrets], the period of limitation does not run during any time when the defendant is continuously absent from the state or is without a reasonably ascertainable place of abode or work within the state, but in no case shall this extend the period of limitation otherwise applicable by more than 1 year. If a criminal prosecution or civil action or other proceeding is brought, or intervened in, to punish, prevent, or restrain any violation of the provisions of ss. 812.012–812.037 [theft] or s. 812.081 [trade secrets], the running of the period of limitations prescribed by this section with respect to any cause of action arising under subsection (6) [aggrieved person] or subsection (7) [state cause of action for threefold damages] which is based in whole or in part upon any matter complained of in any such prosecution, action, or proceeding shall be suspended

533 FLA. STAT. ANN. § 895.05(10) (West 2011).
534 *Id.* § 772.17.

> during the pendency of such prosecution, action, or proceeding and for 2 years following its termination.[535]

Florida law contains several relevant general provisions for statutes of limitations.[536] Section 95.11, "Limitations other than for the recovery of real property," in relevant part, provides:

> Actions other than for the recovery of real property shall be commenced as follows:
>
> . . .
>
> **(3) Within four years.**—. . .(j) A legal or equitable action founded on fraud. . . .
>
> **(4) Within two years.**—. . .(d) An action for wrongful death. . . .
>
> **(6) Laches.**—Laches shall bar any action unless it is commenced within the time provided for legal action concerning the same subject matter regardless of lack of knowledge by the person sought to be held liable that the person alleging liability would assert his or her rights and whether the person sought to be held liable is injured or prejudiced by the delay. This subsection shall not affect application of laches at an earlier time in accordance with law.[537]

In addition, § 95.031, "Computation of time," in relevant part, provides:

> Except as provided in subsection (2) and in s. 95.051 and elsewhere in these statutes, the time within which an action shall be begun under any statute of limitation runs from the time the cause of action accrues.
>
> (1) A cause of action accrues when the last element constituting the cause of action occurs. . . .
>
> (2)(a) An action founded upon fraud under s. 95.11(3) [including constructive fraud] must be begun within the period prescribed in this chapter, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, instead of running from any date prescribed elsewhere in s. 95.11(3), but in any event an action for fraud under s. 95.11(3) must be begun within 12 years after the date of the commission of the alleged fraud, regardless of the date the fraud was or should have been discovered.[538]

The state Supreme Court is also an important source of general principles applicable to statutes of limitation in its jurisprudence, including the relation of the statutory provisions to common law doctrines, the status of common law doctrines, and the court's view of the

535 *Id.* § 812.035(10).
536 *See, e.g.*, *id.* § 95.11.
537 *Id.*
538 *Id.* § 95.031 (West Supp. 2012).

purpose of statutes of limitations. This view provides a backdrop to each interpretation of the statutes of limitations and the various tolling doctrines in Florida jurisprudence. Significantly, the court in *Davis v. Monahan*,[539] held that because the legislature expressly provided for the common law "delayed-discovery" rule for particular statutes of limitations, the common law rule did not apply to other claims for relief. The court was not impressed with precedent from other jurisdictions.[540] To be sure, the court acknowledged it recognized a "delayed discovery" doctrine to claims for relief arising out of childhood sexual abuse and repressed memory.[541] But, so the court explained, that was because of "the unique and sinister nature of childhood sexual abuse, as well as the fact that the doctrine is applicable to similar cases where the tortious acts cause the delay in discovery."[542] In addition, the court in *Major League Baseball v. Morsani*[543] recognized the application of "equitable estoppel" to claims for relief filed outside of the statute of limitations. Observing that statutes of limitations "impose a strict time limit for filing legal actions,"[544] it noted, however, that several legal doctrines, including equitable estoppel, could deflect them.[545] The court began by commenting that at common law no fixed limits circumscribed filings lawsuits; thus, limitations were a creature of statute.[546] It then noted that the prime purpose of the statutes was to protect defendants from "stale" claims.[547] It reasoned that the antiquity of the claim would unfairly place the defendant at a grave disadvantage where the plaintiff carelessly slept on his legal rights and left the defendant to shield himself with only "tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses [where] the quest for truth might elude

539 832 So. 2d 708 (Fla. 2002). *Davis* casts considerable doubt on the sweeping language in *Jones v. Childers*, 18 F.3d 899, 906 (11th Cir. 1994) (stating that Florida courts have "broadly adopted" the discovery principle) that would extend, without qualification, the doctrine to "breach of contract, breach of fiduciary duty, negligence, fraud, and violations of [the Criminal Remedies for Criminal Practices Act.]" *Id.* at 909.

540 *Davis*, 832 So. 2d at 711–12 (dismissing the respondent's reliance on cases from Iowa, Nebraska, and New York).

541 *Id.* at 709 (citing Hearndon v. Graham, 767 So. 2d 1179, 1185–86 (Fla. 2000)).

542 *Id.* at 712. The court also acknowledged that the legislature enacted a statute to deal with the situation in FLA. STAT. ANN § 95.11(7) (West 2002).

543 790 So. 2d 1071 (Fla. 2001).

544 *Id.* at 1074.

545 *Id.*

546 *Id.*

547 *Id.* at 1075.

even the wisest court."[548] In addition, it said, the Florida statutes articulate "an exclusive list" of conditions that can toll the running of the statutes of limitations.[549] Nevertheless, the court recognized that the doctrine of equitable estoppel was a "fundamental tenet of Anglo American jurisprudence for centuries."[550] "Equitable estoppel," it observed, "is based on principles of fair play and essential justice . . . ."[551] "It differs from other legal theories that may operate to deflect the statute of limitations."[552] They include accrual (e.g., delayed discovery), tolling (e.g., absence from the state of the defendant), equitable tolling (e.g., the blameless ignorance of the plaintiff and lack of prejudice of the defendant), and waiver (e.g., intentional relinquishment of a known right). According to the court, "Tolling operates [to deflect] the statute of limitations; equitable estoppel operates on the party."[553] In addition, "The common law remains in effect . . . unless the statute specifically says otherwise."[554] The court commented that the legislature did not expressly modify the doctrine. Moreover, the policies of limitation and estoppel are congruent. Limitations deal with unfair surprise and stale claims. Estoppel acts to prevent a person from profiting from his own wrong; he could hardly claim surprise if his own conduct prevented the plaintiff from filing suit. Authority supports the application of the doctrine. Thus, the court held that it remains the law in Florida.[555]

548 *Id.* at 1075 (quoting Nardone v. Reynolds, 333 So. 2d 25, 36 (Fla. 1976)).

549 *Id.*

550 *Id.* at 1076 (quoting Lord Coke, saying that "estoppel" comes from the French word *estoupe* that means to "closeth up [a man's] mouth to allege or plead [otherwise]" (citing LANCELOT FEILDING EVEREST, EVEREST AND STRODE'S LAW OF ESTOPPEL 1 (3d ed. 1923))). The court also held that the doctrine became the law of Florida as part of the common law background as of July 4, 1776 when the common law was adopted by the Florida Legislature in 1829. *Id.*

551 *Id.*

552 *Id.*

553 *Id.* at 1077.

554 *Id.* at 1078.

555 *Id.* at 1080. Two other opinions of the court require brief mention. In *Lane v. State*, 337 So. 2d 976, 977 (Fla. 1976), the court held that because the statute of limitations is a substantive (not procedural) matter, the statute in effect at the time of the crime governed (not at the time of charge). In *Eaddy v. State*, 638 So. 2d 22, 24–25 (Fla. 1994), the court held that the defendant may waive a statute of limitations. Because the court only instructed the jury on first-degree murder, it faced a "Hobson's choice": convicting him or acquitting him. The enhanced risk of an unwarranted conviction for first-degree murder was constitutionally unacceptable. *Id.* at 25. In short, the defendant had the right to waive the statute on the lesser-included offense, and the lower court denied it. *Id.*

Turning to the district courts of appeal and the lower federal courts interpreting Florida RICO, the Civil Remedies for Criminal Practices Act, or the theft act, the decisions themselves are remarkable only in the lack of number since 1977. On the whole (one exception), the decisions are straightforward, workmen-like, and unremarkable applications of the statutory language, precisely what you should expect to find. They dealt with equitable tolling, the discovery rule, time of accrual, burden of proof, trebling, retroactivity, the relation of the statutes to other statutory limitations rules, notice in theft litigation, suspension during criminal proceedings, and the doctrine of continuing offenses and torts. Six decisions warrant individual attention, in particular, because they favorably contrast with the less impressive work of the federal courts. How each court handled them is instructive.

First, in *Senfeld v. The Bank of Nova Scotia Trust Co.*,[556] the Third District upheld conversion and civil theft claims. The court found that conversion "is an unauthorized act which deprives another of his property permanently or for an indefinite time," and "[w]here a person having a right to possession of property makes a demand for its return," and the person having it declines to turn it over, a conversion occurs.[557] Concededly not carefully drawing a distinction between equitable tolling and the discovery rule, the court held that where the plaintiff was in blameless ignorance of the conduct of the defendant, the period had not run on the conversion claim.[558] Turning to the theft claim, the court rejected arguments that because the legislature premised the claim on a crime, the criminal point of accrual (the time of the theft) applied, that a conviction had to precede the civil claim, that the burden of proof was beyond a reasonable doubt (not preponderance), that only a jury (not the court) could treble the damages (trebling was a ministerial act), and that the a period of limitation, enacted in 1977, could not apply to a 1975 conversion, the statute of limitation was applicable, and the court affirmed the judgment.[559]

In *State v. Guthrie*,[560] the Second District mindlessly read the theft act without regard to the general provision for limitations that absence from the state tolled the period, necessitating the amendment of the theft act.

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556 450 So. 2d 1157 (Fla. Dist. Ct. App. 1984).

557 *Id.* at 1160–61 (citation omitted).

558 *Id.* at 1162.

559 *Id.* at 1162 (reading the statute to achieve its remedial goals under FLA. STAT. ANN. § 812.037 (West 2002)).

560 567 So. 2d 544, 545 (Fla. Dist. Ct. App. 1990).

In *Seymour v. Adams*,[561] the Fifth District faced a classic landlord-tenant dispute that involved a theft claim where the lower court granted summary judgment to the property owner. These materials can pass over the property owner law. On the theft claim, the lower court granted summary judgment to the property owner, because the tenant did not make a demand for $200, and he did not allege a criminal state of mind.[562] Significantly, the court found that the demand, while required by the statute, was timely if made within the period of limitations, on an amendment accompanied by compliance with the notice.[563]

In *Ziccardi v. Strother*,[564] the Second District held that the five-year limitations period in the 1986 amendment to Florida RICO that created the Criminal Remedies for Criminal Practices Act was "remedial," and that a court could apply it to conduct that occurred in 1979.[565] Nevertheless, the five-year period did not save the plaintiff's claim, because it was for conduct that occurred in 1979, and she did not file her claim for relief until 1987.[566] That said, because the state filed criminal charges against one of the defendants in 1979, and the state did not resolve them until 1988, plaintiff's period of limitations under the statute tolled until two years after 1988; thus, she filed it timely against the criminally charged defendant.

In *O'Malley v. Mounts*,[567] the Fourth District faced a writ of prohibition against a prosecution for grand theft and RICO for the theft of corporate bonds with intent to defraud and an organized scheme to defraud. The thefts occurred in October 1983, and May 1984, but thereafter ended. The state filed its prosecution in July 1989, charging grand theft and racketeering.[568] The state sought to circumvent the running of the five-year period of limitation by characterizing the

561 638 So. 2d 1044 (Fla. Dist. Ct. App. 1994).

562 *Id.* at 1049.

563 *Id.* at 1049 n.9 (holding that pre-suit notice requirements for malpractice are subject to correction on amendment accompanied by compliance with the notice if within the period of limitations (citing Hosp. Corp. of Am. v. Lindberg, 571 So. 2d 446, 448 (Fla. 1990))).

564 570 So. 2d 1319 (Fla. Dist. Ct. App. 1990).

565 *Id.* at 1320–21.

566 *Id.* at 1321–22.

567 590 So. 2d 437 (Fla. Dist. Ct. App. 1991).

568 *Id.* at 437–38.

theft and racketeering as "continu[ing]" offenses.[569] The attempt failed.[570]

Last, in *Huff Groves Trust v. Caulkins Indiantown Citrus Co.*,[571] the Fourth District faced a civil theft claim for failure to pay the proper amount for fruit processed during growing seasons between 1988 and 1994.[572] Recognizing that growers had to file their claims from when the conduct terminated *or* the cause of action accrued under § 772.17, and while failing to focus its decision on "conduct . . . terminates" or "cause of action accrues" (defined under § 95.031(1) as "when the last element constituting the cause of action occurs"), the court recognized that the five-year period ran from the "last pay-out to any of the plaintiffs."[573] The last payout occurred in April 1995. The five-year statute ran out in April 2000. The growers filed their suit in August 2000. While unnecessary under the law now, the court discussed the discovery rule, finding, however, that the plaintiffs had ample notice that the payouts were deficient well before August 1995.[574]

Turning to the federal court decisions that deal with Florida issues, the work of the judiciary stands in sharp and unfavorable contrast. The opinions reflect an atmosphere of result-oriented resolutions rather than the routine application of unremarkable legal

569 *Id.* at 438. The classic example of a "continuing tort" rightly not barred by the statute of limitations until the conduct or its effects end is *State Department of Environmental Protection v. Fleet Credit Corp.*, 691 So.2d 512 (Fla. Dist. Ct. App. 1997). The Department challenged Fleet for its "continuing injury to groundwater caused by the . . . seepage of hazardous substances disposed and discharged on commercial property in the 1980s." *Id.* at 513. Fleet defended on statute of limitations grounds. The court fully recognized that the statute "*begins* to run when the last element of the cause of action accrues." *Id.* at 514 (citing FLA. STAT. ANN. § 95.03(1) (1995)) (emphasis added). The claim for relief was for a failure to abate an imminent hazardous substances exposure in violation of FLA. STAT. ANN. § 403.726 (1995). *Id.* Fleet held the burden of proof on the statute of limitations. *Id.* (noting that it is "elementary" that the burden of establishing statute of limitations bar is on the party raising the defense (citing Petroleum Prods. Corp. v. Clark, 248 So. 2d 196, 199 (Fla. Dist. Ct. App. 1971))). Under the court's view, little did it matter when Fleet abandoned the property, because the initial disposal was not the gravamen of the claim for relief, but the continuing, but abatable nuisance, and, as such, the statute of limitations, where a continuing invasion does exist, "does not begin to run until the wrongful invasion . . . that constitutes the violation ceases." *Id.* Otherwise, the statutory scheme "to abate pollution . . . would be wholly frustrated." *Id.*

570 *Id.* at 438 (relying on *State v. King*, 282 So. 2d 162, 167 (Fla. 1973), which held that larceny was not continuing offence).

571 829 So. 2d 923 (Fla. Dist. Ct. App. 2002).

572 *Id.* at 924.

573 *Id.*

574 *Id.* at 925.

principles, the opposite of what youone should expect to find. They, too, warrant individual attention, so that the performance of the federal judiciary stands out. In *Armbrister v. Roland International Corp.*,[575] the district court faced homebuyer fraud litigation involving interstate land sales. Buyers dealt with sales representatives using direct mail and telephone solicitations. Most never saw their homes or land. The buyers alleged that the salesmen misrepresented the character and value of their purchases as part of a scheme to defraud.[576] First, denying summary judgment on the claims, but limiting discovery to the statute of limitations (a prudent move in any massive litigation like RICO), the court, after discovery, held that the statute of limitation ran on, among other claims, civil conspiracy, civil theft, RICO, and Florida RICO. The court found that the period for civil conspiracy, as an intentional tort, was four years under § 95.11(3) (o).[577] Incredibly, the court ran the claim from the first payment, because that was the point of injury, ignoring the continuing injuries inflicted by the subsequent payments; it held that the statute begins to run when injury "first appears, not when it recurs."[578] The court should have recognized the doctrine of separate accrual.[579] To support its holding, the court mischaracterized *Kelley v. School Board of Seminole County*;[580] it is inapt; it involved a leaking roof where the school board sustained the entire injury when the roof first leaked.[581] It has nothing to do with separated injuries sustained over time. The court also misused *Phillips v. Amoco Oil Co.*;[582] it is also inapt; it dealt only with the discovery rule in the context of an employment contract. It says nothing about continuing injury. Neither opinion includes the court's most telling line: "first appears, not when it recurs." In fact, the court conspicuously ignores *Isaacs v. Deutsch*,[583] which holds where payments are at issue,

575 667 F. Supp. 802 (M.D. Fla. 1987).

576 *Id.* at 806.

577 *Id.* at 809 (citing Newberger v. U.S. Marshals Serv., 751 F.2d 1162, 1165 (11th Cir. 1985); Faulk v. Allen, 12 So.2d 109, 110 (Fla. 1943)).

578 *Id.*

579 For duty of support, see *Isaacs v. Deutsch*, 80 So. 2d 657, 660 (Fla. 1995) ("[I]n the case of an obligation payable by instalments [sic], 'the statute of limitations runs against each instalment [sic] from the time it becomes due; that is, from the time when an action might be brought to recover it.'" (quoting 34 AM. JUR. *Limitations of Actions* § 142 at 114 (1941))).

580 435 So. 2d 804 (Fla. 1983).

581 *Id.* at 806–07.

582 799 F.2d 1464, 1468–69 (11th Cir. 1986).

583 80 So. 2d 657, 660 (Fla. 1995). The doctrine of *Isaacs* remains good law. Lopez-Infante v. Union Cent. Life Ins. Co., 809 So. 2d 13, 15 (Fla. Dist. Ct. App. 2002) ("[T]he alleged fraud was an ongoing fraud. . . . [E]ach yearly premium payment by

the statute runs from each payment, not against the series. The court next turned to the possibility of tolling, but it painfully confused "equitable estoppel" (focusing on the conduct of the defendant) and "equitable tolling" (focusing on the conduct of the plaintiff).[584] It confused "fraudulent concealment" (a form of equitable estoppel) with "equitable tolling."[585] No matter, concluding that plaintiffs did not exercise any due diligence after signing the contracts, the court denied each of the plaintiffs' efforts to postpone on any ground the running of the period of limitations.[586] When the court turned to

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the appellants resulted in consequent injury to them by virtue of their reliance on the representations of Union Central." (emphasis omitted)).

On the other hand, arguably, because the buyers "should have known" of the fraud at the beginning, when they made subsequent payments, the payments were not because of the fraud, but because of the buyers' own gullibility. That said, I remain unpersuaded. *See, e.g.*, United States v. Coffman, 94 F.3d 330, 334 (7th Cir. 1996) (Posner, C. J.) ("[The law, if it distinguishes the savvy from the guidable,] would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection—and most needful or not are within its protective scope. . . . 'Taking advantage of the vulnerable is a leitmotif of fraud.' . . . It would be very odd for the law to protect only those who, being able to protect themselves, do not need the law's protection. In fact picking on the vulnerable normally makes your conduct more rather than less culpable, earning you a heavier sentence." (citations omitted)); *accord,* United States v. Svete, 556 F.3d 1157, 1167 (11th Cir. 2009) ("[Scheme to defraud does not] 'differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity[,]' . . . or that '[t]he negligence of the victim in failing to discover a fraudulent scheme is not a defense to criminal conduct.'" (citations omitted)).

584 *See* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–52 (7th Cir. 1990).

585 *Armbrister*, 667 F. Supp. at 809–10.

586 *Id.* at 810. At one time, the Eleventh Circuit held that a scheme to defraud required the making of a misrepresentation "reasonably calculated to deceive persons of ordinary prudence and comprehension." United States v. Brown, 79 F.3d 1550, 1558–60 (11th Cir. 1996) (reversing a mail fraud conviction where the deception was easily discovered from "readily available external sources"). *Brown* is another way of saying that the statute does not apply to those who need it, and that the statute does apply to those who do not need it. *See generally*, Mark Zingale, Note, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?* 99 COLUM. L. REV. 795 (1999). In *Brown*, the court faced defendants that sold their homes at significantly higher prices than independently built homes in the same neighborhoods. Defendants targeted customers in "snowbelt" states who were encouraged to visit defendants' communities at defendants' expense. *Brown*, 79 F.3d at 1553–54. The court reversed, holding that the government presented insufficient evidence that defendants devised a scheme "reasonably calculated to deceive persons of ordinary prudence and comprehension" because the buyers could have acquired information about comparable house prices. *Id.* at 1558–59. The court observed, "[t]he government tries to draw a distinction; they say these men were convicted for deceptions about these high prices. For us, at least in the context of home sales and

plaintiffs' civil theft claim, the court found that the period was five years, but still found that the plaintiffs' claims were untimely, because of their lack of due diligence.[587] Similarly, when the court turned to plaintiffs' RICO claim for relief, it recognized that the period was four years, but following antitrust law, it held that the claim for relief accrued on injury.[588] That made the claims untimely, if the court ran the period from the first payment and ignored the subsequent payments, (whether discovery applied, because of its analysis on the other claims).[589] Finally, when it turned to Florida RICO, it candidly recognized that § 895.05(10) "clearly" contained "alternative limitations periods . . . ."[590] It declined to construe it and held that because it had dismissed the federal claims, it could decline to assert pendent jurisdiction of over Florida RICO.[591]

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of the openness of the Florida real estate market, this distinction is a distinction without meaning." *Id* at 1562. It also quoted with approval *Simms v. Biondo*: "'[T]he doctrine of *caveat emptor* applies to real estate transactions such that a buyer has a duty to satisfy himself or herself of the quality of a bargained purchase price without trusting a seller [and] facts which are accessible as a matter of public record bar a claim of justifiable reliance necessary to sustain a cause of action for fraud.'" *Id.* at 1560 (quoting Simms v. Biondo, 816 F. Supp. 814, 820, 822 (E.D.N.Y. 1993)). *Brown* reflects a terribly misguided opinion of obviously gullible "snow-birds" and manifestly culpable Florida "home sales representatives." Did *Brown* really mean to say that no ordinary person should ever trust a Florida salesperson of real estate? Surely, some pride themselves on telling the truth. In brief, no reason exists to let the morals of a few set the standard for the many. In part, *caveat emptor* gave us the Great Recession of 2008 and the Great Depression of 1929. *See* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 186 (1963) (noting fraud in securities statute is designed to curtail the "philosophy of caveat emptor"); MAX RADIN, THE LAWFUL PURSUIT OF GAIN, 54 (photo. reprint 1976) (1931) ("[C]aveat Emptor . . . is bad Latin, and from the Roman point of view, worse law."). Fortunately, the Eleventh Circuit thought better of *Brown*, later overruled it, and held that the mail fraud statute prohibits "any scheme or artifice to defraud," no matter how fanciful. United States v. Svete, 556 F.3d 1157, 1169 (11th Cir. 2009). Lamentably, that misguided philosophy animated *Armbrister*'s fact-finding and its application of the law.

587 *Armbrister*, 667 F. Supp. at 822.

588 *Id.* at 824 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1970)).

589 *Id.* at 824.

590 *Id.* at 825 ("[A] criminal or civil action or proceeding . . . may be commenced at any time within 5 years after the conduct . . . terminates or the cause of action accrues." (citing FLA. STAT. §895.05 (10) (1985))).

591 *Id.* After *Armbrister*, the court in *Colonial Penn Ins. Co. v. Value Rental-A-Car*, 814 F. Supp. 1084 (S.D. Fla. 1992), *adopted by* 814 F. Supp. 1084, 1089 (S.D. Fla. 1992), faced a multi-count complaint under RICO, Florida RICO, and civil theft; it upheld the RICO claim as timely, but it applied *Bivens Gardens Office Building, Inc. v. Barnett Bank*, 906 F.2d 1546, 1554 (1lth Cir. 1990), that adopted the injury-and-pattern discovery rule. As such, it is not of interest here. In addition, it dealt with issues largely

In contrast, in *Perera v. Wachovia Bank*,[592] the court sensitively faced an outrageous bank theft of $187,871.10 by a bank officer where the bank incredibly did not make good on the customer's losses. During a thirty-year relationship with the bank, the plaintiff opened several certificates of deposit (CDs). In August 2008, he learned from the FBI that his account representative stole his funds in February 2001.[593] The bank learned of the theft in 2005, but unbelievably did not inform the plaintiff.[594] The government filed a criminal case against the representative in January 2010. After continuing delays by the bank, it finally flatly denied plaintiff's claim. He then filed his theft claim in December 2009.[595] The bank did not deny the theft, but even after it had delayed the matter, it defended on statute of limitations grounds. The court rightly found that the character of the theft and its subsequent cover-ups by the bank amounted to a "continuing tort," similar in character to churning of investment accounts.[596] As such, the bar of the statute of limitation did not limit plaintiff's claim for relief. In the alternative, the court also considered "equitable tolling" that applies when the defendant misleads or lulls the plaintiff into inaction.[597] (Under *Cada*'s and *Davenport*'s lexicon, the doctrine is that of "equitable estoppel;" "equitable tolling" focuses on the conduct of the plaintiff, not the defendant.)[598] Here, too, the court held that the bank's conduct prevented plaintiff from filing his action and tolled the statute of limitations. On the merits of the claim, the court held that civil theft included the conversion or misap-

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bypassed by more recent developments touching on notice and fact pleading, see, *e.g.*, *Ashcroft v. Iqbal*, 556 US. 662, 670 (2009) ("plausibility" pleading), *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("plausibility" pleading), that need not tarry these materials, and several substantive RICO issues (scienter, pattern, enterprise); several RICO and Florida RICO questions it dealt with as if the two statutes were largely "identical," *Colonial Penn*, 814 F. Supp. at 1095 (a problematic judgment at best): injury, pattern (again), conspiracy, constitutional (vagueness), Florida RICO's single contract limitation, civil theft (criminal state of mind) limitations and relation back. These issues are not germane here.

592 No. 09-23773, 2010 U.S. Dist. LEXIS 33618 (S.D. Fla. March 15, 2010), *adopted by* No. 09-23773, 2010 U.S. Dist. LEXIS 33759 (S.D. Fla. Apr. 6, 2010).

593 *Id.* at *2.

594 *Id.*

595 *Id.* at *3.

596 *Id.* at *8, *10 (citing Laney v. Am. Equity Inv. Life Ins. Co., 243 F. Supp. 2d 1347, 1357 (M.D. Fla. 2003) (citing Seaboard Air Line R.R. v. Holt, 92 So. 2d 169, 170 (Fla. 1956) (continuing tort))).

597 *Id.* at *10.

598 *See* Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450–52 (7th Cir. 1991).

propriation of CDs[599] and upheld plaintiff's civil theft and conversion claims for relief; the statute of limitations barred neither of them.[600] The contrasts in how these two courts handled the claims for relief before them stand out sharply and unfavorably to *Armbrister* as well as the laudable work of the District Courts of Appeal in Florida.[601]

Strangely, Florida courts, while recognizing it, did not construe at length the alternative accrual points—"after the conduct . . . terminates or the cause of action accrues"—from which to run the period of limitations in FLA. STAT. § 895.05(10). Unhappily, other state courts have construed it, but unwisely missed its controlling significance. Georgia adopted RICO legislation modeled on Florida RICO. The courts in Georgia have construed its statute reflecting the Florida language. The Georgia court inexcusably reached an indefensible result, and they are staying the course.[602] Other states (including Florida) that followed the Florida lead in adopting the language should not follow the Georgia lead in misinterpreting it. Several aspects of the application of the alternative points are material here. The statute applies to criminal *and* civil claims; it also applies to continuing offenses *and* continuing torts. Any construction of the statute must accommodate each of these functions to reflect accurately the Legislature's intent. The Georgia court, however, focused on only

599 *Perera*, 2010 U.S. Dist. LEXIS 33618, at *12 (upholding an injunction under the civil theft statute, FLA. STAT. § 812.035(6), preventing a legal co-owner from withdrawing funds where plaintiff had an equitable claim for the full amount of the account (citing Tinwood N.V. v. Sun Banks, Inc., 570 So. 2d 955, 960 (Fla. Dist. Ct. App. 1990) ("An embezzlement whereby defendant lawfully obtains possession of the plaintiff's funds and thereafter converts said funds to his own use will justify an action for civil theft." (citations omitted)))), *disapproved on other grounds*, State v. Lucas, 600 So.2d 1093 (Fla. 1992); *see also* Miles Plastering & Assocs., Inc. v. McDevitt & St. Co., 573 So. 2d 931, 932 (Fla. Dist. Ct. App. 1991) (finding civil theft does not lie for action brought by subcontractor on construction project against general contractor for payment of services rendered because uncertain or unspecified amount of money alleged to be owed and no identifiable account or piece of property from which the money is to be paid).

600 *Perera*, 2010 U.S. Dist. LEXIS 33618, at *15–16.

601 *See* Jones v. Childers, No. 88-85-CIV-T-22C, 1992 U.S. Dist. LEXIS 19430, at *60 & n.22 (M.D. Fla. June 26, 1992) ("[I]t is clear that the plain language of Section 772.17 of CRCPA provides for alternative methods of calculating the statute of limitations. . . . To accept the Defendants' position, the Court must conclude not only that the sale of the Telron II investment constituted the last 'predicate act,' but also that the point in time at which the conduct in violation of CRCPA terminated and at which the cause of action accrued is exactly the same. Given the facts of this case, the Court is unable to accept Defendant's argument."), *rev'd on other grounds*, 18 F.3d 899 (11th Cir. 1994).

602 My analysis here follows that of John E. Floyd, the preeminent authority on state RICO statutes. *See* ABA RICO SUMMARY, *supra* note 13.

one aspect of the statute (civil limitations), and it mistakenly followed inapt federal law not even construing similar legislative language.

Georgia Code § 16-14-8 provides:

> Notwithstanding any other provision of law, a criminal or civil action or proceeding under this chapter may be commenced up until five years *after the conduct in violation of a provision of this chapter terminates or the cause of action accrues.* If a criminal prosecution or civil action is brought by the state to punish or prevent any violation of this chapter, then the running of this period of limitations, with respect to any cause of action arising under subsection (b) or (c) of Code Section 16-14-6 which is based upon any matter complained of in such prosecution or action by the state, shall be suspended during the pendency of the prosecution or action by the state and for two years thereafter.[603]

Blalock v. Anneewakee, Inc. was the first decision to interpret the relevant language in Georgia RICO.[604] Plaintiff was a student at Anneewakee, a corporation created specifically for the operation of the youth treatment center, known as "Anneewakee;" he was there between 1972 and 1975; he was thirteen years-old when Anneewakee discharged him; he became eighteen years-old on August 15, 1981.[605]

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603 GA. CODE ANN. § 16-14-8 (2011) (emphasis added).

604 426 S.E.2d 165, 167 (Ga. Ct. App. 1992), *following*, Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 156 (1987); *see also* Bivens Gardens Office Bldg. v. Barnett Bank of Fla., 906 F.2d 1546, 1554–55 (11th Cir. 1990) (noting that RICO accrues on discovery of injury and pattern), *overruled by* Rotella v. Wood, 528 U.S. 549, 556–57 (2000).

605 *Blalock*, 426 S.E.2d at 166. The age of majority in Georgia is eighteen. GA. CODE ANN. § 39-1-1 (a). Plaintiff's minority excused his filing while he remained a minor. *See* GA. CODE ANN. § 9-3-90 (a) (entitling a person who is a minor when his claim for relief arises to bring an action within the same statute of limitation after reaching the age of majority). That translated into his having five years from, not 1973, when the sexual abuse ended, as to him, but from 1981 (then plus five or 1986); his claim for relief was not filed until 1990; thus, his claim for relief was untimely, no matter how you read the statutory issue of "terminates or accrues" (whether discovery applied). But if the conduct by Anneewakee staff continued, *as to other students*, until at least, say, 1987, his claim was timely, if he can count from, not when the conduct terminates at to him (1973 plus his majority (1981) plus five (1986)), but from the termination of the corporation's conduct *as to anyone in the same pattern of conduct* (1987 plus five or 1992), because he filed in 1990. This alternative method of counting played no role in the court's decision. Nevertheless, his claim for relief would have been timely, had the court read the statute through the lens of *Keystone Ins. Co. v. Houghton.* 863 F.2d 1125, 1131 (3d Cir. 1988) ("[I]t is the continuing nature of the violation that is the very essence of a RICO claim . . . ." (quoting Cnty. of Cook v. Berger, 648 F. Supp. 433, 434 n.1 (N.D. Ill. 1986))); *see also id.* at 1131 ("It is the continuing nature of the violation which distinguishes a RICO claim from claims arising simply from a predicate act and which requires the rule we announce." (citing

He filed his claim for relief on July 9, 1990. Plaintiff alleged that, during his enrollment, the staff of the corporation sexually and physically abused him.[606] Anneewakee moved for summary judgment because the five-year statute of limitation for Georgia RICO barred his claims. The court observed:

> We do not agree with appellant's argument that the legislature intended that the statute of limitation begin to run from the time that the racketeering activity terminates. We conclude that the more reasonable construction of OCGA § 16-14-8 is that the statute of limitation begins to run *when the civil RICO cause of action accrues, which we interpret to mean when the plaintiff discovers, or reasonably should have discovered, that he has been injured and that his injury is part of a pattern.*[607]

The test adopted by the court from the Eleventh Circuit in *Bivens* is the injury-and-pattern-discovery rule, one of the tests, albeit rejected, for the accrual of RICO.[608]

United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977) (holding that RICO is a continuing offense), *aff'd*, 578 F.2d 1371 (2d Cir. 1978))); *id* at 1132 ("By analogy the last predicate act of a pattern of racketeering activity is an appropriate place for civil RICO causes of action to accrue. . . . '[T]he principles of conspiracy law ought clearly to apply, and so long as any of the predicate acts occur within the limitations period, a defendant should have to answer for all of his related and continual acts of harm.'" (quoting *Berger*, 648 F. Supp. at 435)); *id* at 1126 ("[T]he accrual period . . . run[s] from the time when the plaintiff knew or should have known of [his] last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same 'pattern.'"). To be sure, the Supreme Court rejected *Keystone*'s last-predicate-act rule in *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 187 (1997). Thus, the rule for accrual in the Third Circuit is now injury-discovery (knows or should have known) plus four years. Forbes v. Eagleson, 228 F.3d 471, 483–84 (3d Cir. 2000). But the Georgia court was (and any other state court is), free, if it wants, not to follow federal law—a course that should depend solely on cogent reasoning and the relevant statutory language—and free to read the Georgia statute in light of *Keystone*, because of its powerful and persuasive reasoning and the language of the statute, ignoring a Supreme Court that still has not made up its mind on the point of accrual for RICO. Rotella v. Wood, 528 U.S. 549, 554 n.2 (2000) ("We do not . . . settle upon a final rule.").

606 *Blalock*, 426 S.E.2d at 166.

607 *Id.* at 167 (emphasis added) (citing Bivens Gardens Office Bldg. v. Barnett Bank of Fla., 906 F.2d 1546, 1554–55 (11th Cir. 1990), *overruled by Rotella,* 528 U.S. at 554).

608 *Bivens*, 906 F.2d at 1554–55. The Court subsequently rejected the test in *Rotella*, 528 U.S. at 554. The Georgia courts of appeals, however, blindly continue to follow the injury-and-pattern-discovery rule despite *Rotella.* Cochran Mill Assocs. v. Stephens, 648 S.E.2d 764, 769–70 (Ga. Ct. App. 2007) (citing with approval the *Blalock*'s injury-and-pattern discovery language); *accord* S. Intermodal Logistics, Inc. v.

Blalock's analysis is mistaken for two reasons. First, *Blalock* says it took guidance from "several federal decisions" that had considered the question when the statute of limitations for RICO begins to run.[609] A problem with this approach is that the decisions do not interpret a similar statutory provision to that which Georgia borrowed.[610] The Georgia legislature enacted Georgia RICO in 1980, when federal decisions on the application of a statute of limitations to federal civil RICO did not exist. In fact, five years *after* the legislature enacted Georgia RICO, an American Bar Association task force described the state of the law at that time on the application of a statute of limitations for civil RICO claims as "confused, inconsistent, and unpredictable."[611] Indeed, the Supreme Court did not apply the four-year statute of limitations from the Clayton Act to federal civil RICO claims for relief in *Malley-Duff* until 1987,[612] well after the enactment of Georgia RICO. The Court in *Malley-Duff* sought a uniform statute of limitations and borrowed the antitrust provision, because "[federal] RICO itself includes no express statute of limitations for either civil or criminal remedies . . . ."[613] Thus, none of the Court's analysis is relevant to the Georgia RICO, because it contains the *express* statute of limitations that federal RICO lacked. Consequently, such inapt general observations (that Georgia RICO reflects federal RICO) are beside the point on this issue.[614]

D.J. Powers Co., 555 S.E.2d 478, 481 (Ga. Ct. App. 2001). That *Blalock*'s mistaken rule, inapt rationale, and inconsistency with the statutory text call for a re-examination are beyond serious debate. Perseverance in error is the opposite of a virtue. *See* THOMAS AQUINAS, SUMMA THEOLOGICA II-II, Art. Q. 137, art. 1 (1274) ("[T]o persist long in something good until it is accomplished . . . [is] special virtue.").

609 *Blalock*, 426 S.E.2d at 167 (citing Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987); *Bivens Gardens*, 906 F.2d at 1554–55).

610 The general rule is that borrowed statutes reflect the legislative intent of the jurisdiction from which the language came. Metro. R.R. Co. v. Moore, 121 U.S. 558, 572 (1887).

611 ABA TASK FORCE ON CIVIL RICO, REPORT OF THE AD HOC CIVIL RICO TASK FORCE OF THE ABA SECTION OF CORPORATION, BANKING AND BUSINESS LAW 391 (1985).

612 *Malley-Duff*, 483 U.S. at 150–53.

613 *Id.* at 155.

614 To the *Blalock* court's credit, it "acknowledge[d] that the Georgia RICO statute is considerably broader than the federal RICO statute and that federal circuit court opinions regarding the federal statute, while instructive, do not control our construction or application of the Georgia RICO statute." *Blalock*, 426 S.E.2d at 167 (citing Dover v. State, 385 S.E.2d 417, 419–20 (Ga. 1989)). Nevertheless, it turned around and said that because "we have found no Georgia cases which address when the statute of limitation for civil RICO actions begins to run, we are guided by several federal decisions which have considered the question." *Id.* How that *non sequitur* follows

Second, *Blalock* violates the fundamental rule of statutory interpretation that requires not reading any of a statute's language as meaningless.[615] *Blalock*'s interpretation of § 16-14-8 violates this rule, because it leaves "after the conduct in violation of a provision of this chapter terminates" without any meaning, based upon no more than its *ipse dixit* that the statute of limitations begin to run when the civil RICO claim for relief accrues is a "more reasonable construction" of § 16-14-8.[616] It fails to explain why, the crucial question.

Courts elsewhere easily interpret identical language in state RICO statutes to reach results opposite to *Blalock*. The Ohio RICO statute contains the following provision:

> Notwithstanding any other provision of law providing a shorter period of limitations, a civil proceeding or action under this section may be commenced at any time within five years after the unlawful conduct terminates or the cause of action accrues or within any longer statutory period of limitations that may be applicable.[617]

Federal courts interpreting this provision have no difficulty concluding that its plain language creates alternative points from which the statute of limitations begins to run, one of which is the point at

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strains the rules of basic logic. The plain language of the statute controls. Looking for case authority when you do not need it is a fool's errand.

615 The Georgia Supreme Court repeatedly teaches that "[t]he fundamental rules of statutory construction require us 'to construe a statute according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage.'" Blue Moon Cycle, Inc. v. Jenkins, 642 S.E.2d 637, 638 (Ga. 2007) (quoting Slakman v. Continental Cas. Co., 587 S.E.2d 24, 26 (Ga. 2003)).

616 *Blalock*, 426 S.E.2d at 166. A federal district court marked its objection to the *Blalock* analysis, but did not act on it in *Southern Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F. Supp. 2d 1337, 1356 n.38 (S.D. Ga. 1998) ("[Arguably,] § 16-14-8's plain language provides for an alternative limitations period, one that begins when the RICO violation terminates. . . . *Blalock* rejected this argument, albeit without explanation. [Plaintiff argues that the] Georgia Supreme Court would not follow *Blalock* and instead would apply the alternative limitations according to the statute's plain terms. The Georgia Supreme Court, however, denied certiorari in *Blalock*. Thus, until the Georgia Supreme Court overrules *Blalock*, this Court is bound to follow that decision." (citations omitted)).

617 OHIO REV. CODE ANN. § 2923.34(J) (LexisNexis 2010) (emphasis added). In 1986, I worked with State Senator Eugene Watts, a master artisan in legislative language. He demanded, to use his words, "the toughest and most comprehensive [RICO] Act in the nation" and "state-of-the-art legislation." State v. Schlosser, 681 N.E.2d 911, 914 (Ohio 1997). I did what he told me to do. Whether he got what he asked for is for others to judge.

which the unlawful conduct terminates.[618] In short, *Blalock* should not bind a trial court in Georgia (or any other state court, trial or appeallate).

Moreover, because of an intervening amendment, and a Georgia Supreme Court decision applying the amendment, *Blalock*'s precedential status is problematic. *Blalock* was decided five years before the 1997 amendments to § 16-14-2(b) that added a requirement that "[t]his chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions."[619] After *Blalock*, the Georgia Supreme Court interpreted the liberal construction provision in a manner that shows the flaws in *Blalock*'s analysis:

> If a different interpretation were called for, though, *it would be error to give a more restrictive meaning to the term*, thus limiting the remedial purposes of the Act and violating the liberal construction imperative of the legislature, as "the purpose of the RICO Act is to provide compensation to private persons injured or aggrieved by reason of any RICO violation."[620]

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618 Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris Inc., 29 F. Supp. 2d 801, 809 (N.D. Ohio 1998) ("Ohio Rev. Code § 2923.34(K) gives the statute of limitations for the state RICO claim. . . . Section 2923.34(K) provides that . . . a civil proceeding or action under this section *may be commenced at any time within five years after the unlawful conduct terminates or the cause of action accrues*. . . . Under the first possible limitations period, Plaintiff Funds' claim under the Ohio Pattern of Corrupt Activity Act . . . is timely if brought 'within five years after the unlawful conduct terminates.' . . . [P]laintiffs show evidence that the defendants' alleged unlawful conduct has not ended and is ongoing."); Baker v. Pfeifer, 940 F. Supp. 1168, 1181 (S.D. Ohio 1996) ("Section 2923.34(K) provides two possible events that may trigger the running of the limitations period—the termination of the unlawful conduct or the accrual of the cause of action.").

619 GA. CODE ANN. § 16-14-2(b) (2011).

620 Williams Gen. Corp. v. Stone (*Williams General II*), 632 S.E.2d 376, 378 (Ga. 2006) (quoting Williams General Corp. v. Stone (*Williams General I*), 614 S.E.2d 758, 760 (Ga. 2005) (emphasis added)). Thus, *Blalock* violated the liberal construction mandate by adopting a more restrictive interpretation of § 16-14-8. That said, *Williams General II* illustrates a generally unnoticed interpretation problem with taking federal or other state decisions and simply applying them to the Florida RICO provisions. If a statute is unambiguous, its plain language controls; interpretation is not necessary. United States v. Turkette, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language. 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.'" (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980))). In fact, "[t]he strict-construction principle is merely a guide to statutory interpretation. Like its identical twin, the 'rule of lenity,' it 'only serves as an aid for resolving an ambiguity; it is not to be used to beget one." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 n.10 (1985) ("Petitioner invokes 'the rule of lenity' for decision in this case. But that 'rule,' as is

Blalock did not attempt to analyze the language in Georgia RICO providing "until five years after the conduct in violation of a provision of this chapter terminates . . . ." Because *Blalock* looked at the statute of limitations provision only in the context of a civil case, it also did not consider that the General Assembly chose to apply the same accrual provision to both criminal and civil violations of the Georgia RICO statute.

Given federal law at the time Georgia enacted its RICO statute, the legislature could easily see the benefit[621] of (1) codifying a limitations provision for criminal and civil RICO cases, (2) adopting the five year period of limitations the federal courts use, (3) recognizing that RICO's "pattern requirement" makes it a continuing offense, and (4) following federal law in concluding that the statute of limitations does not begin to run until the conduct in violation of the statute, that is, the acts of racketeering activity, end. The language in § 16-14-8, that a criminal action or criminal proceeding under Georgia RICO "may be commenced up until five years *after the conduct in violation of a provision of this chapter terminates*," is the explicit language envisioned by *Toussie*.[622] The conclusion is inescapable: Georgia RICO (and Florida RICO) is—where the pattern continues over time—a continuing-crime offense (and a continuing tort). As read by the courts, the stat-

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true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one. . . . The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. That is not the function of the judiciary." (citing Callanan v. United States, 364 U.S. 587, 596 (1961))). Moreover, "[t]he simple existence of some statutory ambiguity . . . is not sufficient to warrant application of that rule [of lenity], for most statutes are ambiguous to some degree." Muscarello v. United States, 524 U.S. 125, 138 (1998). More to the point, the crucial language discussed here setting alternative dates is not ambiguous in context of its effort to blend criminal and civil actions and the traditional concepts of "continuing offenses" and "continuing torts."

621 *See* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 379 (1982) ("[It] is always appropriate to assume that our elected representatives, like other citizens, know the law." (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 696–97 (1979))) .

622 Toussie v. United States, 397 U.S. 112 (1970). Federal courts recognize RICO's pattern element makes it a continuing offense within the meaning of *Toussie*. *See, e.g.*, United States v. Yashar, 166 F.3d 873, 879 (7th Cir. 1999) ("RICO, however, is a continuing offense under the *Toussie* definition. It criminalizes a 'pattern' of activity that can include predicate acts separated in time by as much as ten years. Therefore, the nature of the offense is such that Congress must have intended it to be a continuing one, and thus an exception to the normal start of the limitations period."); *supra* note 57.

ute of limitations for crimes and torts must reflect this fundamental insight.

Conclusion[623]

Most people can easily enough grasp the basic idea behind time-bars in the law. The enterprise of law, whether criminal or civil, has as its purpose "justice." This much is beyond serious dispute. The overall meaning of "justice" remains, of course, in contention. Fortunately, however, ultimate questions, always near the surface of legal issues, do not require final resolutions to make practical judgments. Agreement on the details is more often easier to secure than agreement about a grand design. At first glance, a time-bar involves two points in time: the time of the event, and the time of the initiation of the legal proceedings looking into the event. As the these two points in time separate more, the practical ability of any legal body accurately to resolve disputes about the facts making up the event—a necessary precondition to giving each person his or her due—becomes more and more problematic. This, too, is beyond serious dispute. Facts come out in court only through witness testimony or the introduction of other evidence. Memories fade. Participants and other relevant persons die or become unavailable. Documents are mislaid, lost, or stolen. Physical evidence deteriorates. Ultimately, "justice"—however defined in the final analysis between the two parties—requires truth in fact-finding, and truth here simply means relative accuracy in the reconstruction of what happened, when, where, to whom, how, and why. Accordingly, at some point, the passage of time itself defeats "justice." This much, too, is beyond serious dispute. Thus, the need is manifest for general[624] rules framed in terms of time, permitting and not permitting litigation to proceed. Yet, these rules must reflect a

623 This conclusion only treats general conclusions about time-bars and makes an assessment, for good or for ill, of the performance of legislatures and the judiciary. The conclusions of this piece on particular issues of law appear annexed to its consideration of them, whether under RICO, exclusively in the footnotes, or whether under time-bars, primarily in the text and in the footnotes. They need not appear here as well.

624 Thomas Aquinas insightfully observes, "[s]ince the lawgiver cannot have in view every single case, he shapes the law according to what happen most frequently. . . . No man is so wise as to be able to take account of every single case and therefore he is not able sufficiently to express in words all those things that are suitable for the end he has in view." St. Thomas Aquinas, Summa Theologica II-I, Q. 96, art. 6 (Fathers of the English Dominican Province trans.) (1274), *in* 20 Great Books, *supra* note 5, at 235. The maxim of the law is *jus constitui oporet in his quae ut plurimun accident, non quae ex inopinato* (the law ought to be made with a view of the case that happens most frequently, and not to those that are unexpected).

sensivity to justice case-by-case. Currently, too, many of these rules, generally crafted to resolve issues abstractly, as they operate on the legal side of the law are not as sensitive to justice case-by-case as the parallel equity principles are when they deal with delay.

Up until this point, the legal journey goes relatively easily. Then, vigorous advocates for the parties get involved in working out the details of the law. They want a judge to fix precisely the metric of this far and no farther, a question of painting dawn or dust, not high noon or midnight. They insist on black and while lines where only grey paint adheres to the canvas. They focus on the particulars of when you start the time-bar and when you stop the time-bar. They doggedly push for bright lines that assuredly fix the limits of liability. Yet having insisted on hard and fast lines, they then argue that if a court applies an unequivocal line mechanically, it gives mechanical answers that do not satisfy a discriminating sense of "equity." Accordingly, they properly argue for the need to develop tolling rules that focus sensitively on first the conduct of the complainant. For example, has he acted with due diligence in bringing his claim or has he slept on his rights to the detriment of the defending party? If not, what consequents should follow? Should his negligence set off the intentional conduct of the respondent? If so how: mechanically or with sensitivity to the balance of the equities? Next, how shall we look at the conduct of the respondent? For example, did he hide, in a special way, beyond the typical cover-up of misbehavior, his offending conduct to the detriment of the complainant? Alternatively, did he gull the complainant to wait and not to file his complaint on time and now seek to use the induced delay to his inequitable advantage? Thus, advocates properly raise compelling notions of fair play that mitigate the harshness of the mechanical results.

In working with time-bars in the law, it takes only a short period of discussion for an attentive participant to see that the interests involved in framing and applying them are hardly simple; they are complex and triangular: the complaining party, the responding party, and society itself, represented by the legal body that must resolve the dispute justly and with equity. The interests, too, involved differ in criminal and civil justice. In addition, time-bars take on a different hue when a representative of the sovereign or the people is one of the parties to the dispute. In brief, a journey that started out relatively straightforward ends up intricate beyond the patience of those who do not spend considerable time doing technical work.

That said, what stands out in the development of the law in area of time-bars is that when we identify the interests carefully, the devilish details are, as Pound says, not much more than a matter of the balanc-

ing of the various interests, as best as experienced humans can resolve.[625] In fact, the rules that comprise the details of time-bars are not matters of logic that have right and wrong answers.[626] That you or

625 ROSCOE POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY 18 (1922) ("[I]n criminal law, as everywhere else in law, the problem is one of compromise; of balancing conflicting interests and of securing as much as may be with the least sacrifice of other interests.").

626 The number of binding precedents at the Supreme Court level in the area of time-bars will never reach a full harvest. The issue is narrow and by definition exceptional. Rightly, other matters more easily draw the attention of the Court. Accordingly, "[i]t is almost as important that the law should be settled . . . as that it should be settled correctly." Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724 (1865). *Misera est servitus ubi lex est vaga aut incerta* (It is a miserable slavery where the law is vague or uncertain). That also means that the Justices must often turn to matters outside of legal precedents for guidance, as, say, theories of right and wrong. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 302 (2d ed. 1927) ("When a case comes before a court for decision . . . there may be no stature, no judicial precedent, no profession opinion, no custom bearing on the question involved, and yet the court must decide the case somehow. . . . [It] must . . . determine what the law ought to be; [it] must have recourse on the principles of morality."). Yet, should the theory reflect "sentiment" or "reason"? *Compare* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921) (noting "sentiment of justice"), *with* LON L. FULLER, THE LAW IN QUEST OF ITSELF 65, 122–23 (1940) ("The facts most relevant to legal study [are] moral facts."). The connection between law and morality, too, is more pervasive than Gray concedes, if we credit, as we should, ROSCOE POUND, LAW AND MORALS 63 (1926) ("[I]n truth, there are continual points of contact with morals at every turn in the ordinary course of judicial administration."). What does moral theory teach us, not about the grand questions of the law, but issues of practical administration in the law in, say, the area of time-bars? RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 63 (2001) argues little ("[M]oral theories . . . it seems to me [are] . . . spongy and arbitrary."); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 348 (1990) ("I am skeptical that moral philosophy has much to offer law in the way of answers to specific legal questions or even in the way of general bearings. . . . [W]hen it comes to specific cases, it lets us down.").

On the contrary, Aristotle rightly teaches, "[P]recision is not to be sought for alike in all discussions, any more than in all the products of the crafts. . . . [We can only] look for precision in each class of things just so far as the nature of the subject matter admits . . . ." ARISTOTLE, *Nichomachean Ethics*, *in* 9 GREAT BOOKS, *supra* note 5, at 339–40. In a similar fashion, John Finnis aptly observes:

> Here, as elsewhere, the sceptic [sic] is a disappointed absolutist, and we must reject the sophistical dilemma, 'all or nothing'. In particular, we must beware of the (often unconscious) legalism which supposes that if there is no uniquely correct solution to a moral problem, no solution to that problem is objectively right (or wrong). The language of 'right' and 'wrong' must not lure us into assuming that for every problem or situation there is one solution or choice which is the right one.

JOHN FINNIS, FUNDAMENTALS OF ETHICS 77 (1983). Thus, in each instance, legal (or moral) reasoning does not necessarily move by way of deduction from demonstrated premises to demonstrated conclusions, that is, one logically correct conclusion.

I might have drawn a particular line at a different point is largely beside the point.[627] In fact, those legislators and judges whose job it is to cultivate this small garden in the law have—overall—done well, as

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Moral (or legal) reasoning is, as Cicero says, about "wisdom," the "art of living." CICERO, ON MORAL ENDS 17 (Julia Annas ed., Raphael Woolf trans., 2001) (45 B.C.). Thomas Aquinas in his *Summa Theologica* draws a helpful distinction between the ways in which different kinds of reasoning proceed. The first is "as a conclusion from premises" (*conclusiones ex principiis*); the second is as "by way of determination of certain generalities" (*sicut deterinationes quaedam aliquorum communium*). ST. THOMAS AQUINAS, SUMMA THEOLOGICA II-I, Q. 95, art. 2, *in* 20 GREAT BOOKS, *supra* note 5, at 227–28. Aquinas's Latin *determinatio* is usually translated "determination." Its primary meaning, however, is "the marking off or fixing of a boundary." OXFORD LATIN DICTIONARY 530 (1982). In a legal context, it best translates as "to make a judgment." Aquinas calls the first way as "like to that by which, *in the sciences*, demonstrated conclusions are drawn from principles." *Id.* The second is "like that whereby, *in the arts*, common forms are determined to something particular; thus, the craftsman needs to determine the common form of a house to the shape of this or that house." *Id.* (emphasis added); *see also id.*, at *Reply to Obj. 4* ("[T]he judgment[s] of expert and prudent men [are based on particular points of natural law] . . . in so far, that is, as they see at once what is the *best* thing to decide." (emphasis added)); *id.* ("[W]e ought to attend to the undemonstrated saying and opinions of experienced and older people or of people of practical wisdom not less than to demonstrations; for because experience has given them an eye they see *aright*." (citing ARISTOTLE, *Nichomachean Ethics*, *in* 9 GREAT BOOKS, *supra* note 5, at 393) (emphasis added))). Here the Justices of the Court have to do the best they can with whatever they have available to them to help them to decide questions with a range of possible resolutions. They have to make judgments of this or that, where it could easily be that or this. In sum, the justices must settle the baroque details of the questions of time-bars one way or the other, as much as anything, so that parties know where they stand, and they can move on. "Precision and certainty are often of more importance to the rules of law, than their abstract justice." M'Gruder v. Bank of Wash., 22 U.S. (9 Wheat) 598, 602 (1824). Justice Johnson's remark is especially true of the details of time-bars.

627 When it comes to drawing lines in the law, Justice Frankfurter said it well in *10 E. 40th St. Bldg., Inc. v. Callus*, 325 U.S. 578, 584–85 (1945):

> [W]e cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations. . . . That is what is meant by a question of degree. . . . But for drawing the figurative line the basis must be something practically relevant to the problem in hand.

Cardozo's thoughts, too, are apt here: "I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things." BENJAMIN CARDOZO, NATURE OF THE JUDICIAL PROCESS 179 (1921).

they work, not with questions of high policy, but with the practical necessity of line drawing in a narrow, but important area of the administration of justice—time. To have done well here is what we expect of them. They deserve our respect and gratitude, even when we find—respectfully—fault in particular judgments.