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Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies

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RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): BASIC CONCEPTS—CRIMINAL AND CIVIL REMEDIES

G. Robert Blakey *

Brian Gettings **

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[P]artnership in crime . . . presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal objective will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. . . . Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed.

*Mr. Justice Felix Frankfurter*¹

What is needed . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. . . . [A]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

*Senator John L. McClellan*²

INTRODUCTION

The law of conspiracy has seldom been in good repute among the practicing bar.³ Too much of its time has been spent in defending the great malefactors of wealth and power—tainted politicians, corrupt corporate officers, faithless union bosses, and mob figures. Personal interest has always had a way of shaping perspective, and the rich and powerful are, after all, paying clients. In addition, law professors do not like the law of conspiracy.⁴ The prevailing ideology of academic life is too liberal to support any legal tool that strengthens the hand of the prosecutor, although it must be conceded that table talk in the dining room was strangely ambivalent when the law of

1. *Callanan v. United States*, 364 U.S. 587, 593-94 (1961). *But see* D. CRESSEY, *THEFT OF THE NATION* 67 (1969) (criminal justice system designed to control individual violator not organizations).

2. S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

3. *See, e.g.*, Goldstein, *The Krulwich Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957).

4. Professor Johnson goes so far as to suggest that it be abolished. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973). *But see* Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 80 (1967) [hereinafter referred to as TASK FORCE]. Professor Blakey stated: "The utility of conspiracy theory in the prosecution of organized crime is manifest. No other single substantive legal tool has been as effective in bringing organized crime to book." *Id.* at 81.

conspiracy was used to bring the Watergate defendants to book.⁵ Eminent judges, too, have added their voices to the general thrust of criticism directed at it,⁶ yet the law of conspiracy has survived and prospered since its uncertain origins in the fourteenth century,⁷ probably because it has been, up until now, society's chief legal answer to a pressing need in the law to respond to the special challenge of group crime. If the law of conspiracy is in good repute among any segment of the bar, it is among the prosecutors. The conspiracy charge has been aptly called by Judge Learned Hand, "the darling of the modern prosecutor's nursery."⁸ Were Judge Hand alive today, he might be moved to comment, however, that the fickle fancy of the prosecutor has turned to RICO, the Racketeer Influenced and Corrupt Organizations title⁹ (title IX) of the Organized Crime Control Act of 1970.¹⁰ Largely ignored at first, today RICO is widely employed by federal prosecutors, not just by organized crime strike force attorneys, but by prosecutors in United States Attorney's offices; RICO is used not just in organized crime prosecutions,¹¹ but in white-collar crime prose-

5. See, e.g., *Ehrlichman v. Sirica*, 419 U.S. 1310 (1974); *United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977); *United States v. Mardian*, 546 F.2d 973 (D.C. Cir. 1976); *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976); *United States v. Ehrlichman*, 546 F.2d 910 (D.C. Cir.), *cert. denied*, 429 U.S. 1120 (1976); *United States v. Chapin*, 515 F.2d 1274 (D.C. Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States v. Barker*, 514 F.2d 208 (D.C. Cir.), *cert. denied*, 421 U.S. 1013 (1975); *United States v. Liddy*, 509 F.2d 425 (D.C. Cir. 1974). *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir.), *cert. denied*, 418 U.S. 955 (1974); *United States v. Mitchell*, 389 F. Supp. 917 (D.D.C. 1975), *cert. denied*, 431 U.S. 933, *rehearing denied*, 433 U.S. 916 (1977).

6. The classic statement of judges who have criticized the law of conspiracy was authored by Mr. Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, 445-46 (1949) ("elastic, sprawling and pervasive offense" constituting "a serious threat to fairness in our administration of justice"). Those who have followed have only copied the statement; they have not improved upon it. Since the law of conspiracy has been almost wholly a judge-made doctrine, there is a certain irony to the prevailing adverse judicial attitude.

7. See *Blakey*, TASK FORCE, *supra* note 4, at 81.

8. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925). There is more than a little irony, too, in Judge Hand's making this comment since the contours of the modern federal law of conspiracy are in many ways his handwork. See, e.g., *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943); *United States v. Mack*, 112 F.2d 290 (2d Cir. 1940); *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938). But see *United States v. Feola*, 420 U.S. 671, 688-90 (1975), in which the Supreme Court questioned the soundness of Judge Learned Hand's conclusion in *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941). Judge Hand concluded that to permit conspiratorial liability when the alleged conspirators were ignorant of the federal implications of their acts would expand the scope of the conspiratorial agreement beyond its terms as understood by the participants in the conspiracy. See generally *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959).

9. 18 U.S.C. §§ 1961-1968 (1976).

10. PUB. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. § 1961 (1976)).

11. N.Y. Times, Dec. 9, 1978, § 4, at 1, col. 4 (seven out of ten not Mafia-type prosecutions).

cutions (most prominently political corruption cases)¹² as well as in a large variety of violent offenses. The result of this heightened prosecutive activity has not been surprising. Like the law of conspiracy when it alienated the rich and the mighty, RICO has now become a favorite target of complaints voiced in the press by defense attorneys.¹³ Obviously, those of us who designed and drafted RICO, as well as

12. See, e.g., *United States v. Marubeni*, 611 F.2d 763 (9th Cir. 1980) (prosecution of Japanese corporation for bribery of Alaskan purchasing agent); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated in part*, 591 F.2d 1347, *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980). For a critique of the *Mandel* litigation that is sharply condemnatory, see 3 CORNELL INSTITUTE ON ORGANIZED CRIME, MATERIALS ON RICO 1213 (1980-1981) [hereinafter referred to as MATERIALS].

13. William G. Hundley, a prominent Washington defense counsel (his clients have included former Attorney General John Mitchell), has been quoted: "But they're using this [RICO] against all kinds of defendants. You know as well as I do that Congress never would have passed it if they ever thought they were going to use it against governors and people like that." *Are Prosecutors Going Wild Over RICO*, *Legal Times of Wash.*, Oct. 8, 1971, at 32, col. 1. Defense attorney Stanley S. Arken of New York has called RICO "cruel." George Collins of Chicago has called its draftsmen "brilliant," but the statute "totalitarian." *In Pursuit of the Mob*, *Nat'l L.J.*, Nov. 26, 1979, at 12, col. 3. Sherman Magidson of Chicago has said, "RICO can reach out and castrate people." *RICO The Enforcer*, *NEWSWEEK*, Aug. 20, 1970, at 83. "It's like the death sentence," according to Harvey M. Silets of Chicago. "If a RICO count is in the indictment, unless you work a [plea bargaining] deal, you are really courting the danger of losing not only your liberty but your business as well." *Racketeering Law Facing Key Test*, *Nat'l L.J.*, Dec. 29, 1980, at 18, col. 1. The potential for abuse "is not fanciful. It's there," added Stephen Horn of Washington. *Id.* at 18, col. 2. "It's like using a cannon to go hunting for squirrels," said Barry Tarlow of Los Angeles. "The way it has been applied and the threats to apply it involve a gross violation of individual rights and liberties." *Id.* at 18, col. 3.

As it can be seen from these comments, most of the objections of the defense bar to RICO boil down to noting a possibility of abuse, something that can be said of all statutes, not just RICO. As such, they should be listened to, but not given undue attention. Administrative abuse is an incident of administration; it is not necessarily caused by poor statutory draftsmanship, and its cure usually lies in careful selection of administrative personnel, not more legislation. No one has convincingly shown, moreover, that RICO's draftsmanship peculiarly makes it subject to abuse. At best, the case can be made that not all marginal cases that fall within its terms warrant its enhanced sanctions. But that, too, is true of all statutes, and that is where sound prosecutorial discretion and the good sense of trial judges come into play. Not all possible cases have to be prosecuted, and not all possible penalties have to be imposed. In addition, there are legitimate provisions in RICO for remission or mitigation of its mandatory forfeiture sanction, where its impact might be too severe. See 18 U.S.C. § 1963(c) (1976). Finally, the Criminal Division of the Department of Justice, on January 16, 1981, issued "RICO Guidelines." These guidelines, while somewhat opaque, emphasized the need for a "RICO purpose" (enhanced sanction, forfeiture, and the like) in bringing a RICO indictment. The guidelines recognized that a RICO count in an indictment should *not* be merely cumulative and that the inclusion of a RICO count in an indictment to enhance the prosecutor's power in plea bargaining was impermissible. The guidelines were also sensitive to the federal-state balance that must be struck when the predicate offenses are solely state crimes. Given common sense in their interpretation and application, the new guidelines should go a long way toward meeting much of the legitimate criticism leveled at RICO.

Although the American Bar Association approved RICO when it passed Congress in 1970, see *Organized Crime Control: Hearings on S. 30 Before the Subcomm. No. 5, House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538 (1970) (statement of Edward L. Wright, President of ABA) [hereinafter cited as *House Hearings on S. 30*], the Bar Association now has a study group compiling "recommendations" for amendments to RICO. See [1979] 26 CRIM. L. REP. (BNA) 2282; ABA SECTION OF CRIMINAL JUSTICE, *THE PROSECUTION AND DEFENSE OF RICO AND MAIL FRAUD CASES* (1980).

those in whose custody its administration has been entrusted, ought not be above criticism, whatever its source. Yet, as Judge Learned Hand said of criticism of the judiciary: "Let . . . [us] be severely brought to book, when . . . [we] go wrong, but by those who will take the trouble to understand."¹⁴

RICO was the end product of a long process of legislative effort to develop new legal remedies to deal with an old problem: "organized crime."¹⁵ As finally enacted, RICO authorized the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is,

14. L. HAND, *THE SPIRIT OF LIBERTY* 85 (Dilliard ed. 1952). He also noted, "Perhaps 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.* at 110.

15. "Organized crime" is a phrase with many meanings. It is much like the fictional crime portrayed in Akira Kurasawa's 1950 film, *Rashoman*, in which a ninth-century nobleman's bride is raped by a bandit, and the nobleman lies dead. The film portrays versions of the double crime from the perspectives of each of the three participants and a witness. Each version is different. So it is with the definition of organized crime. Some have seen nothing and decided that nothing was there. *See, e.g.,* Hawkins, *God and the Mafia*, 14 PUB. INTEREST 24 (1969). Others, examining the phenomenon from an anthropological perspective, have seen a "social system." *See, e.g.,* F. IANNI, *A FAMILY BUSINESS* (1972). One commentator, relying on press accounts, has seen only a public relations gimmick. *See* D. SMITH, *THE MAFIA MYSTIQUE* (1975). The organizational theorist sees a functional division of labor. *See* D. CRESSEY, *supra* note 1. Some lawyers have seen it as a conspiracy. *See, e.g.,* Blakey, *TASK FORCE*, *supra* note 4, at 80, 81-83. The President's Crime Commission in 1967 adopted a view that termed conspiratorial behavior "organized crime" when its organizational sophistication reached a level where division of labor included positions for an "enforcer" of violence and a "corrupter" of the legitimate processes of our society. *Id.* at 8. The particular organized crime syndicate known as the Mafia was termed only the "core" of organized crime; it was not identified with it. *Id.* at 6. The tendency of some to identify organized crime with the Mafia has been decried by no less than the sponsor of the Organized Crime Control Act, Senator John L. McClellan. *GAMBLING IN AMERICA: REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING 181-82* (1976) ("in none of the hearings or in the processing of legislation in which I have been involved has the term been used in this circumscribed fashion"). That other ethnic groups are deeply involved in organized crime on both the syndicate and enterprise level seems evident. *See* PENNSYLVANIA CRIME COMMISSION, 1980 REPORT: A DECADE OF ORGANIZED CRIME 18-20 ("Black Mafia" in Philadelphia). Indeed, the concept of "enterprise criminality" that RICO embodies—whether organized crime, white-collar crime, or violent crime generally—owes its origin to a seminal paper prepared by Professor Donald R. Cressey. *TASK FORCE*, *supra* note 4, at 25. *See also id.* at 56-60 for a discussion of the key concepts of "organization" plus "crime." For a further breakdown of the concept into "syndicate," "enterprise," and "venture," *see* ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION FOR THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPING AND ELECTRONIC SURVEILLANCE 190-92 (1976). However the phrase is defined, the scope of the Organized Crime Control Act was not limited to the operations of "organized crime." *See, e.g.,* 116 CONG. REC. 35344 (1970) (statement of Rep. Richard Poff). Congressman Poff was a principal House sponsor of the legislation. *See also* *United States v. Campanale*, 518 F.2d 352, 365 (9th Cir. 1975); *United States v. Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); *United States v. Vignola*, 464 F. Supp. 1091, 1096 (D. Md. 1979). *Compare* *United States v. Thordarson*, 487 F. Supp. 991, 999 (C.D. Cal. 1980) (to be applied conservatively beyond organized crime). When Congress wanted to limit a provision of the Act, it knew how to use appropriate words. *See* Organized Crime Control Act of 1970, PUB. L. NO. 91-452, § 601, 84 Stat. 934-35 (1970) (codified at 18 U.S.C. § 3503 (1976)) (depositions limited to situations where Attorney General certified legal proceeding involved "organized criminal activity").

enterprise criminality—from simple political corruption to sophisticated white-collar crime schemes to traditional Mafia-type endeavors. In addition, RICO restored to American jurisprudence a limited concept of criminal forfeiture of ill-gotten gains and economic bases of misused power. Civil suits were also authorized, which may be brought by the Attorney General of the United States¹⁶ or by injured persons against RICO violators.¹⁷ The remedies made available in civil actions brought by the Attorney General were injunctive relief¹⁸ and, in a private RICO suit, not only injunctions and other forms of civil relief, but treble damages plus costs and a reasonable attorney's fee.¹⁹ As such, RICO's promise of new legal relief for old wrongs was great. We are only now discovering whether all that RICO promised in 1970 will be redeemed in the years ahead.

This article will present a brief overview of the legislative history of RICO and its structure, including its standards and basic concepts. The article will then consider the criminal sanctions authorized under RICO and discuss specific aspects of the RICO civil suit as well as some of the problems that may be expected to arise in it. The objective of the article is to provide the reader with a short introduction to RICO, one of the most sophisticated statutes ever enacted by Congress.

I. LEGISLATIVE HISTORY²⁰

In 1951, the Kefauver Committee disclosed the problem of organized crime's infiltration into legitimate business.²¹ By 1960, the problem of criminal infiltration of labor unions had been documented

16. 18 U.S.C. § 1964(b) (1976).

17. *Id.* § 1964(c).

18. *Id.* § 1964(b).

19. *Id.* § 1964(c).

20. For a more comprehensive analysis of the legislative history of RICO, see 1 MATERIALS, *supra* note 12, at 58-105.

21. "One of the most perplexing problems in the field of organized crime is presented by the fact that criminals and racketeers are using the profits of organized crime to buy up and operate legitimate business enterprises." S. REP. NO. 141, 82d Cong., 1st Sess. 33 (1951). The list of industries noted included advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drug stores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, juke box, laundry, liquor, loans, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap shipping, steel, surplus, television, theaters, and transportation. S. REP. NO. 307, 82d Cong., 1st Sess. 170-81 (1951). "In most cases, these are enterprises in which gangster methods have been used to obtain monopolies so that their vicious practices taint otherwise legitimate business They are able to compete unfairly with legitimate businessmen because of their accumulations of cash and their vicious methods." S. REP. NO. 2370, 81st Cong., 2d Sess. 16 (1950).

by the McClellan Committee.²² Then, the McClellan Committee exposed the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra.²³ The problem of organized criminal activity in the world of legitimate businesses and unions was, therefore, well-documented by 1967 when the President's Commission on Law Enforcement and Administration of Justice reported the methods used by organized crime to acquire control of business concerns²⁴ and recommended the use of new approaches to control its infiltration into legitimate business.²⁵

In 1967, bills 2048²⁶ and 2049²⁷ were proposed in the Senate to implement aspects of the Commission's recommendations by apply-

22. See generally the following reports of the Senate Select Committee on Improper Activities in the Labor or Management Field: S. REP. No. 1784, 87th Cong., 2d Sess. (1962); S. REP. No. 621, 86th Cong., 2d Sess. (1960); S. REP. No. 1417, 85th Cong., 2d Sess. (1958). See also *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Comm. on Government Operations*, 88th Cong., 1st Sess. (1963).

23. S. REP. No. 72, 89th Cong., 1st Sess. (1965). See *Hearings Before the Subcomm. of the House Comm. on Appropriations*, 89th Cong., 2d Sess. 271-78 (1966) (statement of J. Edgar Hoover); *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations*, 88th Cong., 1st Sess. 5-35 (1963) (statement of Robert F. Kennedy).

24. The Commission reported:

Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion.

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 190 (1967).

25. "Law enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business." *Id.* at 208. In support of its recommendation, the Commission noted the easier civil standard of proof, the possibility of discovery, and the value of antitrust-type remedies. *Id.* It was this insight that was the origin of the two-track approach—criminal and civil—of RICO.

26. S. 2048, 90th Cong., 1st Sess. (1967). S. 2048 proposed an amendment to the Sherman Act prohibiting the investment or business use of unreported income: Every person who (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise engaged in or affecting trade or commerce among the several states, with foreign nations, or within any place subject to the provisions of section 3, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than \$50,000, or imprisoned for not more than one year or both.

Id. § 8. The bill's sponsor, Senator Roman L. Hruska, hoped to bring the full force of the Sherman Act to bear on organized crime:

The antitrust laws now provide a well-established vehicle for attacking anticompetitive activity of all kinds. They contain broad discovery provisions as well as civil and criminal sanctions. These extraordinarily broad and flexible remedies ought to be used more extensively against the "legitimate" business activities of organized crime.

113 CONG. REC. 17999 (1967) (remarks by Sen. Hruska upon introduction of S. 2048).

27. S. 2049, 90th Cong., 1st Sess. (1967). S. 2049 was drafted to supplement the Sherman Act amendments proposed by S. 2048. It prohibited: (1) the

ing antitrust-type remedies to certain activities of organized crime. Both bills were referred to the Senate Committee on the Judiciary,²⁸ but no action was taken on either bill. The proposed bills, however, were studied by the private bar. The Antitrust Section of the American Bar Association analyzed Senate bills 2048 and 2049 and agreed with them in theory but not in form.²⁹ The Section recommended that antitrust-type bills attacking criminal infiltration of business be independent criminal statutes.³⁰ Concern was expressed that a commingling of the two distinct statutory purposes might produce inharmonious results and methods.³¹ An independent statute, it was suggested, would also free the new criminal remedies from the restrictive case law appropriate for the primarily regulatory antitrust setting.³² The Section considered that in the areas of "standing" and

acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities, *id.* §2(1); and (2) the agent of a corporation from authorizing the corporation to engage in any of the listed criminal activities, *id.* at §3. The bill allowed the government, as well as third parties, to seek injunctions to restrain violations of S. 2049, *id.* at §4(b)-(c). Actions for damages and cost were made available to the government, *id.* at §5(b), and actions for treble damage costs and attorneys' fees were made available to the victims, *id.* at §5(a). S. 2049 also provided a full range of liberal procedural provisions.

Congressman Poff introduced companion bills to S. 2048 and S. 2049 in the House. H.R. 11766 and H.R. 11268, 90th Cong., 1st Sess., 113 CONG. REC. 17976 (1967).

28. 113 CONG. REC. 18007 (1967). For an analysis of other procedural aspects (lesser included offenses, venue, joinder, severance, and verdict) of RICO, see 3 MATERIALS, *supra* note 12, at 1377-1477.

29. See *House Hearings on S. 30*, *supra* note 13, at 149. The American Bar Association Antitrust Section testified:

The Antitrust Section agrees that organized crime must be stopped. It further agrees that the antitrust machinery possesses certain advantages worthy of utilization in this fight. It therefore supports and endorses the principles and objectives of both S. 2048 and S. 2049, and similar legislation.

However, it prefers the approach of S. 2049. By placing the antitrust-type enforcement and discovery procedures in a separate statute, a commingling of criminal enforcement goals with the goals of regulating competition is avoided.

Id.

30. *Id.*

31. *Id.*

32. *Id.* The Antitrust Section also testified:

Moreover, the use of the antitrust laws themselves as a vehicle for combating organized crime could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with a body of precedent—appropriate in a purely antitrust context—setting strict requirements on questions such as "standing to sue" and "proximate cause."

Conversely, the placing of this legislation in the body of the antitrust laws could have an undesirable and inappropriate impact on the administration of the antitrust laws in their normal context. Thus, faced with litigation between private citizens and members of the organized criminal hierarchy, there may well be a natural inclination to weigh the balance heavily in favor of the private citizen. Such an imbalance, while defensible in this context, is inappropriate in the normal antitrust litigation context.

Id.

"proximate cause," more liberal standards might be desirable in the new actions where the primary focus would be organized crime.³³

In 1969, Senator John L. McClellan, in response to his long-standing interest in organized crime, introduced Senate bill 30,³⁴ which was based on a number of the recommendations of the President's Crime Commission.³⁵ The Organized Crime Control Act was a broad-based reform bill covering such areas as grand juries,³⁶ immunity,³⁷ contempt,³⁸ false statements,³⁹ depositions,⁴⁰ and sentencing for dangerous special offenders.⁴¹ When Senate bill 30 was first introduced, it did not contain comprehensive RICO-type provisions. Also in 1969, Senator Hruska introduced Senate bill 1623⁴² which combined the concepts of Senate bills 2048 and 2049⁴³ introduced previously. As a product of the Senate hearings on Senate bills 30 and 1623, Senate bill 1861,⁴⁴ RICO's immediate predecessor, was drafted and introduced by Senators McClellan and Hruska.⁴⁵ Senate bill 1861 enlarged the range of listed "racketeering activities" (referred to as "criminal activity" in previous bills) and required the proscribed conduct be accomplished through a "pattern" of racketeering activity. Victim treble damage and injunctive actions were not dealt with explicitly in the new bill in an effort to streamline it and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a va-

33. *Id.*

34. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

35. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADM. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967).

36. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 39906 (1969) (tit. I).

37. *Id.* (tit. II).

38. *Id.* (tit. III).

39. *Id.* (tit. IV).

40. *Id.*, 115 CONG. REC. at 39906-07 (tit. V).

41. *Id.*, 115 CONG. REC. at 39907 (tit. X). It was, in short, the legal dimension of "integrated package" that the President's Crime Commission had called for. TASK FORCE, *supra* note 4, at 24.

42. The Criminal Activities Profits Act, S. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6995-96 (1969).

43. 115 CONG. REC. 6993 (1969) (remarks of Sen. Hruska upon introduction of S. 1623).

44. The Corrupt Organizations Act of 1969, S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9568-9571 (1969).

45. "The bill which I am introducing today, the Corrupt Organizations Act of 1969, is in part a product of testimony developed in four days of hearings on S. 30." 115 CONG. REC. 9567 (1969) (remarks of Sen. McClellan upon introduction of S. 1861). Hearings on S. 30 were combined with hearings on S. 1623 and other bills. See *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1816, S. 2022, S. 2122 and S. 2292 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 268 (1969) [hereinafter cited as *Senate Hearings on S. 30*]. While RICO had its origins in previous attempts to curtail organized crime infiltration into legitimate business, S. 1861, when redrafted and introduced, had a broader

riety of both public and private remedies.⁴⁶ On the other hand, Senate bill 1861 strengthened Senate bill 1623 by providing civil investigative demands,⁴⁷ use immunity,⁴⁸ criminal forfeitures,⁴⁹ and a congressional mandate for liberal construction.⁵⁰ These and other organized crime-related measures were referred to the Subcommittee on Criminal Law of the Senate Judiciary Committee.⁵¹ A variety of witnesses offered recommendations touching on aspects of RICO: its immunity provisions,⁵² its scope,⁵³ its definitions,⁵⁴ and its potential threat to the civil liberties of defendants.⁵⁵ Incorporating some, but not all, of

purpose; it was directed at all forms of "enterprise criminality." It represented the rest of the Crime Commission's integrated package.

46. See S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9569 (1969). S. 1861's congressional findings and Statement of Policy, for example, explicitly recognized that it carried with it a range of remedies that included "fine, imprisonment, criminal forfeiture, and civil divestiture, dissolution, injunctions and *other relief . . .*" (emphasis added). It is likely, therefore, that a private cause of action would have been implied. See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

47. S. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9570-71 (1969).

48. *Id.*, 115 CONG. REC. 9569-70 (1969).

49. *Id.*, 115 CONG. REC. 9569 (1969). As originally drafted, forfeiture was limited to an "interest in any enterprise." As reported out and passed, the forfeiture provisions were expanded to include "any interest acquired," *i.e.*, ill-gotten gains, as well as the base of control over the enterprise. See 18 U.S.C. § 1964(a) (1976). See note 117 *infra* for a further discussion of forfeiture.

50. S. 1861, 91st Cong., 1st Sess. § 4, 115 CONG. REC. 9571 (1969).

51. S. Res. 1623, 91st Cong., 1st Sess., 115 CONG. REC. 6925 (1969); S. Res. 1861, 91st Cong., 1st Sess., 115 CONG. REC. 9512 (1969).

52. The American Bar Association, for example, preferred transaction over use immunity. *Senate Hearings on S. 30, supra* note 45, at 268.

53. The Department of Justice, for example, suggested that the investor be required to have been a principal in the criminal activity and be allowed minimal investment of illegal monies. *Id.* at 406.

54. Clarification of the concepts of "pattern of racketeering activity" and "racketeering activity" was also suggested by the Department of Justice. *Id.* at 405.

55. The American Civil Liberties Union (ACLU), for example, expressed its disapproval of the RICO provisions through a series of general attacks. The ACLU claimed that mandatory open proceedings in government civil actions and the use of civil investigative demands against natural persons violated the Fifth Amendment and the defendant's right of privacy. *Senate Hearings on S. 30, supra* note 45, at 477. More importantly, the ACLU recognized that RICO applied beyond organized crime in the traditional sense of the Mafia-type crime, and it expressed concern that the RICO provisions would infringe upon the civil rights of white-collar and political activist defendants. *Id.* at 475. Congressman Poff ably answered this last civil liberty objection during the floor debate in the House:

The curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

Nevertheless, this line of analysis has a certain superficial plausibility. But if we make a closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new lesson derived from that reexamination. For example, our examination of how organized crime figures have achieved immunity from legal accountability led us to examine the sentencing practices and powers of our Federal courts. There we found that now our Federal judges, unlike

these recommendations, the Judiciary Committee integrated Senate bill 1861 into Senate bill 30 as title IX of the re-drafted bill. Immunity was provided in title II of Senate bill 30; it was dropped from title IX.⁵⁶ The definition of "racketeering activity" was broadened and clarified to include more specific types of conduct.⁵⁷ Similarly, the definition "pattern of racketeering activity" was limited by requiring at least two acts, one of which must have occurred after the effective date of the law.⁵⁸ Participation of the investor as a principal in the racketeering activity was required and minimal investment allowed without assessing additional penalties.⁵⁹ This revised version of Senate bill 30⁶⁰ was passed by the Senate almost unanimously⁶¹ and sent to the House.⁶²

State judges, have no statutory power to deal with organized crime leaders as habitual offenders and give them extended prison terms. Having noted the lack of habitual offender provisions by considering one class of cases, we obviously learned that it was lacking in other classes, too. Is there any good reason why we should not move to meet that need across the board?

....

... [M]ost disturbingly, however, this objection seems to imply that a double standard of civil liberty is permissible. S. 30 is objectionable on civil liberties grounds, it is suggested, because its provisions have an incidental reach beyond organized crime. Coming from those concerned with civil liberty in particular, this objection is indeed strange. Have they forgotten that the Constitution applies to those engaged in organized crime just as it applies to those engaged in white-collar or street crime? S. 30 must, I suggest, stand or fall on the constitutional questions without regard to the degree to which it is limited to organized crime cases.

116 CONG. REC. 35344 (1970) (statement of Rep. Poff). Almost identical remarks were made in the Senate by Senator McClellan, 116 CONG. REC. 18913-14 (1970). Congressman Poff's remarks, it should be emphasized, identified the most common mistake in reading RICO: the confusion of one aspect of the occasion for its enactment (organized crime) with the scope of its provisions (enterprise criminality). RICO was broadly drafted to reach a wide variety of problems that were identified in the Committee's examination of organized crime. Those problems were not limited to organized crime cases and neither was the statute. For a detailed rejoinder, see McClellan, *The Organized Crime Control Act (S. 30) or Its Critics: Which Threatens Civil Liberties?* 46 NOTRE DAME LAW. 55 (1970).

56. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 926-928 (codified at 18 U.S.C. §§ 6001-6005 (1976)). Title II was sustained against constitutional objections under the Fifth Amendment in *Kastigar v. United States*, 406 U.S. 441 (1972).

57. *House Hearings on S. 30*, *supra* note 13, at 50-51 (1970).

58. *Id.* at 52. The concept was not defined in the text of the bill, but the Committee Report indicated it meant "not isolated." S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) ("continuity plus relationship").

59. *House Hearings on S. 30*, *supra* note 13, at 53-54. Since the generation of black money, *i.e.*, illegal profits, was prohibited by 18 U.S.C. § 1962(c), it was not thought necessary to impose additional penalties on their investment under 18 U.S.C. § 1962(a) unless control was also obtained.

60. The reach of S. 30 beyond organized crime was retained over the dissent of Senators Hart and Kennedy. S. REP. NO. 617, 91st Cong., 1st Sess. 215 (1969) (individual views of Senators Hart and Kennedy).

61. The vote in the Senate was 73 to 1. 116 CONG. REC. 972 (1970).

62. Upon receipt, the House sent S. 30 to the Committee on the Judiciary. 116 CONG. REC. 1103 (1970).

In the House, many bills parallel to Senate bill 30 were introduced, and while the House generally agreed with the purpose of Senate bill 30, it did not always agree with the details of its draftsmanship.⁶³ Most of the amendments made to Senate bill 30 by the House Judiciary Committee circumscribed its scope. Excluding the addition of a treble damage action, all of the House's changes limited Senate bill 30. The statutory definitions of "unlawful debt"⁶⁴ and "pattern of racketeering activity"⁶⁵ were narrowed. The continuing offense clause added by the Senate Judiciary Committee was deleted by the House as unnecessary language. Mandatory open proceedings in government civil suits were replaced with broad court discretion.⁶⁶ A number of amendments were offered to Senate bill 30 on the House floor, but all were defeated or withdrawn.⁶⁷

63. H.R. 19215, 91st Cong., 2d Sess., 116 CONG. REC. 31914, and H.R. 19586, 91st Cong., 2d Sess., 116 CONG. REC. 35242 (1970), for example, paralleled the RICO sections of the Senate version of S. 30, except in their inclusion of private civil actions. H.R. 19586 provided for private treble damage actions, but it did not explicitly resolve any of the subsidiary legal issues. H.R. 19215 was much more complete, expressly providing for private injunctive and treble damage actions and governmental actual damage actions. H.R. 19215 also provided for government intervention in private suits, a five-year statute of limitations, and automatic tolling during governmental actions. The language of RICO as enacted into law is identical to the language of H.R. 19586, but it contained none of the subsidiary provisions of H.R. 19215. It is unfortunate that H.R. 19215, the more complete bill, was not used by the House amendment drafters in making changes in S. 30.

64. Debts from legal gambling, even if unenforceable, were removed from RICO's prohibitions against collection of debts. Pub. L. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(6) (1976)).

65. "Pattern of racketeering activity" was limited, requiring both acts to have occurred within ten years. Pub. L. 91-452, 84 Stat. 941 (codified at 18 U.S.C. § 1961(5) (1976)).

66. Pub. L. 91-452, 84 Stat. 944 (codified at 18 U.S.C. § 1967 (1976)). In addition to the objections to S. 30 that led to the changes made in S. 30, see notes 64-65 *supra* and accompanying text; other concerns were raised during the hearings which did not command a majority of the Committee. Committee dissenters felt that the forfeiture provisions were unwise and envisioned difficulty for the courts in interpreting racketeering activities in terms of potentially conflicting state substantive definitions. H.R. REP. NO. 1549, 91st Cong., 2d Sess. 186-88 reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007-91. The American Bar Association majority suggested that "pattern of racketeering activity" should require three acts. *House Hearings on S. 30, supra* note 13, at 556, 558-60. According to the ACLU, civil investigative demands directed against natural persons raised Fifth Amendment difficulties, *id.* at 500, while the New York Lawyers Association worried about protecting innocent persons. *Id.* at 402. The Association of the Bar of the City of New York reiterated the continuing issue of S. 30's scope beyond organized crime. *Id.* at 370.

67. An amendment establishing penalties for malicious treble damage actions, introduced by Congressman Mikva, was defeated, 116 CONG. REC. 35342 (1970), as was an amendment introduced by Congressman Biaggi to outlaw being a member of "organized crime." *Id.* at 35343. An amendment was also offered to clarify aspects of the treble damage action added by the Judiciary Committee, *id.* at 35346, but the amendment was withdrawn by its sponsor, Congressman Sam Steiger, at Congressman Poff's suggestion, *id.*, as the bill was being processed under an informal agreement among the Judiciary Committee members to oppose all floor amendments. Withdrawal, rather than defeat, was desirable to avoid creating an unfavorable legislative history on the ideas contained in the amendment, most of which were supported by Congressman Poff.

Efforts to clarify some of the possible interpretation problems raised by the language of the House amendments to RICO occurred in the Senate, but not in

On October 12, 1970, the Senate received Senate bill 30 as amended by the House. The basic structure and scope of the bill had been preserved. Because of the approaching end of the session of Congress and the upcoming elections, the Senate decided to concur with the House version of Senate bill 30 without asking for a conference⁶⁸ in order to avoid the possible death of a much-needed bill.⁶⁹ The President signed Senate bill 30 into law on October 15, 1970.⁷⁰

II. STRUCTURE OF RICO

A. Standards

RICO makes unlawful, that is, contrary to law,⁷¹ four activities by any person:

- (1) using income derived from a pattern of racketeering activity to acquire an interest in an enterprise;⁷²

the House. In the 92d Congress, Senators McClellan and Hruska introduced S. 16. *Victims of Crime: Hearings on S. 16, S. 33, S. 750, S. 1946, S. 2087, S. 2426, S. 2748, S. 2856, S. 2994, and S. 2995 Before the Subcomm. on Criminal Laws and Procedure of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. 3-4 (1972). S. 16 would have assured private injunctive actions and provided for federal damage actions in addition to setting a specific civil statute of limitations. S. 16 was reported favorably from the Judiciary Committee, S. REP. NO. 1070, 92d Cong., 2d Sess. (1972), and unanimously passed, 118 CONG. REC. 29379 (1972). Even when S. 16 was incorporated into the amended Senate version of H.R. 8389, 118 CONG. REC. 31054-56 (1972), the House took no action on it. In the first session of the 93d Congress, the Senate considered and passed S. 13, 93d Cong., 1st Sess. 119 CONG. REC. 10319 (1973). Senate bill 13 of the 93d Congress was identical in relevant portions to S. 16 of the 92d Congress. The House referred S. 13 to committee where it died, 119 CONG. REC. 10592 (1973), "not . . . [because of] a lack of support for the bill but . . . [because of] the committee's heavy work load." N.Y. Times, May 5, 1974, §1, at 69, col. 3.

68. 116 CONG. REC. 36296 (1970).

69. The Senate received S. 30 from the House on October 12, 1970, two days before the election recess and only 29 working days before the end of the session. See 116 CONG. REC. 36280-37264 (1970).

70. 116 CONG. REC. 37264 (1970). In 1969, the President had indicated his support for the use of antitrust-type provisions against organized crime, as well as a number of the bill's other provisions; therefore, his signature on the bill was expected. See President's Special Message to the Congress on a Program to Combat Organized Crime in America, 1969 PUB. PAPERS 315, 320-21 (Apr. 23, 1969).

71. RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. In addition, its standards of unlawful, i.e., criminal or civil, conduct are sanctioned by both criminal and civil remedies. RICO, in short, is a "remedial" statute. PUB. L. NO. 91-452, § 904(a), 84 STAT. 947 (1970) ("remedial purposes"). See generally Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980) for an excellent discussion of history and rationale of the liberal construction directive. Nevertheless, RICO has been sustained against constitutional objection under the double jeopardy clause, *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980) (state robbery conviction, RICO not precluded) and for alleged multiplicity. 609 F.2d at 306-07; *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir. 1980).

72. 18 U.S.C. § 1962(a) (1976) provides:

It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or

- (2) acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity;⁷³
- (3) conducting the affairs of an enterprise through a pattern of racketeering activity;⁷⁴ and
- (4) conspiring to commit any of these offenses.⁷⁵

An understanding of these legal standards requires a look at the basic concepts used in their drafting.

B. Concepts⁷⁶

1. Person

Section 1961(3) indicates that "person" "includes . . . any individual or entity capable of holding a legal or beneficial interest in property."⁷⁷ This definition is an illustration; it does not limit the

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 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.

Section 1962(a) has only been used in one reported case. *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980). In *McNary*, the statute received a liberal construction, and illicit funds were traced into an investment in a business which was then forfeited. *Id.* 628-29.

73. 18 U.S.C. § 1962(b) (1976) 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.

74. 18 U.S.C. § 1962(c) (1976) 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.

75. 18 U.S.C. § 1962(d) (1976) provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." For a comprehensive analysis of what state of mind should be implied in assessing responsibility under RICO, see 3 MATERIALS, *supra* note 12, at 1286-1331.

76. See 1 MATERIALS, *supra* note 12, at 106-19 for the original version of this discussion of RICO concepts.

77. 18 U.S.C. § 1961(3) (1976).

concept.⁷⁸ Those "persons" who can violate RICO include white-collar criminals⁷⁹ as well as members of organized crime.⁸⁰

2. Enterprise

To violate RICO, a person must acquire or maintain an interest in or control of an enterprise,⁸¹ or must conduct or participate in the conduct of an enterprise's affairs.⁸² Section 1961(4) provides that "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact though not a legal entity."⁸³ Here, too, the definition works by illustration, not by limitation.⁸⁴ Private businesses as well as labor organizations are enterprises under RICO.⁸⁵ The

78. "Includes" is generally a term of enlargement, not of limitation. *Highway & City Freight Drivers v. Gordon Transps., Inc.*, 576 F.2d 1285, 1289 (8th Cir.), *cert. denied*, 439 U.S. 1002 (1978); *American Fed'n of Television and Radio Artists v. NLRB*, 462 F.2d 887, 889-90 (D.C. Cir. 1972); *Argosy Ltd. v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968); *Federal Power Comm'n v. Corporation Comm'n*, 362 F. Supp. 522, 544 (W.D. Okla. 1973), *aff'd*, 415 U.S. 961 (1974). It was so used in RICO. *See United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) ("enterprise" illustrative not exhaustive).

79. *See, e.g.*, *United States v. Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976), *aff'd*, 591 F.2d 1347 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979) (en banc), *cert. denied*, 100 S. Ct. 1647 (1980) (Governor of Maryland).

80. *See e.g.*, *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

81. 18 U.S.C. § 1962(b) (1976). The concept of "enterprise" is not unconstitutionally vague. *See United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) (although broad in scope, statute is not vague); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) (statute does not violate due process). The concept of enterprise—or separate entity—is not, moreover, new to the law; it is reflected in the Supreme Court's jurisprudence that holds the privilege against self-incrimination inapplicable to corporations, *Hale v. Henkel*, 201 U.S. 43, 51 (1906), unions, *United States v. White*, 322 U.S. 694, 704 (1944), and some partnerships, *Bellis v. United States*, 417 U.S. 85, 90 (1974) (three-person law partnership more than "an informal association or a temporary arrangement for the undertaking of a few projects of short-lived durations"). Note, however, that an enterprise may also be an individual, that is, a sole proprietorship under 18 U.S.C. § 1961(4) (1976).

82. 18 U.S.C. § 1962(c) (1976). Under this subsection, the person must be employed by or associated with the enterprise, and the enterprise must be engaged in interstate commerce or its activities must affect interstate commerce. The effect on commerce must be alleged, *United States v. Diecidue*, 603 F.2d 535, 545 (5th Cir. 1979) (allegations sufficient) and shown beyond a reasonable doubt, *United States v. Nerone*, 563 F.2d 836, 852-53 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978) (failure to prove), although its impact need only be slight. *United States v. Malatesta*, 583 F.2d 748, 754-56 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir. 1979) (en banc), *cert. denied*, 440 U.S. 962 (1979) (long-distance phone calls).

83. 18 U.S.C. § 1961(4) (1976).

84. *See, e.g.*, *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). For a discussion of the term "includes," *see* note 78 *supra*.

85. *See, e.g.*, *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (legitimate restaurant serving as front for narcotics trafficking); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (auto dealership); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (beauty college); *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency); *United States v. Parness*, 503 F.2d 430 (2d Cir.

enterprise need not be legitimate.⁸⁶ Government agencies may also be enterprises.⁸⁷ In addition, the definition of enterprise encompasses

1974), *cert. denied*, 419 U.S. 1105 (1975) (foreign hotel and gambling casino); *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978) (theater); *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (labor union). For a general analysis of entity liability under RICO, see 3 MATERIALS, *supra* note 12, at 1145-80.

86. The business being infiltrated or conducted may be illegitimate as evidenced by the following circuit court decisions. D.C. Circuit: *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) ("enterprise" applies to illegitimate businesses). Second Circuit: *United States v. Huber*, 603 F.2d 387, 393-96 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980) (RICO not unconstitutionally vague and can be applied toward illegal enterprises; however, court cautioned against undue prosecutorial zeal in invoking RICO); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (exempting illegal enterprises from RICO would leave loophole). Third Circuit: *United States v. Provenzano*, 620 F.2d 985, 993 (3d Cir. 1980) (association formed for the sole purpose of racketeering satisfies "enterprise" requirement). Fourth Circuit: *United States v. Whitehead*, Nos. 78-5160 to 78-5162 (4th Cir. Mar. 20, 1980). Fifth Circuit: *United States v. Diecidue*, 603 F.2d 535, 545 (5th Cir. 1979) (robbery, murder and narcotics group); *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (court would "deny society the protection intended by Congress were it to hold that the Act does not reach those enterprises nefarious enough to diversify their criminal activity"); *United States v. McLaurin*, 557 F.2d 1064, 1073 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (prostitution ring); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (police taking bribes); *United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976) (cheating at cards); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976) (gambling). Seventh Circuit: *United States v. Aleman*, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) (RICO not limited to include only legitimate business); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (statutory language and legislative history of RICO would include within its reach an illegal enterprise actually connected with a legitimate billiards hall). Cappetto was extended by *United States v. Winstead*, 421 F. Supp. 295, 296 (N.D. Ill. 1976), in which the court held that § 1964 could be invoked to prevent or restrain illegal enterprises not otherwise connected with legitimate business. Ninth Circuit: *United States v. Rone*, 598 F.2d 564, 568, 569 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980) ("enterprise" has a "broad and unrestricted use" which includes illegal enterprises). The Sixth Circuit in *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) held contrary to the other circuits, but the case was reversed after an en banc rehearing on December 3, 1980. *United States v. Sutton*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980). See note 91 *infra* for a detailed discussion of *Sutton*.

87. See, e.g., *United States v. Grant*, 622 F.2d 308, 313 (8th Cir. 1980) (county judge); *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir. 1978), *cert. denied*, 439 U.S. 836 (1978) (warden of county prison); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978) (Bureau of Cigarette and Beverage Taxes); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (law enforcement department); *United States v. Ohloon*, 552 F.2d 1347 (9th Cir. 1977) (law enforcement department); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980) (Philadelphia Traffic Court).

In *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), the court held that Congress did not intend a state government to be included in the definition of enterprise. *Id.* at 1022. The Third Circuit disagreed with this holding in *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). In *Frumento*, the court stated that Congress intended to prevent the infiltration of organized crime into all areas of economic life, not only into private business. *Id.* at 1090-91. The Fourth Circuit in unrelated decisions explicitly rejected the holding of *Mandel*. See *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980) (narrow interpretation of RICO rejected); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980) (definition of "enterprise" includes public entities). In addition, the legislative history indicates that Congress was aware of the role of government, through corruption and bribery of officials, in facilitating other illegal activities. See S. REP. NO. 617, 91st Cong., 1st Sess. 16 (1969). It is clear that *Mandel* was wrongly decided.

associations in fact. This type of enterprise need not be a legal entity; RICO is directed at groups of individuals informally organized for a common purpose. Associations in fact are often formed for the purpose of engaging in criminal activities,⁸⁸ but their purposes may be legitimate as well.⁸⁹ The group associated in fact may also change its membership in the course of its activity.⁹⁰ Courts continue to disagree, however, as to the proper construction and scope of the "enterprise" concept.⁹¹

88. See, e.g., *United States v. Clemones*, 577 F.2d 1247, *modified*, 582 F.2d 1373 (5th Cir. 1978) (en banc), *cert. denied*, 100 S. Ct. 1313 (1980) (prostitution ring); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977) (gambling); *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (gambling). Such illegitimate associations are in fact usually connected with § 1962(c) violations. See *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) in which the court held: "There is no distinction, for 'enterprise' purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infrastructure that controls a secret criminal network." 571 F.2d at 898.

89. See S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969). Legitimate associative groups are often enterprises infiltrated in § 1964(b) violations.

90. *United States v. Clemones*, 577 F.2d 1247, 1253 (5th Cir. 1978), *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 1313 (1980). The key is "community of interest and continuing core of personnel." *United States v. Con Errico*, No. 80-1255 (2d Cir. Dec. 1, 1980).

91. See, e.g., *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980); *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing*, Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980) (en banc). Because the *Sutton* panel's opinion misconstrued RICO and its legislative history, it merits close analysis. The "enterprise" before the panel was an association in fact engaged in offenses involving drugs, mail fraud, stolen property, and firearms. Because the panel felt that the government's construction of "enterprise," which would have included such an association, read the concept out of the statute by drawing no distinction between "enterprise" and "pattern of racketing activity," the panel declined to adopt it. The panel also relied on its reading of the statute's legislative history, which it found to reflect a single purpose: to prohibit the infiltration of legitimate business by organized crime. Under the panel's analysis, therefore, Congress did not try to attack organized crime directly. In addition, the panel felt supported in its construction of "enterprise" by the existence in 18 U.S.C. § 1962(a) (1976) of an investment exemption. Since § 1962(a) apparently dealt only with legitimate business, so, too, should § 1962(b) and (c). The panel did not find the "liberal construction" directive of RICO inconsistent with its result. See *Organized Crime Control Act*, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Instead, it felt that the traditional approaches of "lenity" and "federal state balance" rather than liberal construction should be followed.

The panel's holding was wrong and appropriately reversed for a number of reasons. First, it ignored the title of RICO. See *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1804) (Marshall, J.) (title relevant in construing statute); C. SANDS, *STATUTES AND STATUTORY CONSTRUCTION* § 45.12, at 37 (4th ed. 1973). Title IX was, after all, entitled "Racketeer Influenced (legitimate) and Corrupt (illegitimate) Organizations." The development of the language of the title, moreover, shows that it reflects precisely this distinction. As noted above, see note 42 *supra* and accompanying text, RICO had its origin in S. 1623, 90th Cong., 1st Sess. (1969), 115 CONG. REC. 6995-96 (1969), which was entitled, "The Criminal Activities Profits Act." Senate bill 1623 was clearly aimed at sterilizing "black money," that is, prohibiting the use of illegal profits to invest in legitimate business. But S. 1623 was subsequently redrafted, enlarged, and reintroduced as S. 1861, which was entitled "The Corrupt Organization Act," 90th Cong., 1st Sess. (1969), 115 CONG. REC. 9512 (1969). As discussed at note 45 *supra* and accompanying text,

the focus of S. 1861—enterprise criminality—was not as narrow as that of S. 1623. Yet, its title was ambiguous: a “corrupt organization” could be, for example, either the mob itself or a union taken over by it. When the Committee reported it out, title IX was, therefore, retitled as it is now, clarifying the ambiguity and drawing the crucial distinction explicitly.

Second, the panel’s opinion confused evidence with the element of the offense that the evidence was offered to prove. Merely because one item of evidence may be introduced to prove two elements, it does not follow that only one element is being shown. For example, in a prosecution for assault with intent to rape, a showing that the defendant pushed a woman to the ground and ripped off her sweater would, of course, be sufficient to establish assault; it could also be used to infer intent to rape. Because the same evidence was used to establish both elements, it does not follow that there is no difference between assault and assault with intent to rape. See *United States v. Short*, 4 C.M.A. 437, 444, 16 C.M.R. 11, 18 (1954). Similarly, RICO requires a finding of both an “enterprise” and a “pattern of racketeering activity.” See McClellan, *supra* note 55, at 144. But, because the evidence that establishes the “pattern” may also establish the existence of the “enterprise,” it does not follow that there are not two distinct elements. In some cases, of course, the evidence that establishes one will also establish the other, but not necessarily. Compare *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980) (insufficient evidence of pattern also to infer enterprise) with *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) (evidence of pattern may be used to show conspiracy). For example, an association in fact may be organized to engage in a pattern of intrastate theft and prostitution. The pattern of theft and prostitution could be used to infer the existence of an “enterprise.” Yet, it could not be used to establish a “pattern of racketeering” since neither intrastate theft nor prostitution is “racketeering activity” under 18 U.S.C. § 1961(1). When two or more murders are added, the RICO offense may be made out if they are not isolated events. McClellan, *supra* note 55, at 144. Here, it is clear that there is a distinction in what the statute requires as elements of the offense and what might be inferred from the evidence. See also *United States v. Elliott*, 571 F.2d 880, 907 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), in which the Fifth Circuit found that Elliott had in fact engaged in a pattern of racketeering activity but that his conduct was not part of the affairs of the enterprise, which was established by other evidence. In short, the concept “enterprise” focuses on a group of people; it asks, did an entity engage in the crime? The concept “pattern” focuses on the relationship between acts of racketeering; it asks were the crimes committed by the entity isolated or related?

Third, the panel misread the statute’s purpose. The purpose of RICO was explicitly stated on the face of the statute.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful actions of those engaged in organized crime.

18 U.S.C. § 1961 (1976). See *Schwegmann v. Calvert Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring) (statute, not legislative history, voted on and signed). Nor can it be convincingly suggested that this statement and the findings that come before it only apply to other titles of the 1970 Act since they appeared in substantially the same form in S. 1861, the predecessor of title IX. For an example of this kind of fallacious reasoning, see Note, *Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in Its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 474 (1980).

Consequently, the panel ignored the plain meaning of the statute (it says “any” enterprise), see note 112 *infra*, its statement of purpose (new sanctions), as well as the liberal construction directive, see *United States v. Altse*, 542 F.2d 104, 105 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), and looked to the legislative history in an effort to construct the panel’s own version of the purpose of the statute. Once there, it read statements of purpose that were illustrative as if they were exhaustive. It is true that one purpose of title IX was to deal with the infiltration of legitimate business, but such statements are incomplete. Nowhere in the legislative history does it say that the legislative history was intended to be exhaustive or that this purpose was the *only* purpose. In short, the panel read “only” into the legislative history and then used that as a justification for reading “legitimate” into the statute itself. The panel, in effect, heedlessly rewrote a “carefully crafted statute.” *Iannelli v. United States*, 420 U.S. 770, 789 (1975). It is, of course, proper for a court to read another court’s opinion in light of the

facts that gave rise to the controversy, but a legislature is not a court; its law-making powers are not limited to the occasion that gave rise to its consideration of a problem. Congress is perfectly free to write a statute broader than that occasion. The infiltration of legitimate business, moreover, was only *one* of the occasions for title IX's enactment, and that single aspect of its legislative history ought not be used to confine narrowly the scope of what Congress finally voted on and the President signed. That scope ought to be derived from the language of the statute and its statutory statement of its purposes, not just a single thrust of part of its legislative history. Congress properly went to the heart of the problem—enterprise criminality in all of its forms—and attacked it directly.

Fourth, while the panel's reading of § 1962(a) was correct, it did not logically follow that § 1962(c), or other aspects of § 1962(a), had to be so limited. There is nothing inconsistent about seeing, for example, that "enterprise" in § 1962(a) would be limited *for the purpose of the exclusion* to a legitimate enterprise, but have a different meaning in another context. What of an investment of "black money" in an illegitimate enterprise? Why could that not violate § 1962(a) without regard to the exclusion? It is the exclusion, and not the prohibition of § 1962(a), in short, that is so limited. See 116 Cong. Rec. 844 (1970) (discussion by Senators McClellan, Magnuson, and Hruska concerning illegal funds from one state being used in illegal activities in another). See *Simpson v. United States*, 435 U.S. 6, 13 (1978) (sponsors' statements entitled to great weight).

Fifth, the panel misunderstood the meaning of the liberal construction directive. RICO is not a criminal statute; section 1962 says "unlawful" not "criminal." See note 71 *supra*. In fact, RICO does not draw the line between innocent and criminal conduct, since it requires the violation of two or more independent criminal statutes before it is violated. Consequently, concern with lenity has no place in its construction. That is why Congress made *all* of title IX subject to it. But see *United States v. Turkette*, 632 F.2d 896, 905 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808).

Finally, concern over federal-state balance is legitimate, but it is a matter that is best handled by the Congress and prosecutive discretion. A court should not rewrite a clear federal statute because it would strike the balance otherwise or because a marginal prosecution is brought. See *Perrin v. United States*, 444 U.S. 37, 43-45 (1979) (Section 1962 not construed narrowly despite federalism concerns). See note 13 *supra* for comment on prosecutive guidelines.

Unfortunately, the *Sutton* panel's decision has begun to poison the well, and its effects have been felt in other circuits, chiefly in *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *cert. granted*, 49 U.S.L.W. 3531 (U.S. Jan. 26, 1981) (No. 80-808) and *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), each of which, for that reason, merits close analysis.

In *Anderson* the Eighth Circuit held that "enterprise" was a concept distinct from "pattern." Consequently, it reversed a RICO conviction despite a showing that two defendants engaged in a pattern of racketeering, to wit, fraud. While the holding of *Anderson* is unexceptional, it continued the confusion between the concepts of "enterprise" and "pattern" initiated by the *Sutton* panel. Had *Anderson* held that, although there was a showing of a "pattern," the evidence was insufficient to infer the existence of an "enterprise," that is, a separate entity as opposed to just two individuals acting together, it would occasion no further comment; it would be only an example of an unwise prosecution on the facts, not the advocacy by the prosecution of an unsound legal theory. Unfortunately, the court apparently assumed that it faced a choice between *Sutton* and the line of cases from other Circuits, noted above, that were in conflict with it, and the court seemingly came down on the side of the *Sutton* panel. The court's opinion also contains unwise and unnecessary language on issues such as legislative purpose, liberal construction, and federal-state balance. Read narrowly, *Anderson* was correctly decided, at least as a factual matter. The thrust of the opinion, however, suggests a hostility toward the use of RICO against illicit associations in fact as a matter of law. Given a more attractive factual showing, it may be hoped that the Eighth Circuit would realign itself with the other circuits and reject the *Sutton* panel's approach.

In *Turkette* the First Circuit followed the *Sutton* panel; it held that RICO did not apply to an association in fact that engaged in a pattern of racketeering, to wit, drugs, arson, arson fraud, and bribery. The court felt that § 1962(a) and (b) made sense only if read to apply to legitimate business. Consequently, § 1962(c) had to be similarly limited. In addition, the court applied the concept *ejusdem generis* to reach this result. It also followed the *Sutton* panel's reasoning on the relation between the concepts of "pattern" and "enterprise." The court suggested that its construction was supported by the legislative history and commentary by Senator McClellan. The court further suggested that a broad construction of §§ 1961 to

1968 would undermine 18 U.S.C. § 1955, a provision enacted as title VIII of the Organized Crime Control Act, as well as Comprehensive Drug Abuse, Prevention and Control Act of 1970. The opinion echoed *Sutton*-like comments on liberal construction of "enterprise" and noted that its reading of RICO would not leave the crimes unpunished since they would remain violations of the independent statutes prohibiting the predicate offenses.

All of the reasons just noted to reject the holding of the *Sutton* panel apply equally to *Turkette*. Additional reasons may be set out. First, the court in *Turkette* misunderstood the definitions in § 1961. As noted above, some of them define with words of limitation. See, e.g., 18 U.S.C. § 1961(1) (1976) ("means"). Others, however, define by illustration. See, e.g., 18 U.S.C. § 1961(3) & (4) (1976) ("includes"). As such, they are definitions that enlarge, not restrict the word defined. See notes 77 & 78 *supra* and accompanying text.

Second, the *Turkette* court viewed the civil sanctions as somehow necessarily limited to injunctions against legitimate enterprises. Yet the Senate Report itself in discussing the civil sanctions used injunctions against a bawdy house, (*Clopton v. State*, 105 S.W. 994 (Tex. 1907), and a gambling house, (*Respass v. Commonwealth*, 131 Ky. 807, 813, 115 S.W. 1131, 1132 (1909), to illustrate how RICO's operation would be consistent with traditional equity principles. S. REP. NO. 617, 91st Cong., 1st Sess. 79 n.9 & 81 n.11 (1969). Although legislative history focused on the infiltration of legitimate businesses and unions, nowhere does it say that this was title IX's *only* purpose, and there is ample language in the Senate Report, as well as elsewhere, that reflects an awareness of the broader scope of title IX. See, e.g., S. REP. NO. 617, *supra*, at 78-79 ("frontal attack on the subversion of our economy by organized criminal activities"; "attack must be made . . . on all available fronts").

Third, the misuse of Senator McClellan's law review article is unfortunate. While it focused, as did the Committee Report, on the infiltration of legitimate businesses and unions, the article never suggested that that was the *only* purpose of title IX. In fact, in setting out the background of title IX, the Senator, as did the Committee Report, reviewed a variety of organized crime business activities—hardly legitimate—including theft from brokerage houses and the business of dealing in stolen and counterfeit credit cards. See McClellan, *supra* note 55, at 143. Consequently, when the Senator summarized the scope of title IX as embracing an "interstate business" that engages in a "pattern" of violations, he could not justifiably be understood to have had only legitimate business in mind, but must be understood to have meant any of the "commercial activities of organized crime." *Id.* The Senator was explicit, too, when he noted that injunctions against "the mob" were contemplated. *Id.* at 142. It must be conceded, however, that the legislative history could be clearer—the Report as well as Senator McClellan's article. Nevertheless, Congress voted on, and the President signed, the statute, not the Report or the article. See *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (when legislative history is doubtful, go to the statute). The statute alone is the law. The statute is what is supposed to be clear and it is. See Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951). See generally Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?* 55 NOTRE DAME LAW. 777 (1980).

Fourth, the Court's attempt to construe RICO with other statutes was laudable, but misguided. Title 18 is not a code, but a compilation; it is, in fact, inconsistent and overlapping. Compare 18 U.S.C. § 1952 with 18 U.S.C. § 1084 (both deal with use of interstate facilities, yet § 1084 has exceptions that § 1952 does not). Until title 18 is codified, such reasoning will lead to bad, not good results. It is worth noting, too, that the pending codification of title 18 does not follow the *Sutton* panel. S. REP. NO. 1437, 95th Cong., 1st Sess. 777 n.31 (1977).

Fifth, in suggesting that its construction of "enterprise" renders the independent offenses still criminal, the *Turkette* court ignored the result that the new remedies of title IX—criminal forfeiture, injunctions, and general civil relief, including treble damages—will not be applicable to these offenses when they are committed as part of the affairs of an illicit enterprise. Three examples make the point vividly. Assume that: (1) the mob tells the owner of a coin-operated machine business that it will now exact, as a price for permitting the business to continue to operate in its area, a tribute and then backs up its demand with a series of threats: pay or else; (2) the mob tells the owner of a similar business that it is now a full partner with him in his business, and then backs up its demands with a series of threats: pay or else; or (3) the mob, which has its own coin-operated machine business, tells the owner of a similar business to stay out of its territory or to cut back on its present territory, or else. Would anyone seriously suggest that the owner of the business would feel that the courts had done their job in construing title IX if he

3. Pattern of Racketeering Activity

To violate RICO, the takeover or operation of an enterprise must be accomplished through a "pattern" of "racketeering activity." Section 1961(5) limits "pattern" by requiring that it include "at least two acts . . . , one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act."⁹² Beyond this statutory limitation, the legislative history of RICO⁹³ as well as its judicial interpretation indicate that the racketeering acts must be "related" to each other.⁹⁴

were told that title IX prohibited examples (2) and (3), but not example (1)? That is what the *Sutton* panel's opinion and the First Circuit's opinion in *Turkette* would require.

In light of the explicit title of the Act as well as the statement of purpose and the plain language of title IX, it will not be the Congress that will have failed to use the right words, but the courts that will have failed to read them properly if the *Sutton* panel and the *Turkette* court prevail in their interpretation of RICO. As noted above, the Sixth Circuit sitting *en banc* has now reversed the panel's holding in *Sutton*, six to four. In a masterful opinion by Chief Judge George Edwards, the full court found "no reason" to support the panel's "strained construction" of title IX in the "language [of the statute] itself, nor . . . in its legal history. . . ." Consequently, the court "decline[d] the appellant's invitation to emasculate Title IX. . . ." Nos. 78-5134 to 78-5139, 78-5141 to 78-5143 (6th Cir. Dec. 3, 1980). In dissent, Judge Merritt, the author of the panel's opinion, noted that the number of RICO prosecutions was rising rapidly, commented on the need for "certainty in the work-a-day world of conducting criminal trials," and observed that the issue of RICO's proper construction "await[ed] authoritative resolution by the Supreme Court." *Id.*

Lastly and ironically, it must be noted that some district courts expressed a hostility toward applying RICO to a legitimate business. See *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 113 (S.D.N.Y. 1975), in which Judge McMan held that Congress did not intend to include legitimate businesses, such as A.T. & T., in the definition of enterprise. In May 1979, Judge Sterling dismissed a RICO count against five Texans accused of an oil swindle, stating, "RICO was designed to keep racketeers out of business, not to make racketeers out of businessmen." *NEWSWEEK*, Aug. 20, 1979, at 83. Neither Judge McMan nor Judge Sterling read the statute correctly. There is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers.

92. 18 U.S.C. § 1961(5) (1976). The effective date is October 15, 1970. The requirement that one act occur after the effective date avoids the prohibition against *ex post facto* laws. See *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir. 1978), *cert. dismissed*, 439 U.S. 801 (1978) (acts both before and after statute); S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969). The last act must be within the statute of limitations. Related to the *ex post facto* issue is the objection that a RICO charge was made to avoid the impact of a state or federal statute of limitations. In *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), the Third Circuit held that a RICO charge was proper, even though the state statute of limitations had run on the predicate offenses since they played no more than a definitional role in RICO. See also *United States v. Malatesta*, 583 F.2d 748, 757-58 (5th Cir. 1978), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.) (*en banc*), *cert. denied*, 440 U.S. 962 (1979) (statutory reference to state law does not invoke state statute of limitations but merely defines offense); *United States v. Davis*, 576 F.2d 1065, 1066-67 (3d Cir. 1978) ("chargeable under state law" means chargeable at time of offense, not time of indictment); *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. denied*, 439 U.S. 801 (1978) (the crime is intended to be treated as continuing over a prolonged period; statute runs from date of last offense).

93. S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

94. See *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) ("pattern" should

Sporadic activity cannot constitute a pattern of racketeering activity. "The racketeering acts must have been connected with each other by some common scheme, plan, or motive so as to constitute a pattern and not simply a series of disconnected acts."⁹⁵ The acts may be unrelated to each other, but held together by a relationship to an enterprise.⁹⁶ Patterns have been found where the separate acts have had similar purposes,⁹⁷ results,⁹⁸ participants,⁹⁹ victims,¹⁰⁰ or methods of commission.¹⁰¹ Under section 1961(1), "racketeering activity" is

be construed as requiring more than accidental or unrelated instances of proscribed behavior). To establish a "pattern" of "racketeering activity," two related acts, not two separate but related schemes must be shown. *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978). *See also* *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975) (several separate, but related acts part of single scheme to take over foreign corporations). In addition, the affairs of the enterprise must be conducted "through" the racketeering activity. *See, e.g.,* *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978) (RICO indictment dismissed when no link between gambling and mobile home business shown).

95. *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* *United States v. White*, 386 F. Supp. 882, 883 (E.D. Wis. 1974) ("pattern" suggests a greater interrelationship among the acts than simply commission by the same person). *But see* *United States v. Field*, 432 F. Supp. 55, 60-61 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978) (Congress may define "pattern" as commission of two acts within a specified period even though the acts would not constitute a pattern as the term is usually understood). *See also* *United States v. Kaye*, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977) (related acts over four-year period established pattern).

96. *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir. 1978). *But see* *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("pattern" should be construed as requiring more than accidental or unrelated instances of proscribed behavior). *Elliott*, not *Stofsky*, was decided correctly. *See* S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) (need only be not isolated). For an excellent discussion of "pattern" and the various cases, *see* *United States v. Weisman*, 624 F.2d 1118, 1121-23 (2d Cir. 1980).

97. *United States v. DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), *rev'd on other grounds*, 49 U.S.L.W. 4022 (U.S. Dec. 9, 1980) (activity included multiple acts of arson and use of mails to defraud insurance company); *United States v. Clemones*, 577 F.2d 1247 (5th Cir.), *modified*, 582 F.2d 1373 (5th Cir. 1978), *cert. denied*, 100 S. Ct. 1313 (1980) (activity involved interstate transportation of prostitutes and establishment of prostitution business); *United States v. Burnsed*, 566 F.2d 882 (4th Cir. 1977), *cert. denied*, 434 U.S. 1077 (1978) (police accepted money and services of prostitutes in return for protection of illegally operated clubs and gambling establishments).

98. *United States v. Nacrelli*, 468 F. Supp. 241 (E.D. Pa. 1979), *aff'd*, 614 F.2d 771 (3d Cir. 1980) (mayor involved in protection racket for gambling activities).

99. *United States v. Morris*, 532 F.2d 436 (5th Cir. 1976) (defendants engaged in several card games to defraud tourists over 19-month period).

100. *United States v. Chavanec*, 467 F. Supp. 41 (S.D.N.Y. 1979) (one victim defrauded six times).

101. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (five acts of mail fraud); *United States v. Kaye*, 556 F.2d 855 (7th Cir. 1977), *cert. denied*, 434 U.S. 921 (1977) (shop steward received money from employer for four and one-half years); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977) (repeated solicitation and acceptance of bribes to protect gambling, prostitution, and illicit manufacture, distribution, and sale of whiskey); *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (officials of trade union accepted payments from employers).

defined by incorporating state and federal offenses. Here the definition limits; it does not merely illustrate. The word used is "means," not "includes." The state offenses are generically defined. Arson, bribery, and extortion are among the incorporated state crimes.¹⁰² Many federal statutes are incorporated under RICO as well. Mail fraud¹⁰³ is the most inclusive of the federal statutes,¹⁰⁴ since it covers a broad range of criminal activity rooted in fraud.

4. Liberal Construction

RICO is to be "liberally construed to effectuate its remedial purposes."¹⁰⁵ With few exceptions,¹⁰⁶ the courts have faithfully followed this congressional directive in applying RICO in both civil and criminal proceedings. In criminal actions, courts have liberally construed "enterprise,"¹⁰⁷ "racketeering activity,"¹⁰⁸ as well as RICO as a whole.¹⁰⁹ Congress believed that the normal practice of following a policy of strict construction or the implementation of a policy of

102. 18 U.S.C. § 1961(1)(A) (1976). Other state crimes are murder, kidnapping, gambling, robbery, and dealing in narcotics. *Id.*

103. 18 U.S.C. § 1341 (1976). See 1 MATERIALS, *supra* note 12, at 120-153 for an analysis of RICO and mail fraud. Security fraud is also considered in 1 MATERIALS, *supra* note 12, at 154-210. The best student note on mail fraud is Comment, *Survey of the Law of Mail Fraud*, 1975 U. ILL. L.J. 237.

104. 18 U.S.C. § 1961(1)(B)-(D) (1976) also includes federal bribery and wire fraud statutes, among others.

105. 18 U.S.C. § 1961 (1976). For a general analysis of how the courts have treated this provision, see 3 MATERIALS, *supra* note 12, at 1213-85; Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

106. See, e.g., *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), in which the court held: "While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency." 415 F. Supp. at 1022. See also *United States v. Davis*, 576 F.2d 1065 (3rd Cir.), *cert. denied*, 435 U.S. 951 (1978), in which the majority construed § 1961(1)(a) liberally, but the concurring opinion emphasized the criminal nature of the action and stated that the language must be strictly construed. *Id.* at 1069. For a discussion of *Mandel*, *Sutton*, *Anderson*, *Turkette*, and *Marubeni*, see notes 87 & 91 *supra*, note 117 *infra*. See also Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself?* 55 NOTRE DAME LAW. 777 (1980).

107. *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliot*, 571 F.2d 880, 899 (5th Cir.), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Vignola*, 464 F. Supp. 1091, 1095 (E.D. Pa. 1979), *aff'd*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); *United States v. Frumento*, 405 F. Supp. 23, 29-30 (E.D. Pa. 1975).

108. *United States v. Salinas*, 564 F.2d 688, 691 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

109. *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3d Cir. 1977); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Parness*, 503 F.2d 430, 439 n.12 (2d Cir. 1974); *cert. denied*, 419 U.S. 1105 (1975). But see *United States v. Turkette*, 632 F.2d 896, 905 (1st Cir. 1980).

leniency¹¹⁰ was inappropriate in the context of RICO, since RICO did not draw a line between criminal and innocent conduct.¹¹¹ Instead, RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion. Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," and the line had been crossed into the sphere of criminality, it was inappropriate to further restrict the scope of the statute by reapplying these policies. Absent application of the constitutional void for vagueness doctrine,¹¹² the policy Congress properly mandated for the

110. See generally Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748 (1935).

111. See, e.g., Mr. Justice Holmes in *McBoyle v. United States*, 283 U.S. 25 (1931):

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.

Id. at 27.

112. See, e.g., Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205 (1967); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). In light of these considerations, it is all the more ironic that some courts, ignoring the plain meaning of the liberal construction directive, have set out to rewrite the statute, most often by misusing its legislative history. The courts are, after all, supposed to give effect to the intent of Congress, and in doing so, the first reference should be to the "literal meaning of the words employed." *Flora v. United States*, 357 U.S. 63, 65 (1958). If the words are "sufficient in and of themselves to determine the purpose of the legislation" plain meaning controls. *United States v. American Trucking Ass'n*, 310 U.S. 534, 543 (1940). There is no need to refer to legislative history where the statutory language is clear. *Gemsco Inc. v. Walling*, 324 U.S. 244, 260 (1945). Going to legislative history may, in fact, not bring into focus meaning, but may pull the matter "into a fog in which little can be seen if found." *United States v. Public Utilities Comm'n*, 345 U.S. 295, 320 (1953) (Jackson, J., concurring). Indeed, the legislative history may be "more vague than the statute." *Ozawa v. United States*, 260 U.S. 178, 194 (1922). Only when literal meaning is "plainly at variance with the policy of the legislation as a whole" should purpose rather than literal words be followed. *United States v. American Trucking Ass'n*, 310 U.S. at 543. When faced with an argument that meaning is at variance with purpose, the traditional, and proper, approach has been to follow the so-called "Mischief Rule," well stated by Sir Edward Coke:

[T]he office of all the Judges is always to make such . . . construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief . . . , and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.

Heydon's Case, 76 Eng. Rep. 637, 638 (Ex. 1584). Such a traditional approach ought to have resolved the enterprise-as-illicit-association-in-fact issue easily, particularly in light of the liberal construction directive. Moreover, for the courts to suggest, despite its plain meaning, that the liberal construction directive itself is limited to the civil aspects of RICO, in the total absence of any legislative history support whatsoever, demonstrates that it is not the policy of Congress, but the policy of the individual judges that is being implemented. The directive plainly states: "The provision of this title shall be liberally construed . . ." Pub. L. No. 91-452, title IX, § 904(a), 84 Stat. 947 (1970). The statute contains no words of limitation that confine its directive to parts of title IX. It clearly applies to title IX as a whole. It is to be regretted that some judges are refusing to give the statute its intended effect.

construction of RICO is one of a generous, rather than a parsimonious reading of its promise of new criminal and civil remedies. The statute was drafted from the perspective of the victim, not the perpetrator.

III. CRIMINAL RICO

Section 1963¹¹³ provides criminal remedies for a violation of RICO's standards. In the event of a criminal conviction, the violator may "be fined not more than \$25,000 or imprisoned not more than twenty years, or both."¹¹⁴ These penalties sometimes, but not always, will exceed those which could be imposed for two violations of the incorporated offenses.¹¹⁵ In addition to a fine and imprisonment, the

113. 18 U.S.C. § 1963 (1976) provides:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

114. *Id.* § 1963(a). For the text of § 1963, see note 113 *supra*.

115. For example, a violation of 29 U.S.C. § 186 (1976) (unlawful payments to a union representative) is a misdemeanor. 18 U.S.C. § 1(2) (1976) (less than one-year is misdemeanor). When § 186 is used as a "racketeering act," the potential penalty for a pattern of § 186 payments is raised to the felony level. 18 U.S.C. § 1(1) (1976) (more than one-year is felony). See, e.g., *United States v. Scotto*, No. 80-1041 (2d Cir. 1980). On the other hand, murder is also a "racketeering act." Murder is frequently punishable by life imprisonment or a death sentence. See, e.g., 18 U.S.C. § 1111 (1976) (murder punishable by death, life imprisonment, or term of years). Nevertheless, under RICO, the penalty of imprisonment could not exceed twenty years unless a separate proceeding was instituted under title X of the Organized Crime Control Act (enhanced terms up to 25 years with appellate review authorized for dangerous special offenders); as was the case in *United States v. DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), *rev'd*, 49 U.S.L.W. 4022 (U.S. Dec. 9, 1980) (No. 79-567) (title X appeal by prosecutor sustained against double jeopardy

objections). Just as RICO had been, until recently, ignored by federal prosecutors and remains largely unused by the plaintiff's bar, so, too, has title X remained largely an unfiled promise. As the Supreme Court noted in its opinion in *DiFrancesco*:

It was indicated at oral argument . . . that this is the first case in which the United States specifically has sought review of a sentence under § 3576. Inasmuch as the statute was enacted a decade ago, this fact might be said to indicate either little use of the special offender statute by the United States, or prosecutorial concern about its constitutionality or that federal trial judges are imposing sufficiently severe sentences on special offenders to make review unnecessary. No definitive explanation, however, has been offered. An attempt on the part of this Court to explain the nonuse of the statute would be speculation, and we shall not indulge in it.

Id. at 4025.

The Court also commented:

It is perhaps worth noting in passing that § 3576 represents a considered legislative attempt to attack a specific problem in our criminal justice system, that is, the tendency on the part of some trial judges "to mete out light sentences in cases involving organized crime management personnel." The Challenge of Crime in a Free Society, Report by the President's Commission on Law Enforcement and Administration of Justice 203 (1967) Section 3576 was Congress' response to that plea.

Id. at 4029.

The court need not have speculated. A comprehensive study had been done of the failure of the Department of Justice to use title X. See GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS: WAR ON ORGANIZED CRIME FALTERING—FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE (Mar. 17, 1977). The 1977 Report of the General Accounting Office concluded:

Five of the six strike forces reviewed had obtained no indictments under the special offender provision and in the few cases that had been prosecuted, only two resulted in convictions.

Attorneys-in-charge of the strike forces offered various reasons for not using this provision more frequently including:

- Appropriate cases have not occurred.
- The provision has been attacked as unconstitutional.
- Many organized crime figures have previously been indicted but not convicted and, therefore, cannot be prosecuted under the special offender provision.

Id. at 29.

The 1977 Report also found 52% of the Strike Force convictions reviewed resulted in no jail time and that a sentence of confinement of 2 years or less occurred in 58% of the convictions. *Id.* at 24. While 37% of the convictions were for illegal gambling, the record for obtaining jail time was not impressive if attention was solely focused on "high-echelon" figures, who, it might be expected, would have received substantial time even for gambling convictions. An examination of 128 of 241 convictions revealed that 51% received no jail time or at least less than 2 years in jail. *Id.* at 26. The Report noted: "The sentences imposed represented only a small fraction of the maximum sentence possible." *Id.* While there is no current study of organized crime sentencing that is publicly available, Director of the FBI, William H. Webster, has told the Congress that the Bureau's efforts in its organized crime program, representing 22% of its field agent time, are resulting in about 632 convictions per year, 405 of which are in the racketeering classification. *Departments of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriation for 1981: Hearings Before a Subcommittee of the House Committee on Appropriations*, 96th Cong., 2d Sess. 59 (1980) (testimony of William H. Webster). Webster also indicated that 107 of the convictions "were either associates or members of the largest organized crime groups operating in this country." *Id.* at 91. Twenty per cent of its field agent time is classified as spent in "RICO-Miscellaneous," 47% "RICO-Traditional" and 17% "RICO-Non-Traditional." *Id.* at 84. There would seem to be, therefore, a number of organized crime type prosecutions, the impact of which could be enhanced if title X proceedings were routinely brought.

The constitutionality of title X has, moreover, been affirmed on issues touching other than its appellate provisions. See, e.g., *United States v. Stewart*, 531 F.2d

violator must forfeit¹¹⁶ to the United States any interest he has acquired (all his ill-gotten gains) as well as any interest in an enterprise (his economic base) which affords him a source of power over the enterprise involved in the violation of RICO.¹¹⁷ The statute authorizes the courts to enter restraining orders prior to conviction

326 (6th Cir.), *cert. denied*, 426 U.S. 922 (1967) (due process requirements satisfied by standards to evaluate "dangerous offender" provision). Consequently, there would seem to be, particularly in light of the Supreme Court's decision in *DiFrancesco*, little reason to continue to neglect this "considered legislative attempt" to control organized crime. For a comprehensive analysis of the rationale, legislative history, and proper statutory construction of title X, see *Amicus Curiae Brief, United States v. Duardi*, No. 75-1354 (8th Cir. 1975) *reprinted in* [1975] 18 CRIM. L. REP. (BNA) 3001.

116. *United States v. L'Hoste*, 609 F.2d 796, 809-13 (5th Cir. 1980), *appeal docketed*, 48 U.S.L.W. 3803 (U.S. May 24, 1980) (No. 79-1898) (§ 1963(a) makes forfeiture mandatory rather than discretionary) is well-reasoned and correctly decided. *But see United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 100 S. Ct. 1312 (1980) (§ 1963(a) permits district court a certain amount of discretion in avoiding draconian application of § 1963(a)). *L'Hoste*, not *Huber*, reflects what Congress intended. See 1 MATERIALS, *supra* note 12, at 402-06.

117. 18 U.S.C. § 1963(a)(1)-(2) (1976). See generally U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, CRIMINAL FORFEITURES UNDER RICO AND THE CONTINUING CRIMINAL ENTERPRISE STATUTES (1980). For example, a union official who breached his trust would not only have to disgorge his ill-gotten gains, but he would also have to give up his office. *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977). The forfeiture provisions have been upheld against constitutional objections rooted in vagueness, *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir. 1980), and cruel and unusual punishment, *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980). They have also been held to be consistent with the treason clause of the constitution. U.S. CONST. art. III, § 3, cl. 2; *United States v. Thevis*, 474 F. Supp. 134, 140-41 (N.D. Ga. 1979). In *United States v. Marubeni America Corp.*, 611 F.2d 763, 769 (9th Cir. 1980), however, the Ninth Circuit held that the only interests subject to forfeiture under § 1963(1) and (2) were those "in an enterprise." In so reading RICO, the court ignored the statute's liberal construction clause, Pub. L. No. 91-452, title IX, § 904(a), 84 Stat. 947 (1970), and its Statement of Findings and Purpose, Pub. L. No. 91-452, 84 Stat. 922 (1970), and read into § 1963(a)(1) the words "in enterprise" which plainly were not there. The court's construction of the subsection not only violated the plain meaning of the statute, it also contradicted the intent of its chief sponsor. See McClellan, *supra* note 55, at 141. ("Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organization, prevention of their return, and, where possible, forfeiture of their ill-gotten gains"). The error of the court illustrates a common mistake. Unable to read the plain words of the statute, see note 112 *supra*, resort is made to the legislative history. The legislative history is then read as exhaustive, rather than as illustrative of the meaning of the statute. See, e.g., S. REP. No. 617, 91st Cong., 1st Sess. 160 (1969) ("in the enterprise"). This reading is correct, but incomplete. Other aspects of the history are ignored. See, e.g., H.R. No. 1549, 91st Cong., 2d Sess. 57, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007-91 ("all property and interests as broadly defined which are related to the violations"). Taking one purpose of a provision as its only purpose, the plain meaning of the statute is narrowed based on a negative pregnant from the legislative history, in contravention of the liberal construction directive. The decision is clearly wrong and should not be followed in the other circuits. See note 112 *supra* for a discussion of the liberal construction directive. For similar erroneous holdings, see *United States v. Mannino*, Crim. No. 79-744 (S.D.N.Y. Apr. 21, 1980); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979); *United States v. Meyers*, 432 F. Supp. 456 (W.D. Pa.), *rev'd on other grounds, sub nom. United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977). Appeals in the Second Circuit, *United States v. Guiliano*, No. 80-1291, and the Fifth Circuit, *United States v. Holt*, No. 78-5260, raise the same issue. Hopefully, the reasoning of *Marubeni* will be rejected, and an opportunity for the Supreme Court to resolve the question correctly will be afforded. For a detailed critique, see 1 MATERIALS, *supra* note 12, at 378a-378jj. For a contrary view, see Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379 (1980).

to prevent the transfer of the property threatened with forfeiture.¹¹⁸ Subsection (c) prescribes that the Attorney General shall seize the forfeited property "upon such terms and conditions as the court shall deem proper."¹¹⁹ It also provides that the provisions of the customs laws dictate the procedure for disposing of the property.¹²⁰ Finally, subsection (c) states that "[t]he United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons."¹²¹

Criminal forfeiture had been largely unknown in American jurisprudence.¹²² Congress included these new forfeiture provisions to break the economic power of organized crime as well as to punish and deter offenders.¹²³ Criminal forfeiture is based on personal guilt; the rights of the government in the property derive from an in personam judgment against the offender.¹²⁴ Civil forfeiture, on the other hand, generally arises from a violation of customs, revenue, or certain narcotics laws. It stems from a fiction that ascribes guilt to the property, and the rights of the government derive from an in rem judgment against the offending articles.¹²⁵ In civil forfeiture proceedings, if the property is tainted, the rights of innocent third parties in the property may be extinguished.¹²⁶ RICO has not carried into the law of criminal forfeiture this objectionable feature of the current law of civil forfeiture, as it gives extensive recognition to the rights of innocent persons. Nevertheless, it does incorporate many of the procedural rules for civil forfeiture under the customs laws into its provisions. Consequently, there is a tension between the customs laws that recognize almost no substantive rights in third parties and subsection (c) that requires due provision for innocent

118. 18 U.S.C. § 1963(b) (1976). Such restraining orders do not deny to a defendant the presumption of innocence, *United States v. Scalzotti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975), or the right to retain a counsel, *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979), and they may be properly granted. *But see United States v. Mandel*, 408 F. Supp. 679, 683 (D. Md. 1976), *cert. denied*, 100 S. Ct. 1647 (1980). For a detailed discussion of tracing problems and procedures in the forfeiture area, see 1 MATERIALS, *supra* note 12, at 353-78.

119. 18 U.S.C. § 1963(c) (1976). See note 113 *supra* for the text of § 1963(c).

120. For a detailed discussion of disposition and remission, see 1 MATERIALS, *supra* note 12, at 379-406.

121. 18 U.S.C. § 1963(c) (1976). For a detailed analysis of this provision, see 1 MATERIALS, *supra* note 12, at 388-90, 393-99.

122. For an excellent treatment of the history of criminal forfeitures in the United States, see Note, *Bane of American Forfeiture Law—Banished At Last?* 62 CORNELL L. REV. 768 (1977). See also 1 MATERIALS, *supra* note 12, at 296-352, for an overview of forfeiture under RICO.

123. S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969).

124. See 1 MATERIALS, *supra* note 12, at 296-352; Note, *supra* note 122, at 796.

125. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

126. *Id.* at 680-90.

third parties in the disposition of forfeited property. RICO, for example, gives the government two opposing duties: disposing of property as soon as commercially feasible, and "making due provision for the rights of innocent persons."¹²⁷ Many problems may arise from governmental disposition of property. Because the government's proprietary stake in forfeited goods is relatively unimportant in relation to the primary goal of removing the criminal from his source of power and denying him the benefit of any proceeds he may have realized from his criminal activity, the policy of the profitable and speedy disposition of property ought not be given such weight that it would deprive innocent persons of their rights.¹²⁸

IV. CIVIL RICO

A. Plaintiff

Under section 1964,¹²⁹ the Attorney General¹³⁰ or "any person injured in his business or property"¹³¹ may bring a civil suit in federal court against the RICO offender. Equitable relief available in a civil action under section 1962(a) includes divestiture of an interest in an enterprise, restrictions on future activities or investments, and dissolu-

127. 18 U.S.C. § 1963(c) (1976). For the text of § 1963(c), see note 113 *supra*.

128. For an analysis of RICO forfeitures, see 1 MATERIALS, *supra* note 12, at 296-406.

129. 18 U.S.C. § 1964 (1976) provides in part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

It is not necessary for a government action, *United States v. Capetto*, 502 F.2d 1351 (7th Cir. 1974), or a private action, *Conway v. Chemical Leaman Tank Lines, Inc.*, 487 F. Supp. 647 (N.D. Ill. 1980) to be preceded by a criminal conviction.

The civil provisions of RICO were modeled on antitrust law. S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969). H.R. REP. NO. 1549, 91st Cong., 2d Sess. 56-60 reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007-91. For an analysis of antitrust law in the context of organized crime, see Note, *Antitrust Enforcement Against Organized Crime*, 70 COLUM. L. REV. 307 (1970).

130. 18 U.S.C. § 1964(b) (1976). For the text of § 1964(b), see note 129 *supra*.

131. 18 U.S.C. § 1964(c) (1976). For the text of § 1964(c), see note 129 *supra*.

tion or reorganization of an enterprise.¹³² In a suit brought by a private party, the plaintiff may obtain not only general equitable relief, but treble damages and costs, including a reasonable attorney's fee.¹³³

Civil suits may be brought in proper cases as class actions under Rule 23 of the Federal Rules of Civil Procedure.¹³⁴ In general, the class action device saves the time and expense of the parties and the courts by combining multiple suits into a single action.¹³⁵ It also encourages claimants to litigate claims too small for individual suits.¹³⁶

132. 18 U.S.C. § 1964(a) (1976). For the text of § 1964(a), see note 129 *supra*. See S. REP. NO. 617, 91st Cong., 1st Sess. 80-83 (1969). The list of remedies is not "exhaustive." H.R. REP. NO. 1549, 91st Cong., 2d Sess. 57, reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007-91. For an analysis of private actions for injunctive relief under RICO, see 3 MATERIALS, *supra* note 12, at 1332-76.

133. 18 U.S.C. § 1964(a) & (c) (1976). A Congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. See, e.g., *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Significantly, the treble damage clause of § 1964(c) is preceded by "and" and not "to." See *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (grant of right in one form implies denial of right in another). Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level. States have been held to be "persons" under the Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914), on which § 1964(c) was modeled. Where fraud is involved, a state would have the right to sue for treble damages and other forms of relief, including the rescission of the illegal contracts. *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971) (recovery of \$82 million). Note, too, that under federal rules, well settled since the Tea Pot Dome scandals, suit by public bodies need not involve quantum meruit accounting. *Pan Am. Petroleum and Transp. Co. v. United States*, 273 U.S. 456, 509 (1927); *K & R Eng'r Co. v. United States*, 616 F.2d 469, 476-77 (Ct. Cl. 1980). A similar rule also exists in the jurisprudence of some states. See, e.g., *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973). Recovery in such actions could be substantial, having the impact of taking the profit out of government fraud, surely one of the most important of RICO's goals. S. REP. NO. 617, 91st Cong., 1st Sess. 78 (1969) (inadequacy of present system calls for attack on subversion of economic power). For example, since the conviction of the Marubeni America Corporation and Hitachi Cable, Ltd., in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980), the City of Anchorage has had under consideration a civil RICO action. Relief could include treble damage for the amount of the bribes (\$330,000 × 3 = \$990,000) plus rescission of \$8.8 million in cable contracts, without having to account for the cable received, as well as costs and attorneys' fees. See *Anchorage Eyes Civil Suit Over Bribery*, Nat'l L.J., Nov. 24, 1980, at 5, col. 1. The city would also be able to take advantage of the federal conviction for the purposes of collateral estoppel. See note 187 *infra* and accompanying text for a discussion of the "mutuality" requirement in the collateral estoppel context. See also *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980) (suit growing out of *United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980)); *N.Y. Times*, Jan. 28, 1981, § 2, at 3, col. 1 (suit for fraud by Suffolk County under RICO for rescission and \$260 million in damages).

134. FED. R. CIV. P. 23. While this issue is yet to be litigated, there is at least one decision that intimates class actions are permissible under RICO. See *Hines v. City Fin. Co. of Eastover, Inc.*, 474 F.2d 430, 431 n.3 (D.C. Cir. 1972). There is no reason to believe that RICO class actions will not be permitted. See 2 MATERIALS, *supra* note 12, at 894-973.

135. ILL. INST. FOR CONTINUING LEGAL EDUC., CLASS ACTIONS § 2.4, at 2-8 (1974). See also 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1751, at 505 (1970).

136. *Shields v. First Nat'l Bank*, 56 F.R.D. 442, 445 (D. Ariz. 1972). See also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 186 (1974) (Douglas, J., dissenting).

RICO class actions would greatly deter crime¹³⁷ because of their geometrically increased damage awards; therefore, they should be encouraged.

B. Venue and Process

RICO civil suits must be brought in accordance with the Federal Rules of Civil Procedure.¹³⁸ RICO does, however, include special procedural rules. Section 1965(a) provides that a civil action may be instituted where the defendant "resides, is found, has an agent, or transacts his affairs."¹³⁹ In such actions, the court has personal jurisdiction over the defendant and venue is proper.¹⁴⁰ Section 1965(b) is one of the most potentially far-reaching procedural devices of the RICO statute.¹⁴¹ It authorizes the court, if the interests of justice require, to serve and join parties over whom the court would not ordinarily have personal jurisdiction and where venue would normally be improper. The suit need only be brought in a proper court for at least one defendant. Section 1965(b) then authorizes "other parties" to be joined and brought before the court; it does not authorize initiating a suit in what would otherwise be an

Recently, however, this incentive has been eroded in the federal courts. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Zahn v. International Paper Co.*, 414 U.S. 291 (1973); *Snyder v. Harris*, 384 U.S. 332 (1969); Becker, *Introduction: Use and Abuse of Class Actions Under Amended Rule 23*, NW. U.L. REV. 991, 992 (1974) (as a result of the decisions in *Zahn* and *Snyder*, use of class actions in diversity cases has diminished to the point of minor significance); Comment, *Zahn v. International Paper: Taking the Action Out of Class Action, or Can Zahn Be Avoided*, 12 SAN DIEGO L. REV. 208 (1974).

137. One commentator has stated: "It is precisely because the class action deters the robber barons from plundering the poor that it has been hailed as a very important supplement to law enforcement." Comment, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338, 338 (1971) (quoting letter from A. Pomeranz to Financial Editor, N.Y. Times, Apr. 25, 1971, § 3, at 22, col. 8). See also *King v. Vesco*, 342 F. Supp. 120, 121 (N.D. Cal. 1972) (RICO private actions are designed to supplement prosecutions by Dep't of Justice to combat attempts by organized crime to takeover legitimate businesses).

138. See 2 MATERIALS, *supra* note 12, at 607-815.

139. 18 U.S.C. § 1965(a) (1976) 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."

140. Under the parallel antitrust statute, 15 U.S.C. § 22 (1976), venue and personal jurisdiction are virtually congruent. See, e.g., *Pacific Tobacco Corp. v. American Tobacco Corp.*, 338 F. Supp. 842, 844 (D. Or. 1972).

141. 18 U.S.C. § 1965(b) (1976) 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.

improper court.¹⁴² Section 1965(c)¹⁴³ deals with subpoenas of witnesses in civil actions brought by the United States. Subpoenas may be served in any judicial district. If the witness lives in another district at a place more than one hundred miles from the court, however, a subpoena will be issued only after approval by the judge upon a showing of good cause. Under section 1965(d),¹⁴⁴ all other process may be served wherever the person "resides, is found, has an agent, or transacts his affairs."¹⁴⁵

C. Standing

Section 1964(c) confers the right to sue on "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . ."¹⁴⁶ It is modeled after, but is not identical to, section 4 of the Clayton Act, which creates a private treble damage action for "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ."¹⁴⁷ Although both statutes are broadly worded and on their face appear to create a private cause of action for anyone who can prove that an injury to his "business or property" was caused by a violation of either section 1962 or the antitrust laws, the federal courts have severely limited the number of private plaintiffs in the antitrust field through the enforcement of stringent "standing" requirements.¹⁴⁸ To establish standing, an antitrust plaintiff must generally

142. While this section was modeled on antitrust law, it is broader. 15 U.S.C. §§ 5, 10 & 25 (1976) are limited to government suits; they do not apply to private suits. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 467 (1945). This provision, however, applies to "any action under section 1964," which includes both governmental and private actions. See *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1282 n.8 (D. Del. 1978).

143. 18 U.S.C. § 1965(c) (1976) provides:

In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

144. 18 U.S.C. § 1965(d) (1976) 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."

145. *Id.* On the scope of this provision, see 1 MATERIALS, *supra* note 12, at 654-59. Service of process on defendants must be distinguished from service of process on witnesses. Government suits must be distinguished from private suits.

146. 18 U.S.C. § 1964(c) (1976). For the text of § 1964(c), see note 129 *supra*. See 1 MATERIALS, *supra* note 12, at 428-532, for a detailed analysis of the character of a treble damage action.

147. 15 U.S.C. § 15 (1976).

148. See 1 MATERIALS, *supra* note 12, at 533-73 for an analysis of standing rules and the RICO treble damages action.

show two elements: first, an injury to his "business or property"; and second, that his injury was "by reason of" a violation of the antitrust laws.¹⁴⁹ The courts have interpreted "business" in its ordinary sense.¹⁵⁰ It encompasses practically all industrial and commercial enterprises,¹⁵¹ including those of nonprofit plaintiffs¹⁵² and labor unions.¹⁵³ The second term, "property," has also been held to have a "naturally broad and inclusive meaning."¹⁵⁴ It is wider in scope and more extensive than the word "business."¹⁵⁵ Property includes, for example, expenditures to defend against patent infringement suits and a labor union's opportunity to obtain members.¹⁵⁶ The interest of the taxpayer or citizen, however, is not considered business or property.¹⁵⁷ Moreover, personal injuries and loss of consortium are not injuries to property under section 4.¹⁵⁸ The "by reason of" language of section 4 has been held to require a causal relationship between the antitrust violation and the plaintiff's injury. This concept is similar to the proximate cause theory in torts.¹⁵⁹ Nevertheless, under section 4 legal causation or proximate cause has been held to require not only "but for" causation but a legally cognizable relationship between the plaintiff and defendant.¹⁶⁰ As a result, it has been held that only direct injury is compensable; indirect injury has been thought to be outside of the scope of the provisions of the antitrust law.¹⁶¹ The circuit courts of appeal have devised a number of different tests for directness, each of which reflects a dif-

149. See, e.g., *Farnell v. Albuquerque Publishing Co.*, 589 F.2d 497, 500 (10th Cir. 1978).

150. See, e.g., *Roseland v. Phister Mfg. Co.*, 125 F.2d 417, 419 (7th Cir. 1942).

151. Compare *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972) (words "business" or "property" refer to "commercial interests or enterprises") with *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979) (phrase "commercial interests or enterprises" read in context in no sense suggests that only injuries to a business entity will grant standing to an antitrust plaintiff).

152. Compare *Friends of Animals, Inc. v. American Veterinary Medical Ass'n*, 310 F. Supp. 1016, 1018 (S.D.N.Y. 1970) (non-profit corporation engaged in reducing number of unwanted cats and dogs is engaged in "trade or commerce") with *Buckley Towers Condominium, Inc. v. Buchwald*, 533 F.2d 934, 938 (5th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) (non-profit condominium corporation has no commercial interests or enterprises in the strict sense).

153. See *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172 (5th Cir. 1976).

154. *Reiter v. Sonotone*, 442 U.S. 330, 339 (1979).

155. *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 86 (S.D.N.Y. 1964).

156. See *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384 (3d Cir. 1973), modified on other grounds, 494 F.2d 1353 (3d Cir. 1974) (en banc).

157. *Cosentino v. Carver-Greenfield Corp.*, 433 F.2d 1274 (8th Cir. 1970).

158. *Hamman v. United States*, 267 F. Supp. 420, 432 (D. Mont. 1967), appeal dismissed, 399 F.2d 673 (9th Cir. 1968).

159. See W. PROSSER, *LAW OF TORTS* §§ 41-43, at 236-70 (4th ed. 1971).

160. See Pollock, *The "Injury" and "Causation" Elements of a Treble Damage Anti-Trust Action*, 57 Nw. U.L. REV. 691, 700 (1963).

161. *Id.*

ferent theory of causation.¹⁶² In general, the tests can be put into three categories: first, the older and stricter "direct-injury" test; second, the more flexible "target-area" test; and third, the most recent "zone of interests" test.¹⁶³ Each of these tests sharply limits the number of plaintiffs who may bring antitrust suits.

Although the language of RICO was taken from the antitrust law, the policies behind the antitrust standing rules make the rules generally inapplicable to RICO. As antitrust law is drawn upon in the interpretation of RICO, policy as well as statutory language should govern how the one body of law is given effect in a new area. Standing is often denied to antitrust plaintiffs, it is said, because the recoveries sought would be duplicative,¹⁶⁴ ruinous,¹⁶⁵ speculative,¹⁶⁶ or windfall.¹⁶⁷ To ruin an antitrust defendant—usually a legitimate businessman engaging in something other than predatory conduct—would generally lessen competition and increase concentration in that particular industry.¹⁶⁸ RICO, on the other hand, is more concerned with compensating victims and making them whole than in maintaining a competitive economy where the "competitive acts" are racketeering in character. The main objective is to control criminal activity. Some of the activity may be predatory, violent, and rooted in fraud, but none of it can be said to have any claim of justification in sound social policy. There are, in short, few countervailing reasons to lessen the impact of remedies on RICO defendants as there might be in a typical antitrust case. Indeed, putting at least some types of defendants out of business would generally further the goals of RICO.

Sometimes the standing requirements of antitrust law have been justified on the ground that opening the doors to more suits would put too much of an administrative burden on the courts.¹⁶⁹ Such a situation is not imminent under RICO. Clearly, private RICO actions have not represented an administrative burden on the courts. Only

162. See *Malamud v. Sinclair Oil Corp.*, 521 F.2d 1142, 1148 (6th Cir. 1975); 1 MATERIALS, *supra* note 12, at 552-69.

163. See 1 MATERIALS, *supra* note 12, at 552-69 for a more detailed discussion of the tests for directness.

164. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-64 (1972).

165. See *Jeffrey v. Southwestern Bell*, 518 F.2d 1129, 1131 (5th Cir. 1975).

166. *Pitchford v. PEPI, Inc.*, 531 F.2d 92, 97 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976).

167. *Conference of Studio Unions v. Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952).

168. *Berger & Bernstein, An Analytical Framework for Anti-Trust Standing*, 86 YALE L.J. 809, 850 (1977).

169. The Supreme Court noted this consideration in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 741 (1977). See Note, *Scaling the Illinois Brick Wall: The Future of Indirect Purchasers in Antitrust Litigation*, 63 CORNELL L. REV. 309 (1978).

a handful of cases have been brought in more than a decade. Apparently the RICO plaintiff needs more, not less, incentive to sue. In any event, the question of court burden is one that ought to be addressed by Congress and not by the courts, especially when Congress has mandated that the courts construe the statute liberally to effectuate its remedial purposes.¹⁷⁰

D. Discovery

Private plaintiffs bringing a RICO treble damage action have broad discovery rights under the Federal Rules of Civil Procedure.¹⁷¹ The Rules authorize discovery regarding any matter, not privileged, which is relevant to the subject matter of the pending action.¹⁷² One limitation on the scope of discovery that may play an important role in RICO litigation is the privilege against self-incrimination.¹⁷³ The privilege applies to facts which directly¹⁷⁴ or indirectly¹⁷⁵ involve criminal liability.¹⁷⁶ Any information within the privilege is precluded from discovery.¹⁷⁷ Because, under RICO, facts that potentially establish civil liability may also potentially establish criminal liability,¹⁷⁸ RICO defendants may be expected to assert the privilege

170. The soundness of this policy argument even in the antitrust field is not clear in light of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), in which the court held that concern over crowded dockets could not be a "controlling consideration" in a section 4 standing determination. *Id.* at 344.

171. Important federal discovery provisions include those authorizing a party to depose other parties and witnesses, FED. R. CIV. P. 26(a), to propound written interrogatories to other parties, FED. R. CIV. P. 33(a), and to compel production of relevant documents, FED. R. CIV. P. 34(a). See 2 MATERIALS, *supra* note 12, at 816-57.

172. FED. R. CIV. P. 26(b)(1).

173. U.S. CONST. amend. V. The amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." *Id.* Although the privilege has no obvious application to civil pretrial discovery, it is a constitutionally guaranteed right in civil proceedings. *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (the privilege applies alike to civil and criminal proceedings, wherever the answer might tend to subject a party or witness to criminal responsibility). See also *United States v. Kordel*, 397 U.S. 1, 7-8 (1970); *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892) for the proposition that the privilege protects witnesses as well as accused parties.

174. 8 J. WIGMORE, EVIDENCE § 2254 (McNaughton rev. ed. 1961).

175. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

176. If the information sought would be only a "link in the chain" of evidence needed for criminal prosecution, *Malloy v. Hogan*, 378 U.S. 1, 11-12 (1964); *Hoffman v. United States*, 341 U.S. 479, 486 (1951), or would provide leads to other incriminating evidence, see Note, *Use of the Privilege Against Self-Incrimination in Civil Litigation*, 52 VA. L. REV. 322, 324-25 (1966), then the information is held within the privilege and will be precluded from discovery in a civil action. 8 C. WRIGHT & A. MILLER, *Federal Practice and Procedure* § 2018, at 140 (1970). See also *DeVita v. Sills*, 422 F.2d 1172, 1178 (3d Cir. 1970) (party can object to discovery directed against him when answers might incriminate him in pending criminal case).

177. FED. R. CIV. P. 26(c).

178. 18 U.S.C. §§ 1962-1964 (1976).

against self-incrimination during pretrial discovery.¹⁷⁹ As a result, many plaintiffs may be frustrated in their effort to discover the defendant's misconduct, particularly when a parallel criminal investigation or prosecution is under way.¹⁸⁰ If a stay is granted, discovery may be delayed until the termination of the criminal proceedings.¹⁸¹ The most effective alternative in such a case may well be a protective order under Rule 26(c).¹⁸² A protective order would allow discovery to go forward but would insure that information is revealed only for the use of parties to the action.¹⁸³

E. Collateral Estoppel

Under section 1964(d) a final judgment in favor of the United States in a criminal proceeding has a collateral estoppel effect on the defendant in a subsequent civil proceeding brought by the government.¹⁸⁴ The language of section 1964, however, provides for col-

179. See generally 8 J. WIGMORE, EVIDENCE § 2257 (McNaughton rev. ed. 1961); Comment, *Federal Discovery in Concurrent Criminal and Civil Proceedings*, 52 TUL. L. REV. 769 (1978).

180. See generally Pickholtz, *The Expanding World of Parallel Proceedings*, 53 TEMP. L.Q. 1100 (1980).

181. See, e.g., *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245, 249 (D. Md. 1980). Should such a stay be granted, however, an unacceptable burden may be placed on the civil plaintiff's right to a prompt and fair disposition of his case. Comment, *supra* note 179, at 781. See generally *United States v. Simon*, 373 F.2d 649 (2d Cir.), *vacated as moot sub nom. Simon v. Wharton*, 389 U.S. 425 (1967). In addition, valuable evidence may be lost as a result of the delay. Comment, *supra* note 179, at 788. See *Texaco, Inc. v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967). Faced with the prospects of expensive, time-consuming delay and possible loss of evidence, potential plaintiffs may be deterred from ever asserting their rights. Comment, *supra* note 179, at 788. Such a result is inconsistent with the right of individuals to be compensated for their damages, *id.*, and reduces the utility found in the public policy of relying on private suits as a means of enforcing the organized crime laws. *Id. Compare* Comment, *supra* note 179, at 788 (in balancing rights of all parties in concurrent antitrust civil and criminal proceedings, there is a possibility of infringing upon rights of civil plaintiffs to be compensated and of contravening public policy of relying on private suits as a means of enforcing antitrust laws) *with* *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751 (1947) (antitrust private remedies and private self-interest provide strong and reliable motive for enforcement, relieve government of cost of enforcement, and arm injured persons with private means of retribution). The undesirability of this result is only partially offset by the civil plaintiff's use of a conviction to establish liability. See notes 184-95 *infra* and accompanying text for a discussion of collateral estoppel.

182. FED. R. CIV. P. 26(c).

183. See Donnici, *The Privilege Against Self-Incrimination in Civil Pre-Trial Discovery: The Use of Protective Orders to Avoid Constitutional Issues*, 3 U.S.F. L. REV. 12 (1968). The author notes that "while the rule [26(c)] is silent as to any intended use to protect a party from self-incrimination, it is obvious that protective orders can be so adapted." *Id.* at 16. Even if the government should learn of the information, it could be argued that utilizing such knowledge either as evidence or investigatory leads would be prohibited under *Garrity v. New Jersey*, 385 U.S. 493 (1967). See Donnici, *supra*, at 21.

184. 18 U.S.C. § 1964(d) (1976) provides:

A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States.

lateral estoppel only in a government action; it does not mention its use by private parties. This omission was not the result of a policy decision to bar private parties' use of collateral estoppel, but rather of an understanding of the requirements of mutuality at the time RICO was drafted. When the subsequent civil action is brought by a private individual, the preclusion effect of the prior criminal prosecution would be governed not by RICO, but by general principles.¹⁸⁵ Generally, the courts have required mutuality and identity of parties.¹⁸⁶ Nevertheless, the "mutuality" requirement, in which collateral estoppel applies only when both parties are bound by the prior judgment, has been significantly modified in the past thirty-five years.

In *Parklane Hosiery Co. v. Shore*,¹⁸⁷ the Supreme Court abolished the mutuality requirement in the context of a private civil damage action subsequent to a government equitable proceeding.¹⁸⁸ In

185. See 2 MATERIALS, *supra* note 12, at 859-93 for a more detailed discussion of the use of a prior criminal judgment for collateral estoppel purposes.

186. See, e.g., *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 323-24 (1971).

187. 439 U.S. 322 (1979). See, Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of Parklane Hosiery*, 64 CORNELL L. REV. 1002 (1979) and Note, 52 TEMP. L.Q. 1221 (1979) for a discussion of *Parklane*.

188. 439 U.S. at 322. The Court in *Parklane* outlined four factors for consideration before applying offensive collateral estoppel: (1) the party seeking to use collateral estoppel could not have joined the previous action; (2) the party against whom collateral estoppel would apply had incentive to fully litigate the issue in the prior action; (3) there have been no inconsistent rulings on the issue in prior actions; and (4) there are no new procedural opportunities available to the precluded party in the second action or, if there are, they are not likely to cause a result different from that of the first action. *Id.* at 331-32.

In the RICO situation, the first three factors are satisfied. The private plaintiff could not have joined the prior criminal prosecution; the defendant in the prior criminal case had the incentive to litigate the issue fully because his liberty or property was at stake; and the inconsistent rulings factor has to be decided on a case-by-case basis. Generally, one would expect only one prior criminal prosecution to be the basis of the estoppel; therefore, no inconsistency would exist. The fourth *Parklane* factor presents minimal problems in the RICO context, since there would be no new procedural opportunities available to the precluded party in the second action, or if there should be, they are not likely to cause a result different from that of the first action. As a general rule, criminal defendants have limited discovery rights, while civil parties have virtually unlimited discovery rights. See FED. R. CRV. P. 26-37. Consequently, an argument could be made that use of collateral estoppel would unfairly deprive a prior criminal defendant of the opportunity to acquire evidence on a particular issue in the civil case. There are several reasons why this consideration should not prevent the offensive use of collateral estoppel in the criminal to civil context. *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978) (criminal conviction by guilty plea constitutes estoppel in favor of United States in subsequent civil proceeding for money retained from illegal activity). Cf. *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973) (preclusion in state action for rescission based on federal bribery conviction). First, the government has to prove the issue in dispute beyond a reasonable doubt in the prior criminal case. In *re Winship*, 397 U.S. 358 (1970). To defeat the government, the defendant has only to raise a reasonable doubt. In addition, while pretrial discovery is limited in a criminal prosecution, there is a broad duty on prosecutors to disclose exculpatory evidence. See, e.g., *United States v. Agurs*, 427 U.S. 97 (1976); *Brady v. Maryland*, 373 U.S. 83 (1963); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

SEC v. Everest Management Corp.,¹⁸⁹ one of the few cases to date applying *Parklane* to the criminal-civil setting, the court held that there was no requirement of mutuality when "the party against whom the estoppel is asserted . . . was afforded a *full and fair opportunity to litigate* the identical issue in the prior [criminal] proceeding."¹⁹⁰ Before *Parklane*, several federal courts considered the issue of the use of collateral estoppel by a person not a party to the previous proceeding against the criminal defendant in the prior action. Generally, the courts allowed offensive as well as defensive use of collateral estoppel.¹⁹¹ Federal courts have given collateral estoppel effect to guilty verdicts¹⁹² and pleas of guilty,¹⁹³ but not to a plea of *nolo contendere*¹⁹⁴ or an acquittal.¹⁹⁵ Consequently, in light of the federal practice before *Parklane* as well as the reasoning of *Parklane*, it seems clear that a third party will be permitted to make use of a prior verdict in a criminal prosecution against the defendant in a subsequent civil action under RICO.

Consequently, it is unlikely that the new party would have an undue advantage over the defendant sufficient to bar all offensive use of prior criminal judgments.

189. 466 F. Supp. 167 (S.D.N.Y. 1979).

190. *Id.* at 172 n.6 (emphasis added).

191. Cases supporting offensive use: *SEC v. Kelly, Andrews & Bradley, Inc.*, 385 F. Supp. 948, 954-55 (S.D.N.Y. 1974) (prior criminal defendant collaterally estopped from denying price manipulation conspiracy in subsequent civil action by SEC); *Travelers Indem. Co. v. Walburn*, 378 F. Supp. 860, 866-68 (D.D.C. 1974) (insurance company can use collateral estoppel to acquire summary judgment on issue of malice in civil suit against defendant convicted of second-degree murder). Cases supporting defensive use: *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 76 (8th Cir.), *cert. denied*, 429 U.S. 855 (1976) (defendant newspaper, in a civil action brought by convicted air hijacker, could use collateral estoppel against hijacker on issue of fair trial); *Brazzell v. Adams*, 493 F.2d 489, 490 (5th Cir. 1974) (state police agents, defendants in civil rights suit brought by convicted narcotics dealer, could use collateral estoppel as to issue of sale of heroin); *Willard v. United States*, 422 F.2d 810, 811 (5th Cir.), *cert. denied*, 398 U.S. 913 (1970) (FBI agents can use finding of no abuse against prior criminal defendant's action for damages).

192. *Williams v. Liberty*, 461 F.2d 325, 327 (7th Cir. 1972); *SEC v. Everest Management Corp.*, 466 F. Supp. 167, 173 (S.D.N.Y. 1979); *Travelers Indem. Co. v. Walburn*, 378 F. Supp. 860, 865 (D.D.C. 1974). *Cf. Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951) (conviction is only prima facie evidence because of Clayton Act § 5).

193. *Ivers v. United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *United States v. Podell*, 572 F.2d 31, 36 (2d Cir. 1978); *Brazzell v. Adams*, 493 F.2d 489, 490 (5th Cir. 1974).

194. *Hudson v. United States*, 272 U.S. 451, 455 (1926); *United States v. Brzoticky*, 588 F.2d 773, 776 (10th Cir. 1978); *United States v. Dorman*, 496 F.2d 438, 440 (4th Cir.), *cert. denied*, 419 U.S. 945 (1974).

195. *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232, 235 (1972); *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938); *Tomlinson v. Lefkowitz*, 334 F.2d 262, 264 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); *SEC v. Everest Management Corp.*, 466 F. Supp. 167, 174 n.9 (S.D.N.Y. 1979). See 1B MOORE'S FEDERAL PRACTICE ¶0.418[1], at 2703-04 (2d ed. 1974). An acquittal might have preclusive effect if based on an affirmative defense proved by a preponderance of the evidence. *Vestal & Coughenout, Preclusion/Res Judicata Variables: Criminal Prosecutions*, 19 VAND. L. REV. 683, 702-03 (1966).

F. Remedies

The civil remedies available in a private civil suit¹⁹⁶ would include not only general equitable relief, including injunctive relief,¹⁹⁷ but also treble damages and a reasonable attorney's fee.¹⁹⁸

G. Statute of Limitations

When a federal statute creates a federal cause of action but specifies no particular statute of limitations, the federal courts usually apply the nearest analogous state statute of limitations.¹⁹⁹ The federal courts applied this rule in the antitrust area until 1955 at which time Congress stepped in to remedy the confusion that had resulted.²⁰⁰ RICO does not include a specific statute of limitations. Apart from questions of fraud in the concealment,²⁰¹ one of the most important and as yet unsettled issues in private civil actions will be the determination of which statute of limitations to apply. The question is exceedingly complex,²⁰² but the best approach would seem to be to apply the nearest analogous federal statute.²⁰³ This approach would promote clarity, predictability, and uniformity, and it would avoid defeating the remedial purposes of RICO by having its application encumbered by an unworkable body of law on the question of which state statute of limitations to apply to the wide range of actions that might be brought under it.

196. 18 U.S.C. § 1964(c) (1976). See note 129 *supra* for the text of § 1964(c).

197. See 1 MATERIALS, *supra* note 12, at 407-27. The Senate bill sent to the House, S. 30, S. REP. NO. 617, 91st Cong., 1st Sess., 1-32 (1969), did not include a private right of action for damages. *Id.* title IX, § 1964. The final House version, S. 30, H.R. REP. NO. 1549, 91st Cong., 2d Sess. 1-2, 15-21 reprinted in [1970] U.S. CODE CONG. & AD. NEWS 4007-91, included the private action to sue and to recover treble damages plus costs and attorney's fee. *Id.* § 1964(c). In floor debate, Congressman Sam Steiger offered an amendment to clarify the scope and procedure to be followed in the private action, 116 CONG. REC. 35346 (1970), and, even though he later withdrew the amendment, *id.* at 35347, he made it clear that he felt the authorization for the private injunctive action existed in the bill and that the amendment was merely to clarify the procedure. *Id.* at 35346-47.

198. See 2 MATERIALS, *supra* note 12, at 574-606.

199. See, e.g., *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

200. Congress remedied the situation by enacting a statute of limitation of four years with a suspension for pending criminal cases. 15 U.S.C. § 15(b) (1976).

201. See 2 MATERIALS, *supra* note 12, at 1096-1144.

202. See 2 MATERIALS, *supra* note 12, at 974-1095. Not only is the question exceedingly complex, but as decisions are rendered, the results achieved are very diverse.

203. See *McAllister v. Magnolia Petro. Co.*, 357 U.S. 221, 227-30 (1958) (Brennan, J., concurring). But see *Ingram Corp. v. J. Ray McDermott & Co.*, 495 F. Supp. 1321, 1324 n.4 (E.D. La. 1980) (Louisiana statute applied to RICO action). Because *Ingram* does not represent a full consideration of the unique character of RICO actions, it should not be followed. The opinion is otherwise exceedingly thoughtful.

CONCLUSION

The history of the first ten years of RICO has been largely taken up with criminal prosecutions. The Department of Justice moved slowly to implement the 1970 Act in the criminal context. RICO's promise in the civil area is as yet almost wholly unrealized. Only in recent years have prosecutors begun to see the benefits that may be gained by its use. Like the Department of Justice, the private victim has not yet begun to take advantage of RICO's promise in the civil area. Nevertheless, as more criminal prosecutions are brought, it may be expected that the plaintiffs' bar will learn that RICO offers important legal avenues of recovery for victims of crime. When that happens, RICO, unlike conspiracy law, may well gain good repute among another segment of the bar. Like antitrust law, RICO will not be seen as merely another tool in the hands of the prosecution, but as a valuable effort by the legislature to launch a broad-based attack on the special challenge of group crime by focusing not only on criminal sanctions imposed on individuals but also on civil relief for victims. If that promise is realized, those of us who had a hand in designing and drafting RICO will know that we not only tried to do our best, but that we accomplished an important aspect of our goal. As *Newsweek* observed after it reviewed the most prominent of the more than two hundred RICO prosecutions that have been brought to date and listened to the complaints of the defense bar: "Whatever its weaknesses, RICO gives the government an effective threat against sophisticated crime At least for a while, for white-collar criminals as well as gangsters, RICO appears to be evening up the odds."²⁰⁴

204. *RICO: The Enforcer*, NEWSWEEK, Aug. 20, 1979, at 82, col. 3. It seems, too, that RICO is serving as a model for state legislation. See, ARIZ. REV. STAT. ANN. §§ 13-2312 to 13-2315 (1978); FLA. STAT. ANN. §§ 943.461 to 943.465 (Supp. 1980); GA. CODE ANN. §§ 26-3401 to 26-3408 (1975 & Supp. 1980); HAWAII REV. STAT. §§ 842-1 to 842-12 (1976); IND. CODE ANN. tit. 35, §§ 45-6-1 & 45-6-2 (Burns Supp. 1980); 18 PA. CONS. STAT. § 911 (1978); R.I. GEN. LAWS §§ 7-15-1 to 7-15-11 (Supp. 1980). For an analysis of these statutes as well as proposed legislation in New Jersey, California, and Massachusetts, see 3 MATERIALS, *supra* note 12, at 1588-668. The state RICO statutes have been well received in the courts. Compare *Aztec Motel v. Faircloth*, 251 So. 2d 849 (Fla. 1971) (civil statute aimed at organized crime held vague) with *Morehead v. State*, 383 So. 2d 629, 630-31 (Fla. 1980) (Florida RICO "pattern" held not vague nor unconstitutionally overbroad as applied).