1980

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

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Partnership 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

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. . . . An 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

INTRODUCTION

The law of conspiracy has seldom been in good repute among the practicing bar. 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. 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


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 title\(^9\) (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-


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 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).


cutions (most prominently political corruption cases) as well as a large variety of violent offenses. The result of this heightened prosecutorial 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. Obviously, those of us who designed and drafted RICO, as well as


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 the "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.

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, Rashomon, 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 deprecated 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 Wiretapping 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. 1091, 1096 (D. Md. 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 States or by injured persons against RICO violators. The remedies made available in civil actions brought by the Attorney General were injunctive relief 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. 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 HISTORY

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

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. Then, the McClellan Committee exposed the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra. 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 concerns and recommended the use of new approaches to control its infiltration into legitimate business.

In 1967, bills 2048 and 2049 were proposed in the Senate to implement aspects of the Commission's recommendations by apply-


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.


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 devises 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-tract 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.


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, 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. The Section recommended that antitrust-type bills attacking criminal infiltration of business be independent criminal statutes. Concern was expressed that a commingling of the two distinct statutory purposes might produce inharmonious results and methods. 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. 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.


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.

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.

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.
“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 longstanding 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.
37. Id. (tit. II).
38. Id. (tit. III).
39. Id. (tit. IV).
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.
riety of both public and private remedies. On the other hand, Senate bill 1861 strengthened Senate bill 1623 by providing civil investigative demands, use immunity, criminal forfeitures, and a congressional mandate for liberal construction. These and other organized crime-related measures were referred to the Subcommittee on Criminal Law of the Senate Judiciary Committee. A variety of witnesses offered recommendations touching on aspects of RICO: its immunity provisions, its scope, its definitions, and its potential threat to the civil liberties of defendants. 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).


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.


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. The definition of "racketeering activity" was broadened and clarified to include more specific types of conduct. 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. Participation of the investor as a principal in the racketeering activity was required and minimal investment allowed without assessing additional penalties. This revised version of Senate bill 30 was passed by the Senate almost unanimously and sent to the House.

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?

Most 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).


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.


61. The vote in the Senate was 73 to 1. 116 Cong. Rec. 972 (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 drafting.

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” and “pattern of racketeering activity” 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.

A number of amendments were offered to Senate bill 30 on the House floor, but all were defeated or withdrawn.

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 conference in order to avoid the possible death of a much-needed bill. The President signed Senate bill 30 into law on October 15, 1970.

II. Structure of RICO

A. Standards

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

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

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 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.


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;\textsuperscript{73}

(3) conducting the affairs of an enterprise through a pattern of racketeering activity;\textsuperscript{74} and

(4) conspiring to commit any of these offenses.\textsuperscript{75}

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

\textit{B. Concepts} \textsuperscript{76}

1. Person

Section 1961(3) indicates that "person" "includes . . . any individual or entity capable of holding a legal or beneficial interest in property."\textsuperscript{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 \textit{McNary}, the statute received a liberal construction, and illicit funds were traced into an investment in a business which was then forfeited. \textit{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 \textit{3 MATERIALS, supra} note 12, at 1286-1331.

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

Those "persons" who can violate RICO include white-collar criminals as well as members of organized crime.

2. Enterprise

To violate RICO, a person must acquire or maintain an interest in or control of an enterprise, or must conduct or participate in the conduct of an enterprise’s affairs. 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." Here, too, the definition works by illustration, not by limitation. Private businesses as well as labor organizations are enterprises under RICO. The
enterprise need not be legitimate.\textsuperscript{86} Government agencies may also be enterprises.\textsuperscript{87} In addition, the definition of enterprise encompasses


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.


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. \textit{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 \textit{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. \textit{Id.} at 1090-91. The Fourth Circuit in unrelated decisions explicitly rejected the holding of \textit{Mandel}. United States v. Allomare, 425 F.2d 5, 7 (4th Cir. 1978) (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 \textit{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, but their purposes may be legitimate as well. The group associated in fact may also change its membership in the course of its activity. Courts continue to disagree, however, as to the proper construction and scope of the "enterprise" concept.

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.


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); United States v. Elliott, 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. Altese, 542 F.2d 104, 105 (2d Cir. 1976), cert. denied, 429 U.S. 953 (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 of what this purpose was. The only purpose, as 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—
title IX's 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
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.

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
(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-

RICO
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 Schwengman 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." Beyond this statutory limitation, the legislative history of RICO as well as its judicial interpretation indicate that the racketeering acts must be "related" to each other.

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.”

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. Maltesia, 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).


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.” The acts may be unrelated to each other, but held together by a relationship to an enterprise. Patterns have been found where the separate acts have had similar purposes, results, participants, victims, or methods of commission. 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).


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. Weissman, 624 F.2d 1118, 1121-23 (2d Cir. 1980).


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).


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. Many federal statutes are incorporated under RICO as well. Mail fraud is the most inclusive of the federal statutes, 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." With few exceptions, 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," "racketeering activity," as well as RICO as a whole. 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.


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 1055 (3rd Cir.), cert. denied, 435 U.S. 551 (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 1067. 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).


leniency \(^{110}\) 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.

\(^{112}\) 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:

> The 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 1963 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." These penalties sometimes, but not always, will exceed those which could be imposed for two violations of the incorporated offenses. 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 unfulfilled 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 forfeit 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. 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.


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. CONSTR. 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) the words “in an 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, 1981); United States v. Thewis, 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. Guilloian, 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-378j. 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.\textsuperscript{118} Subsection (c) prescribes that the Attorney General shall seize the forfeited property "upon such terms and conditions as the court shall deem proper." \textsuperscript{119} It also provides that the provisions of the customs laws dictate the procedure for disposing of the property.\textsuperscript{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." \textsuperscript{121}

Criminal forfeiture had been largely unknown in American jurisprudence.\textsuperscript{122} Congress included these new forfeiture provisions to break the economic power of organized crime as well as to punish and deter offenders.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} In civil forfeiture proceedings, if the property is tainted, the rights of innocent third parties in the property may be extinguished.\textsuperscript{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


\textsuperscript{120} For a detailed discussion of disposition and remission, \textit{see} 1 MATERIALS, \textit{supra} note 12, at 379-406.

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

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


\textsuperscript{124} \textit{See} 1 MATERIALS, \textit{supra} note 12, at 296-352; \textit{Note}, \textit{supra} note 122, at 796.

\textsuperscript{125} \textit{See}, \textit{e.g.}, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

\textsuperscript{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." 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.

IV. CIVIL RICO

A. Plaintiff

Under section 1964, the Attorney General or "any person injured in his business or property" 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-

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. Cappetto, 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.


tion or reorganization of an enterprise. 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.

Civil suits may be brought in proper cases as class actions under Rule 23 of the Federal Rules of Civil Procedure. 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. It also encourages claimants to litigate claims too small for individual suits.


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, (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 suit brought by the cable received, as 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 X 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. 328, 329 (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.


RICO class actions would greatly deter crime 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. 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." In such actions, the court has personal jurisdiction over the defendant and venue is proper. Section 1965(b) is one of the most potentially far-reaching procedural devices of the RICO statute. 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


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."


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.\textsuperscript{142} Section 1965(c)\textsuperscript{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),\textsuperscript{144} all other process may be served wherever the person “resides, is found, has an agent, or transacts his affairs.”\textsuperscript{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 . . . .”\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{148} To establish standing, an antitrust plaintiff must generally

\begin{itemize}
\item \textsuperscript{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).
\item \textsuperscript{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.
\item \textsuperscript{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.”
\item \textsuperscript{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.
\item \textsuperscript{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.
\item \textsuperscript{148} See 1 MATERIALS, supra note 12, at 533-73 for an analysis of standing rules and the RICO treble damages action.
\end{itemize}
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. The courts have interpreted "business" in its ordinary sense. It encompasses practically all industrial and commercial enterprises, including those of nonprofit plaintiffs and labor unions. The second term, "property," has also been held to have a "naturally broad and inclusive meaning." It is wider in scope and more extensive than the word "business." Property includes, for example, expenditures to defend against patent infringement suits and a labor union's opportunity to obtain members. The interest of the taxpayer or citizen, however, is not considered business or property. Moreover, personal injuries and loss of consortium are not injuries to property under section 4. 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. 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. 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. The circuit courts of appeal have devised a number of different tests for directness, each of which reflects a differ-

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).
161. Id.
ficient theory of causation. 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. 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, ruinous, speculative, or windfall. 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. 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. Such a situation is not imminent under RICO. Clearly, private RICO actions have not represented an administrative burden on the courts. Only

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

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


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


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.\(^{170}\)

\section*{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 directly\(^{174}\) or indirectly\(^{175}\) 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

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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. \textit{Id.} at 344.


173. \textit{U.S. Const. amend. V.} The amendment provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." \textit{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). \textit{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 \textit{J. WIGMORE, EVIDENCE} §2254 (McNaughton rev. ed. 1961).


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, \textit{see} Note, \textit{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, \textit{Federal Practice and Procedure} §2018, at 140 (1970). \textit{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. \textit{Fed. R. Civ. P. 26(c)}.

against self-incrimination during pretrial discovery. 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. If a stay is granted, discovery may be delayed until the termination of the criminal proceedings. The most effective alternative in such a case may well be a protective order under Rule 26(c). 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.

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. The language of section 1964, however, provides for col-


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.


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. Generally, the courts have required mutuality and identity of parties. 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, the Supreme Court abolished the mutuality requirement in the context of a private civil damage action subsequent to a government equitable proceeding. 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 are, they are not likely to cause a result different from that of the first action. Id. at 331-32.

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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 contendere194 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.

190. Id. at 172 n.6 (emphasis added).
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).
F. Remedies

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

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. 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. RICO does not include a specific statute of limitations. Apart from questions of fraud in the concealment, 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, but the best approach would seem to be to apply the nearest analogous federal statute. 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.


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).


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.

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