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BIFURCATED JURY DELIBERATIONS IN CRIMINAL RICO TRIALS

INTRODUCTION

Courts have been reluctant to tamper with the process by which criminal juries traditionally arrive at their verdicts.¹ Ordinarily, the jurors apply the law, as given to them by the judge, to the facts and return a general verdict of guilty or not guilty, with no further explanation.² On rare occasions, the jury is instructed to answer special interrogatories posed by the trial judge, which supplement its general verdict with documented findings of fact.³ In addition, the jury may be asked to make findings of fact upon which the judge bases a verdict. This is called a special verdict.⁴

In criminal trials, special verdicts⁵ and special interrogatories⁶ are generally disfavored because they might lead a jury that would otherwise acquit to convict.⁷ Some courts, while acknowledging that special interrogatories are disfavored, have nevertheless approved their use in criminal cases in certain situations.⁸

With the advent of complex and lengthy criminal trials such as those brought under the Racketeer Influenced and Corrupt Organizations Act⁹

1. See *United States v. Powell*, 469 U.S. 57, 67 (1984); *United States v. Spock*, 416 F.2d 165, 181-82 (1st Cir. 1969).

2. See, e.g., *Morris v. United States*, 156 F.2d 525, 529 (9th Cir. 1946); *United States v. Noble*, 155 F.2d 315, 317-18 (3d Cir. 1946); *Ingber v. Enzor*, 664 F. Supp. 814, 821 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 450 (2d Cir. 1988).

3. See *infra* note 8 and accompanying text.

4. In criminal cases where forfeiture is an issue, a special verdict is required by Federal Rule of Criminal Procedure 31(e). See Fed. R. Crim. P. 31(e); see, e.g., *United States v. Moya-Gomez*, 860 F.2d 706, 716 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3221 (1989); *United States v. Feldman*, 853 F.2d 648, 660 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 1164 (1989); *United States v. Possick*, 849 F.2d 332, 340 (8th Cir. 1988).

5. See, e.g., *Morris*, 156 F.2d at 528.

6. See, e.g., *United States v. Griffin*, 705 F.2d 434, 437 (11th Cir. 1983); *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969).

7. See *Spock*, 416 F.2d at 181-82; see also Note, *Jury Agreement and the General Verdict in Criminal Cases*, 19 Land & Water L. Rev. 207, 222 (1984) (special interrogatories force jury to be more logical and less humane).

8. See, e.g., *United States v. Roman*, 870 F.2d 65, 73 (2d Cir.) (permissible to determine who defendant managed or supervised in prosecution under continuing criminal enterprise statute), *cert. denied*, 109 S. Ct. 3164 (1989); *United States v. Pforzheimer*, 826 F.2d 200, 205-06 (2d Cir. 1987) (information sought relevant to sentencing); *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986) (same); *United States v. Ruggiero*, 726 F.2d 913, 922-23 (2d Cir.) (to determine which predicate acts underlie RICO conviction), *cert. denied*, 469 U.S. 831 (1984); *United States v. Desmond* 670 F.2d 414, 419 (3d Cir. 1982) (used for each element of prosecution for tax evasion, although not recommended); *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980) (to reduce juror confusion and prejudice in RICO case), *cert. denied*, 450 U.S. 967 (1981). *But see* *United States v. Desmond*, 670 F.2d 414, 420-21 (3d Cir. 1982) (Aldisert, J., dissenting) (use of special interrogatories in criminal cases has gone too far; should only be used when defendant specifically requests them with good cause).

9. Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified at 18 U.S.C. §§ 1961-1968 (1982 & Supp. V 1987)).

("RICO"), "[s]ome courts have questioned whether the mammoth proportions of these trials are beyond the capability of trial judges and ordinary jurors."¹⁰ The most startling example of this attitude recently appeared in *United States v. Coonan*,¹¹ in which the Court of Appeals for the Second Circuit suggested a novel plan for structuring criminal RICO jury deliberations.¹² The plan called for special interrogatories and bifurcation of the jury charge and deliberations.¹³

A criminal jury usually knows how its findings will affect its determination of guilt or innocence.¹⁴ The procedure proposed in *Coonan* represents a break with that tradition.¹⁵ As a result, the plan raises fundamental questions about the power of a judge to modify traditional procedures, the function of the jury in a criminal trial, and the extent of the prosecution's rights in connection with trial by jury.

Part I of this Note illustrates the great risk in some criminal RICO trials that the jury will convict a defendant even if the jurors have reasonable doubts about some elements of the crime. Part I then explains the Second Circuit's plan to alleviate that risk. Part II discusses the power of the trial judge to modify procedure, and Part III describes the impact of the proposed procedure on the function of the criminal jury. This Note concludes that in some criminal RICO cases, where there is a great danger that the jury will seek to convict a RICO defendant on impermissible grounds, the trial judge should require the jury to answer special interrogatories about the predicate acts. This should be done before the jurors are informed that two such acts are needed to constitute a pattern of racketeering activity and before they render a general verdict on the RICO count.

10. Giuliani, *Legal Remedies for Attacking Organized Crime*, in *Major Issues in Organized Crime Control: Symposium Proceedings*, 103, 113 (1986); see also *United States v. Gallo*, 668 F. Supp. 736, 749-50, 754-56 (E.D.N.Y. 1987) (discussing effects of RICO cases on jury, defendant and judge).

11. 839 F.2d 886 (2d Cir. 1988).

12. See *id.* at 889-90.

13. See *id.* The plan originally proposed by the district court judge called for a special verdict. See *id.* at 888. The district court's proposal was based on the then prevailing view in the Second Circuit that two predicate acts were sufficient, without more, to form a pattern of racketeering activity. See *id.* at 889 n.3. Thus, the district court judge's proposal would have removed no factfinding from the jury and the judge could merely add up the predicate acts found by the jury to determine if a pattern was present. See *id.*

The Second Circuit, however, recently changed its position on this issue. Now two acts are not sufficient to form a pattern. See *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir. 1989) (en banc). Therefore, to find a pattern the judge could not simply add up the number of predicate acts committed. He would also have to consider the requirements of relatedness and continuity. Because the district court's proposal is problematic, this Note focuses on the procedure suggested by the majority in the court of appeals.

14. See *Morris v. United States*, 156 F.2d 525, 531 (9th Cir. 1946); see also *United States v. Johnson*, 469 F.2d 973, 976 n.3 (5th Cir. 1972) (trier of fact not required to look at evidence in isolation or vacuum).

15. See *infra* notes 36-43 and accompanying text.

I. RICO AND THE COONAN PROCEDURE

RICO has proven an effective tool for combatting organized criminal activity because it allows the prosecutor to present the jury with a complete picture of how an organized criminal enterprise operates. Criminal acts which might otherwise have to be prosecuted separately can be proved as part of the single crime of racketeering.¹⁶

The main weapon in this fight has been 18 U.S.C. § 1962(c) which makes it a crime to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity.¹⁷ To establish a pattern of racketeering activity, the prosecution must prove at least two predicate acts of racketeering.¹⁸ RICO can be used to attack the infiltration of legitimate enterprises by racketeers,¹⁹ or illegitimate enterprises that exist solely to carry out the criminal activities of racketeers.²⁰

RICO, however, raises some issues that must be addressed to ensure that the statute is fairly applied.²¹ For example, indictments brought under RICO require proof of a great deal of criminal activity²² and cre-

16. As one noted prosecutor has observed:

[RICO] is the only criminal statute that enables the Government to present a jury with the whole picture of how an enterprise, such as an organized crime family, operates. . . . Instead of merely proving one criminal act in a defendant's life, it permits proof of a defendant's whole life in crime.

Giuliani, *supra* note 10, at 106; *see also* Lynch, *RICO: The Crime of Being a Criminal* (pts. III & IV), 87 Colum. L. Rev. 920, 940-41 (1987).

17. 18 U.S.C. § 1962(c) (1982) 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.

Id.

In addition, section 1962(d), which makes it a crime to conspire to violate RICO, has been an important weapon in the fight against organized crime. *See* 18 U.S.C. § 1962(d) (1982).

18. *See id.* § 1961(5). The predicate acts of racketeering that will support a RICO conviction are listed in section 1961(1). *See id.* § 1961(1) (Supp. V 1987).

19. *See, e.g.,* United States v. Friedman, 854 F.2d 535, 563 (2d Cir. 1988) (municipal agency as enterprise), *cert. denied*, 109 S. Ct. 1637 (1989); United States v. Feldman, 853 F.2d 648, 655 (9th Cir. 1988) (corporation as enterprise), *cert. denied*, 109 S. Ct. 1164 (1989).

20. *See, e.g.,* United States v. Salerno, 868 F.2d 524, 528 (2d Cir.) (commission of "La Cosa Nostra" as enterprise), *cert. denied*, 109 S. Ct. 3192 (1989); United States v. Castellano, 610 F. Supp. 1359, 1392 (S.D.N.Y. 1985) (group united for purpose of racketeering activity as enterprise). The Supreme Court approved the use of RICO to attack wholly illegitimate enterprises in United States v. Turkette, 452 U.S. 576 (1981).

21. These issues are discussed extensively in a recent article by Professor Lynch that is the most comprehensive discussion of the RICO statute. *See* Lynch, *RICO: The Crime of Being a Criminal* (pts. I-IV), 87 Colum. L. Rev. 661, 920 (1987). The case that offered the solution discussed in this Note was rendered after the publication of Professor Lynch's article and is, therefore, not discussed in it.

22. *See, e.g.,* United States v. Ianniello, 866 F.2d 540, 541-42 (2d Cir. 1989) (11 defendants charged in indictment requiring more than 160 determinations of guilt or innocence); United States v. Boylan, 698 F. Supp. 376, 377 (D. Mass. 1988) (7 defendants

ate the danger of prejudicial spillover of evidence.²³ This danger may be exacerbated where the alleged enterprise is illegitimate, rather than legitimate,²⁴ because the prosecution may present evidence of other bad acts which are not charged in the indictment to prove the enterprise element.²⁵

Evidence from RICO counts can also affect determination of non-RICO counts. In some instances, the possibility of prejudicial spillover is so great that convictions on other non-RICO counts must be reversed when an unproven RICO count is submitted to the jury.²⁶

In addition to prejudicial spillover of evidence, there is also the danger that the jurors will convict simply to punish a defendant even if the prosecution has not proved every element of RICO beyond a reasonable doubt.²⁷ This concern is greatest when the defendant is charged only

charged in 57 count indictment); *United States v. Castellano*, 610 F. Supp. 1359, 1378-79 (S.D.N.Y. 1985) (24 defendants charged with violating RICO through a pattern of 80 acts of racketeering; 76 other counts in indictment).

23. The policy behind evidentiary rules that generally prohibits the use of evidence of other crimes to prove propensity to commit charged crimes, *see* Fed. R. Evid. 404(b); Fed. R. Evid. 609, is challenged in a RICO case. *See Lynch, supra* note 16, at 961.

Some appellate courts dismiss claims of prejudicial spillover in RICO cases when one or more defendants are acquitted on one or more counts, reasoning that this is evidence that the jury was able to distinguish among defendants and counts. *See, e.g., United States v. Friedman*, 854 F.2d 535, 564-65 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989); *United States v. Watchmaker*, 761 F.2d 1459, 1477 (11th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986); *see also Lynch, supra* note 16, at 966 (danger of prejudicial spillover may be exaggerated).

This proves, however, only that the defendant who was acquitted was not prejudiced. There may be different amounts of evidence presented to the jury concerning different defendants and different counts. Some defendants may, arguably, benefit from joinder because they appear relatively blameless compared to their co-defendants. *See Lynch, supra* note 16, at 966 n.189. However, those defendants in whose cases the evidence is close might be prejudiced because the jury may be more likely to use its own sense of justice and equity. *See V. Hans & N. Vidmar, Judging the Jury 154* (1986). Therefore, prejudice and other extra legal factors may play a greater role in cases when the outcome is more doubtful. *See United States v. Wasson*, 568 F.2d 1214, 1223 (5th Cir. 1978) (once some jury confusion was shown, "[a]lthough the evidence was sufficient to support the verdict on the substantive count, it was not so overwhelming that the obvious guilt of [one defendant] did not tip the scales against [another defendant]").

24. *See United States v. Kragness*, 830 F.2d 842, 855 n.10 (8th Cir. 1987); *see also Lynch, supra* note 16, at 961.

25. *See United States v. Ellison*, 793 F.2d 942, 949 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

26. *See United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981); *United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1225-26 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982).

Courts have adopted different tests to determine when prejudicial spillover requires reversal in such a case. *Compare United States v. Murphy*, 836 F.2d 248, 256 (6th Cir.) (defendant must show jury unable to separate and distinguish evidence relevant to different counts or defendants), *cert. denied*, 109 S. Ct. 307 (1988) *with United States v. Stefan*, 784 F.2d 1093, 1101 (11th Cir.) ("(1) [w]hether the jury meticulously sifted the evidence; and (2) whether the appellant was prejudiced by a spill over of evidence relating to other counts or defendants"), *cert. denied*, 479 U.S. 855 (1986).

27. *See infra* notes 105-07 and accompanying text. This is of particular concern in RICO cases because the prosecutor must necessarily present evidence of multiple acts

with a RICO count. If the prosecution has presented strong proof as to one particularly heinous predicate act, but its proof as to other predicate acts is weak, the jury may "find" another predicate act rather than allow the defendant to go unpunished.²⁸

Recognizing this problem posed by RICO cases, the Court of Appeals for the Second Circuit recently approved a unique method of instructing the jury, designed to ensure that the jury actually believes the defendant committed at least two predicate acts before convicting him under RICO. In *United States v. Coonan*,²⁹ eight defendants were charged with violating RICO through a pattern of thirty-two predicate acts.³⁰ The district court judge feared that, if the jurors believed that one predicate act was proved beyond a reasonable doubt and he informed the jurors that at least two were necessary to form a pattern of racketeering activity, they might find a second predicate act to ensure punishment.³¹

The judge proposed that the jury return a special verdict. Unaware that at least two predicate acts were necessary to constitute a pattern of racketeering activity, the jurors would only determine which predicate acts, if any, each defendant committed. In addition, the jurors would determine whether the other elements of RICO were proved. The judge would then determine the defendant's guilt based on the jury's findings. The judge reasoned that this procedure would make the jury focus on each predicate act and determine whether it had been proved beyond a reasonable doubt.³² The prosecution appealed for a writ of mandamus to prevent the district court judge from using this procedure. The appellate court rendered its decision on the same day it heard oral argument.³³

The Court of Appeals for the Second Circuit approved this proce-

which would themselves constitute crimes outside the RICO context. *See supra* notes 17-23 and accompanying text.

28. The predicate acts of racketeering can range from violent crimes such as murder and kidnapping to white collar crimes such as mail or wire fraud. *See* 18 U.S.C. § 1961(1) (Supp. V 1987). In addition to presenting evidence of the predicate acts, the prosecutor may present evidence of other bad acts not charged in the indictment in order to prove the existence of an illegitimate enterprise. *See Ellison*, 793 F.2d at 949. Proof beyond a reasonable doubt as to any one of these acts may make a jury prone to convict. *See United States v. Salerno*, 868 F.2d 524, 544 (2d Cir.) (Bright, J., concurring in part, dissenting in part) ("because the defendants may have been shown to belong to the [enterprise] does not justify putting them in jail for one hundred years on evidence that does not establish guilt beyond a reasonable doubt"), *cert. denied*, 109 S. Ct. 3192 (1989).

29. 839 F.2d 886 (2d Cir. 1988).

30. *See id.* at 887.

31. *See id.* at 889. In explaining his plan, the district court judge stated:

If one [predicate] act is clear and [the jury is] kind of fuzzy on the other, in that situation the jury should find the fuzzy one not proven.

If the jury is told that finding that fuzzy one not proven will release that defendant, they may go back and think it over, which I don't think they should.

Brief for the United States of America at 8, *United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988) (No. 88-3007).

32. *See Coonan*, 839 F.2d at 888. The judge also gave the defendants veto power over this procedure because he had designed it for their benefit. *See id.*

33. *See id.* at 887.

ture³⁴ and proposed an alternative.³⁵ The majority of the panel³⁶ suggested that the jury deliberate in two phases. In the first phase, the jury would answer interrogatories about the predicate acts without being told that two such acts were needed to constitute a pattern of racketeering activity. If the jury found that a defendant committed at least two predicate acts, the judge would then instruct the jury on the pattern requirement and instruct the jury to return a general verdict on the RICO counts.³⁷ The trial judge used this procedure and seven of eight defendants were convicted of violating RICO.³⁸

This procedure is unique in criminal trials. Normally, bifurcation of criminal trials involves the introduction of separate evidence. For example, jury deliberations have been bifurcated in criminal trials to separate the guilt determination from the sentencing determination in capital punishment cases,³⁹ to determine an insanity defense independently,⁴⁰ to separate a forfeiture proceeding from the guilt determination so that a defendant may testify on the former without implicating his fifth amendment right against self-incrimination,⁴¹ and to meet the requirements of statutes that require proof of previous crimes.⁴²

The *Coonan* procedure, however, does not separate the presentation of

34. *See id.* at 891-92.

35. *See id.* at 889-90.

36. In a dissenting opinion, Judge Altamari dealt mostly with the trial judge's proposed procedure. He thought that the majority improperly suggested a procedure during oral argument and the court should confine its decision to the issues briefed by the parties. *See id.* at 892 (Altamari, J., dissenting). Judge Altamari remarked on the majority's suggestion only briefly. *See id.* at 899-900.

37. *See id.* at 889-90.

38. *See* 42 Crim. L. Rep. 1082 (BNA) (Mar. 2, 1988).

39. *See, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 190-92 (1976).

40. *See, e.g.,* *United States v. Greene*, 834 F.2d 1067, 1069 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 2908 (1988); *see also* Schwartz, *Should Juries Be Informed of the Consequences of the Insanity Verdict?*, 8 J. Psychiatry & L. 167, 178 n.4 (1980) (some states bifurcate trials when insanity is raised as a defense).

41. *See, e.g.,* *United States v. Feldman*, 853 F.2d 648, 661-62 (9th Cir. 1988) (trial courts should bifurcate forfeiture proceedings from guilt phase of RICO cases), *cert. denied*, 109 S. Ct. 1164 (1989); *United States v. Sandini*, 816 F.2d 869, 874 (3d Cir. 1987).

42. *See, e.g.,* *United States v. Vastola*, 670 F. Supp. 1244, 1263 (D.N.J. 1987) (statutes prohibiting possession of firearms by felon bifurcated from other charges); *see also* Comment, *State v. Green Recidivist Statutes: The Procedure for the Introduction of Prior Crime Evidence*, 61 Tul. L. Rev. 960, 965 n.32 (1987) (nine states now bifurcate jury proceedings in connection with habitual offender statutes). *But see* *United States v. Colamare*, 868 F.2d 24, 27-28 (1st Cir. 1989) (improper to bifurcate elements of crime of possession of weapon by felon so jury does not hear criminal record in first stage).

A few courts have bifurcated deliberations in multi-defendant cases so that evidence against one defendant is presented to the jury only after they have rendered a verdict on the other defendant. *See* *United States v. Crane*, 499 F.2d 1385, 1387 (6th Cir.), *cert. denied*, 419 U.S. 1002 (1974). This procedure was criticized by the circuit court, but not reversed because the jury acquitted the defendant on which they deliberated first. *See id.* at 1388. *But see* *United States v. McIver*, 688 F.2d 726, 729 (11th Cir. 1982) (bifurcated trial in which same jury that convicted codefendants heard case against defendant violates right to fair and impartial jury and requires reversal); *United States v. Stratton*, 649 F.2d 1066, 1081-82 (5th Cir. 1981) (same in RICO trial).

evidence into different stages; all the evidence is presented before the jury deliberates. Only the jury charge and deliberations are bifurcated.⁴³

II. POWER OF TRIAL JUDGE TO MODIFY PROCEDURE

The jury traditionally receives the law from the court through instructions, which the jury is expected to follow.⁴⁴ Although no provision in the Federal Rules of Criminal Procedure specifically gives a judge the power to bifurcate instructions or jury deliberations, Rule 57 provides, in part, that “[i]n all cases not provided for by rule, the district judges . . . may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.”⁴⁵

The use of special interrogatories in *Coonan* differs from their use in other criminal contexts. In other situations, the jury either knows the consequences of its answers to the interrogatories or is supplying information necessary for sentencing.⁴⁶ In the *Coonan* procedure, however, the jury does not know the consequences of its answers to the special interrogatories. Nevertheless, the use of special interrogatories in these other contexts in criminal RICO cases illustrates how courts have adopted procedures which they believe enhance the jury deliberation process.⁴⁷

43. The *Coonan* procedure provides only limited protection for the defendant. It will protect the defendant from the jury finding two predicate acts to ensure punishment, but will not protect the defendant from the jury finding any other element of RICO for the same purpose.

44. See *United States v. Powell*, 469 U.S. 57, 66 (1984); *Gregg v. Georgia*, 428 U.S. 153, 193 (1976). For a suggestion for RICO jury instructions, see *Jury Instructions for Civil and Criminal RICO Cases with Commentary*, 1987 B.Y.U.L. Rev. 1 (approved by RICO Cases Comm., Criminal Justice Section of the A.B.A.).

The Supreme Court has recognized that “there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.” *Bruton v. United States*, 391 U.S. 123, 135 (1968); *accord Krulwich v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring). In *Bruton*, the Court held that the effect of one defendant’s confession, which implicated his codefendant and was inadmissible against his codefendant, could not be remedied by limiting instructions from the judge. See *Bruton*, 391 U.S. at 137.

45. Fed. R. Crim. P. 57.

46. See *supra* note 8 and accompanying text.

47. The use of other innovative procedures which are not specifically provided for in the rules of procedure or in statutes, such as note taking by the jury, see *United States v. Johnson*, 584 F.2d 148, 157-58 (6th Cir. 1978), *cert. denied*, 440 U.S. 918 (1979); *United States v. Maclean*, 578 F.2d 64, 65 (3d Cir. 1978), and multiple juries, see *United States v. Lewis*, 716 F.2d 16, 19 (D.C. Cir.), *cert. denied*, 464 U.S. 987 (1983); *United States v. Hayes*, 676 F.2d 1359, 1366 (11th Cir.), *cert. denied*, 459 U.S. 1040 (1982); *United States v. Rimar*, 558 F.2d 1271, 1273 (6th Cir. 1977), *cert. denied*, 435 U.S. 922 (1978); see also *United States v. Crane*, 499 F.2d 1385, 1388 (6th Cir.) (one jury deliberated in two phases so that evidence admissible against one defendant would not be used against codefendant), *cert. denied*, 419 U.S. 1002 (1974), have been left to the discretion of the trial judge. Bifurcated juries have also been left to the trial court’s discretion. See *Holmes v. United States*, 363 F.2d 281, 283 (D.C. Cir. 1966); see also *United States v. Greene*, 834 F.2d 1067, 1069 (D.C. Cir. 1987) (issue of insanity bifurcated), *cert. denied*, 108 S. Ct. 2908 (1988); *United States v. Vastola*, 670 F. Supp. 1244, 1263 (D.N.J. 1987) (possession of

Despite the lack of any explicit authorization for the use of special interrogatories in criminal cases,⁴⁸ and the fact that they are generally disfavored,⁴⁹ some courts have approved their use in criminal RICO trials to supplement the jury's general verdict.⁵⁰ This use has been justified on the basis of their perceived benefits to the trial process.

One such benefit arises at the appellate level. Special interrogatories inform the appellate court of the precise basis for a RICO conviction.⁵¹ When a RICO jury returns a general verdict of guilty and one of the predicate acts submitted to the jury is later found to be legally insufficient by a reviewing court, the conviction must be overturned because it is impossible to determine whether two legally sufficient predicate acts sup-

weapon by felon bifurcated from other charges). *But see* United States v. Collamore, 868 F.2d 24, 27-28 (1st Cir. 1989) (bifurcation of elements of possession of firearm by felon improper); United States v. Brewer, 841 F.2d 667, 674 (6th Cir.) (Krupansky, J., concurring in part, dissenting in part) (bifurcation proper only when provided for by legislature), *cert. denied*, 109 S. Ct. 375 (1988).

48. *See* United States v. Ruggiero, 726 F.2d 913, 926 (2d Cir.) (Newman, J., concurring in part, dissenting in part) (relying, in part, on Fed. R. Crim. P. 57(b), the precursor to Fed. R. Crim. P. 57, to justify the use of special interrogatories in criminal trials), *cert. denied*, 469 U.S. 831 (1984).

49. *See supra* notes 6-7. On the other hand, when a criminal case is tried to a judge, the judge must explain the factual findings upon which the verdict was based, if requested. *See* Fed. R. Crim. P. 23(c). These conclusions must be explicit enough to enable an appellate court to review the decision. *See* United States v. Silberman, 464 F. Supp. 866, 869 (M.D. Fla. 1979).

50. *See, e.g.,* United States v. Madrid, 842 F.2d 1090, 1092 (9th Cir.), *cert. denied*, 109 S. Ct. 269 (1988); United States v. Ruggiero, 726 F.2d 913, 922-23 (2d Cir.), *cert. denied*, 469 U.S. 831 (1984); United States v. Palmeri, 630 F.2d 192, 202-03 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981).

51. If all the predicate acts were always charged as separate counts in the indictment, then general verdicts on the predicate acts would serve the same function as special interrogatories because general verdicts would indicate which predicate acts supported the RICO conviction. *See* Brennan v. United States, 867 F.2d 111, 115 (2d Cir.), *cert. denied*, 109 S. Ct. 1750 (1989); United States v. Bailey, 859 F.2d 1265, 1278 n.4 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 796 (1989); United States v. Lopez, 803 F.2d 969, 976 (9th Cir. 1986), *cert. denied*, 481 U.S. 1030 (1987). *But see* United States v. Brown, 583 F.2d 659, 669 (3d Cir. 1978) (RICO conviction reversed because no way to determine whether jury relied on two valid substantive counts as predicate acts to find pattern of racketeering), *cert. denied*, 440 U.S. 909 (1979).

In a dissent from a denial of certiorari, Justice White maintained that a conflict among the circuits on this issue existed that required resolution. *See* McCulloch v. United States, 108 S. Ct. 337 (1987) (White, J., dissenting from denial of certiorari). *But see* United States v. Holzer, 840 F.2d 1343, 1350-51 (7th Cir.) (no conflict among circuits if court finds jury would have been acting irrationally not to convict on RICO given convictions on predicate offenses), *cert. denied*, 108 S. Ct. 2022 (1988).

As a practical matter, the predicate acts are not always charged as separate counts in the indictment. Crimes which cannot be charged as a substantive count in a federal indictment, such as state crimes, *see* United States v. Garner, 837 F.2d 1404, 1418-19 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 2022 (1988); 18 U.S.C. § 1961(1)(A) (Supp. V 1987), crimes for which the statute of limitations has run, *see* United States v. Pepe, 747 F.2d 632, 663 n.55 (11th Cir. 1984); 18 U.S.C. § 1961(5) (1982), and charges for which the defendant has already been tried and acquitted, *see* United States v. Erwin, 793 F.2d 656, 670 (5th Cir.), *cert. denied*, 479 U.S. 991 (1986); United States v. Hampton, 786 F.2d 977, 980 (10th Cir. 1986), can all serve as predicate acts in a RICO indictment.

port the RICO conviction.⁵² If the jury reveals the predicate acts upon which the RICO conviction is based through special interrogatories, the court would not have to overturn the conviction if two sufficient predicate acts remained.⁵³

The use of special interrogatories in criminal RICO cases can also alert a reviewing court to possible jury errors. Special interrogatories may disclose that a jury has mistakenly convicted a defendant after finding only one predicate act.⁵⁴ This procedure can also ensure that the jury agrees unanimously on the same two predicate acts,⁵⁵ and that the jury did not use as predicate acts other counts which were not charged as such in the indictment.⁵⁶

The use of special interrogatories in criminal RICO cases may also benefit the defendant⁵⁷ by reducing jury confusion and by forcing the jury to consider each defendant and each predicate act individually. This reduces the risk of prejudicial spillover of evidence.⁵⁸

When interrogatories are used for the purpose of appellate review, the

52. See, e.g., *United States v. Holzer*, 840 F.2d 1343, 1352 (7th Cir.), cert. denied, 108 S. Ct. 2022 (1988); *United States v. Kragness*, 830 F.2d 842, 861 (8th Cir. 1987).

53. See *United States v. Ruggiero*, 726 F.2d 913, 922-23 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The practice of using special interrogatories in criminal RICO cases for the purpose of appellate review has been encouraged. See Note, *supra* note 7, at 222; Note, *RICO and the Predicate Offenses: An Analysis of Double Jeopardy and Verdict Consistency Problems*, 58 *Notre Dame L. Rev.* 382, 407-08 (1982). It has also been criticized as an unnecessary intrusion into the role of the jury. See Obermaier, *Juries and Their Verdicts*, N.Y.L.J., Dec. 4, 1984, at 2, col. 1.

In complex civil cases, the use of special verdicts and special interrogatories is encouraged in order to avoid relitigation. See *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 279 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980). Unlike criminal cases, however, special verdicts and special interrogatories are specifically provided for in Federal Rule of Civil Procedure 49(a) and (b). See Fed. R. Civ. P. 49(a)-(b). Furthermore, the objectives of civil and criminal cases are different. See, e.g., *Sparf & Hansen v. United States*, 156 U.S. 51, 174-75 (1895) (Gray, J., dissenting) (verdict in criminal cases is a judgment of guilt or innocence of defendant and is not meant to establish rules for future like verdicts in civil cases); *Skidmore v. Baltimore & Ohio Ry.*, 167 F.2d 54, 70 (2d Cir.) (Hand, J., concurring) (favoring greater use of interrogatories in civil but not criminal trials), cert. denied, 335 U.S. 816 (1948).

54. See *Biaggi Convicted of Racketeering in Wedtech Case*, Wall St. J., Aug. 5, 1988, at 42, col. 2 (conviction of Richard Biaggi on RICO count overturned by judge because jury only found one predicate act). The court would not be able to ascertain this if only a general verdict were returned and if the predicate acts were not all charged in the indictment. Such inconsistent verdicts, however, do not require automatic reversal. See *United States v. Powell*, 469 U.S. 57 (1984); cases cited *infra* note 128.

55. Cf. *United States v. Cauble*, 706 F.2d 1322, 1344 (5th Cir. 1983) (in RICO case judge should instruct jury that they must be unanimous on the predicate acts but failure to do so is not plain error), cert. denied, 465 U.S. 1005 (1984); *United States v. Davis*, 673 F. Supp. 252, 258 (N.D. Ill. 1987) (verdict form will ensure that jury is unanimous as to predicate acts).

56. See *Cauble*, 706 F.2d at 1344.

57. See *United States v. Ruggiero*, 726 F.2d 913, 927 n.3 (2d Cir.) (Newman, J., concurring in part, dissenting in part), cert. denied, 469 U.S. 831 (1984); *United States v. Palmeri*, 630 F.2d 192, 202-03 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981).

58. See *United States v. Desmond*, 670 F.2d 414, 418 (3d Cir. 1982); *Palmeri*, 630 F.2d at 202.

jury can be instructed to answer the interrogatories only after they vote to convict, thereby alleviating the concern that this procedure would lead an otherwise merciful jury to convict.⁵⁹ When special interrogatories are used as a means of structuring the jury's deliberations, as in *Coonan*, the jury must answer the interrogatories before a general verdict is returned. The ultimate decision whether to use special interrogatories in criminal RICO cases is left to the discretion of the trial judge in those courts which permit their use.⁶⁰ Neither the prosecutor⁶¹ nor the defendant⁶² has the right to insist on their use.

Clearly, however, there must be some limits on the trial judge's discretion. The trial judge has no power to adopt procedures that violate the Constitution or are prohibited by statute. The sixth amendment guarantees the defendant a trial by jury.⁶³ However, the prosecution, "as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."⁶⁴ Thus, although the defendant can demand a jury trial, a waiver of that right requires the consent of the prosecutor.⁶⁵

The right to trial by jury consists of at least those essential elements associated with jury trial at the time of the adoption of the sixth amendment.⁶⁶ A waiver of any of these elements constitutes a waiver of the

59. See *Ruggiero*, 726 F.2d at 928 (Newman, J., concurring in part, dissenting in part); *United States v. Ogull*, 149 F. Supp. 272, 275 (S.D.N.Y. 1957).

60. See *Ruggiero*, 726 F.2d at 928 (Newman, J., concurring in part, dissenting in part); see also *Brennan v. United States*, 867 F.2d 111, 114 (2d Cir.) (general verdict returned although special interrogatories available), *cert. denied*, 109 S. Ct. 1750 (1989); *United States v. Riccobene*, 709 F.2d 214, 227-28 (3d Cir.) (trial court rejected prosecution request for use of interrogatories because defendant objected), *cert. denied*, 464 U.S. 849 (1983).

61. See *Riccobene*, 709 F.2d at 227-28.

62. See *United States v. Shelton*, 588 F.2d 1242, 1251 (9th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *United States v. Munz*, 542 F.2d 1382, 1388-89 (10th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976).

63. See U.S. Const. amend. VI.

64. *Singer v. United States*, 380 U.S. 24, 36 (1965). However, a "jury trial [is] principally for the benefit of the accused." *Id.* at 33 (citing *Patton v. United States*, 281 U.S. 276, 312 (1930)).

65. Fed. R. Crim. P. 23(a) provides: "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government." *Id.* In *Singer v. United States*, 380 U.S. 24 (1965), the Supreme Court upheld the constitutionality of this rule. See *id.* at 36; see also *United States v. Sun Myung Moon*, 718 F.2d 1210, 1217-18 (2d Cir. 1983) (jury trial because prosecution would not consent to waiver), *cert. denied*, 466 U.S. 971 (1984).

66. See *Patton v. United States*, 281 U.S. 276, 288 (1930). The essential elements of trial by jury as defined by the *Patton* court were:

- (1) that the jury should consist of twelve men, neither more nor less;
- (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and
- (3) that the verdict should be unanimous.

right to trial by jury.⁶⁷ Therefore, any change in procedure that would constitute a waiver of trial by jury must be conditioned on the prosecution's consent under Federal Rule of Criminal Procedure 23(a).

The *Coonan* procedure, however, does not constitute such a waiver.⁶⁸ The jury is instructed on all the essential elements of RICO as the sixth amendment requires.⁶⁹ Moreover, the jury and not the judge determines the existence of the elements of a RICO violation.⁷⁰ The procedure as proposed by the majority in *Coonan* will not reduce the jury "to the position of a mere ministerial agent."⁷¹ The procedure merely adds a preliminary step to the process and ensures that the jury has found the pattern of racketeering activity element proven beyond a reasonable doubt.

The trial judge also may not adopt any procedure which is inconsistent with the Federal Rules of Criminal Procedure.⁷² Bifurcation of issues is specifically provided for in the Federal Rules of Civil Procedure.⁷³ There is no such provision in the Federal Rules of Criminal Procedure.⁷⁴ Some courts have suggested that judges should not adopt procedures in criminal trials which are specifically provided for in the Federal Rules of Civil Procedure and as to which the Federal Rules of Criminal Procedure are silent.⁷⁵ Presumably this is an indication that such rules were considered and rejected in a criminal context. Other courts have held that this circumstance does not preclude the use of such procedures in criminal trials.⁷⁶ The latter view seems more consistent with the spirit of the rules,

67. *See id.* at 290.

68. Some district courts have held that there are some instances where the prosecution's interest will not override a defendant's waiver of trial by jury. *See* United States v. Lewis, 638 F. Supp. 573, 578-80 (W.D. Mich. 1986); United States v. Braunstein, 474 F. Supp. 1, 12-14 (D.N.J. 1979); United States v. Panteleakis, 422 F. Supp. 247, 248-50 (D.R.I. 1976); United States v. Schipani, 44 F.R.D. 461, 463 (E.D.N.Y. 1968). The Supreme Court explicitly left this issue open. *See* Singer v. United States, 380 U.S. 24, 37 (1965).

69. *See* United States *ex rel.* Johnson v. Hatrak, 417 F. Supp. 316, 319 (D.N.J. 1976), *aff'd*, 564 F.2d 90 (3d Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); *see also* Morris v. United States, 156 F.2d 525, 529 (9th Cir. 1946) (instructions should not leave jury ignorant of what constitutes crime charged).

70. It is an impermissible invasion of the jury's function for the judge to determine the existence of elements of a crime. *See* Morris, 156 F.2d at 529-31; *see also* United States v. Howard, 506 F.2d 1131, 1134 (2d Cir. 1974) (prosecution must prove elements of crime to jury not judge); Glenn v. United States, 420 F.2d 1323, 1324 (D.C. Cir. 1969) (jury not judge must determine offense committed by defendant).

71. *Morris*, 156 F.2d at 529. The proposal of the trial judge is more troublesome in this respect. Under that proposal, the jury would never be instructed on the pattern of racketeering element of RICO. Allowing the judge to extrapolate from findings made by the jury might deny the jury their historic province of applying the law to the facts. *See id.*

72. *See* Fed. R. Crim. P. 57.

73. *See* Fed. R. Civ. P. 42(b).

74. Federal Rule of Criminal Procedure 30 deals with the timing of instructions to the jury. The judge may instruct the jury before or after closing arguments or at both times. *See* Fed. R. Crim. P. 30.

75. *See* United States v. Collamore, 868 F.2d 24, 28 (1st Cir. 1989); United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969).

76. *Cf.* United States v. Ruggiero, 726 F.2d 913, 925-26 (2d Cir.) (Newman, J., con-

which are to be construed liberally⁷⁷ and "were not intended to be, a rigid code [having] an inflexible meaning irrespective of the circumstances."⁷⁸ The *Coonan* procedure does not contravene the letter or spirit of any Federal Rule of Criminal Procedure. Indeed, trial judges are given discretion over other aspects of the procedure by which instructions are submitted to the jury.⁷⁹

The *Coonan* procedure is within the trial judge's discretion because it does not violate the Constitution nor does it contravene the Federal Rules of Criminal Procedure. Nevertheless, the effect of the procedure on the function of the criminal jury must be assessed to determine whether use of the procedure would be a wise exercise of the trial judge's discretion in any particular case.

III. IMPACT OF THE *COONAN* PROCEDURE ON THE FUNCTION OF THE CRIMINAL JURY

The judge instructs the jury on the law and the jury applies it to the facts to decide whether a defendant violated the law.⁸⁰ In making this determination the criminal jury acts as the "conscience of the community."⁸¹ Changes in traditional procedure, therefore, should not be undertaken lightly by the trial judge.⁸²

A. *Defendant's Perspective*

The criminal jury is heralded as a guarantor against oppression by the government.⁸³ An intrusion on its function by a representative of the government, such as a judge, is looked upon with disfavor.⁸⁴ The general verdict is perceived as an important safeguard in this respect. As one court remarked, "[i]t is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general

curing in part, dissenting in part) (fact that special interrogatories specifically provided for in civil rules but not provided for in criminal rules does not prohibit use in criminal cases), *cert. denied*, 469 U.S. 831 (1984).

77. *See* United States v. Claus, 5 F.R.D. 278, 280 (E.D.N.Y. 1946).

78. *Fallen v. United States*, 378 U.S. 139, 142 (1964); *accord* *Berman v. United States*, 378 U.S. 530, 538 (1964) (Black, J., dissenting); *United States v. Mendoza*, 565 F.2d 1285, 1289 (5th Cir. 1978). "The[] rules are intended to provide for the just determination of every criminal proceeding. They [should] be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." Fed. R. Crim. P. 2.

79. *See* United States v. Previte, 648 F.2d 73, 84 (1st Cir. 1981).

80. *See* *Morris v. United States*, 156 F.2d 525, 528-29 (9th Cir. 1946).

81. *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969); *accord* *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part, dissenting in part) (jury "spokesman for the community conscience").

82. *See* *Patton v. United States*, 281 U.S. 276, 312-13 (1930); *Morris v. United States*, 156 F.2d 525, 529 (9th Cir. 1946).

83. *See* *Williams v. Florida*, 399 U.S. 78, 100 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968); *Spock*, 416 F.2d at 181.

84. *See* *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *Spock*, 416 F.2d at 181; *United States v. Ogull*, 149 F. Supp. 272, 278 (S.D.N.Y. 1957).

verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit."⁸⁵

In the early history of the United States, the jury had the right to return a general verdict that defied the law.⁸⁶ This concept, known as jury nullification, refers to the notion that the jurors may ignore the law as given to them by the court and decide a case based on their own sense of justice. Courts began to deny the jury this right⁸⁷ when the distrust of judges as potential tools of government tyranny declined⁸⁸ and judges began to fear that juries would use their power to treat criminal defendants harshly.⁸⁹ Finally, in 1895, the Supreme Court settled the issue and affirmed a judge's instruction that "'a jury is expected to be governed by law, and the law it should receive from the court,'"⁹⁰ citing the need for uniformity in the law.⁹¹ Nevertheless, courts continue to acknowledge the power, but not the right, of the jury to return a verdict "in the teeth of both law and facts."⁹²

85. *Spock*, 416 F.2d at 181 (quoting G. Clementson, *Special Verdicts and Special Findings by Juries* 49 (1905)). The policy favoring the general verdict in criminal cases is usually associated with the jury showing mercy to the defendant. Thus, the jury "temper[s] [the law's] rigor by the mollifying influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942); *accord United States v. McCracken*, 488 F.2d 406, 419 (5th Cir. 1974) ("[a] general verdict insures the input of compassion into a jury's decisional process").

86. *See Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 32 (1795) (jury not bound to return verdict which conforms to court's instructions on law); *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 n.2 (1794) ("[i]n a criminal case, the jury have not only the power, but the right, to determine the law as well as the facts, by a verdict of 'not guilty'") (emphasis in original). This notion was partially a function of the colonists' experience with British laws and judges. Colonial juries often defied Parliament by not enforcing the Navigation Act, and a colonial jury refused to convict John Peter Zenger for publishing material not authorized by the British Mayor. *See Schefflin & Van Dyke, Jury Nullification: The Contours of a Controversy*, 43 *Law & Contemp. Probs.* 51, 57 (Autumn 1980); Schefflin, *Jury Nullification: The Right to Say No*, 45 *So. Cal. L. Rev.* 168, 173-74 (1972). There may have been a practical aspect to this development as well. Many of the judges at the time were not professionals. Thus, they had no greater training in the law than a jury. *See Howe, Juries as Judges of Criminal Law*, 52 *Harv. L. Rev.* 582, 591 (1939).

87. *See United States v. Morris*, 26 F. Cas. 1323, 1331-36 (C.C.D. Mass. 1851) (No. 15,815); *United States v. Battiste*, 24 F. Cas. 1042, 1043 (C.C.D. Mass. 1835) (No. 14,545).

88. *See United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

89. *See Schefflin & Van Dyke, supra* note 86, at 59.

90. *Sparf & Hansen v. United States*, 156 U.S. 51, 62 n.1 (1895) (emphasis omitted).

91. *See id.* at 101.

92. *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920); *accord United States v. Kerley*, 838 F.2d 932, 938 (7th Cir. 1988); *United States v. Avery*, 717 F.2d 1020, 1027 (6th Cir. 1983), *cert. denied*, 466 U.S. 905 (1984). When the jury exercises this power in favor of a criminal defendant by returning a general verdict of not guilty, the verdict is not reviewable. *See Harris v. Rivera*, 454 U.S. 339, 345-46 (1981); *United States v. Dougherty*, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

There are still instances when criminal juries use their power of nullification in favor of a criminal defendant. Juries may have a more generous view of self defense than the law provides. *See H. Kalven & H. Zeisel, The American Jury* 221-41 (1966). The jury may inject a notion of contributory fault of the victim into the criminal law. *See id.* at 242-57.

In Indiana⁹³ and Maryland,⁹⁴ the power of the jury to decide the law is guaranteed by the state constitution. Even in these states, the jury may not use its power to create a crime simply to punish a defendant.⁹⁵ Similarly, some judges⁹⁶ and commentators⁹⁷ express the view that the jury should be able to use its nullification power only when it is inclined to be merciful. Under this view, the jury should be told that it has the right to acquit if it believes that under certain circumstances the law should not be applied to a particular defendant. Courts can protect against the jury using its nullification power to create crimes through appellate review,⁹⁸ directed verdicts,⁹⁹ judgments notwithstanding the verdict¹⁰⁰ and orders

The jury might be less likely to convict when the harm done by the defendant is minimal. *See id.* at 258-85. Finally, the jury may exercise its nullification power in cases where defendants are charged with violating unpopular laws. *See id.* at 286-97. One example of this was the difficulty prosecutors encountered obtaining convictions for violating prohibition laws. *See id.* at 291-93.

93. *See* Ind. Const. art. I, § 19.

94. *See* Md. Const. art. 23.

95. Thus, the Indiana provision "does not empower a jury to convict by defining the elements in an offense in a manner that does violence to the statutory language." *Holloway v. State*, 352 N.E.2d 523, 529 (Ind. 1976). In Maryland, the jury can only decide the law when there is a sound dispute as to its interpretation. *See Smiley v. State*, 294 Md. 461, 466, 450 A.2d 909, 912 (1982). "[T]he jury's right to judge the law is virtually eliminated; the [Maryland] provision . . . basically protects the jury's right to judge the facts." *In re* Petition for Writ of Prohibition, 312 Md. 280, 318, 539 A.2d 664, 682 (1988).

96. *See United States v. Johnson*, 718 F.2d 1317, 1326 (5th Cir. 1983) (Garwood, J., concurring); *United States v. Dougherty*, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part, dissenting in part).

97. *See Becker, Jury Nullification: Can a Jury Be Trusted?*, 16 *Trial* 41, 43 (Oct. 1980); Schefflin & Van Dyke, *supra* note 86, at 59; Van Dyke, *The Jury as a Political Institution*, 16 *Cath. Law*. 224, 241 (1970).

98. The district court judge in *Coonan* doubted the efficacy of this safeguard in RICO cases because of the unsettled state of the RICO statute and the vague charges that result.

[N]o one knows exactly what [the RICO statute] means, at least the Supreme Court doesn't, and the circuits don't agree as to what the Supreme Court thinks, and I have never heard of a RICO case being reversed, and the reason is the judge always charges vague principles and the Court of Appeals always finds something in the record to support those vague principles.

See Brief for the United States of America at 6, *United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988) (No. 88-3007).

99. *See* Fed. R. Crim. P. 29(a); *see, e.g., United States v. Stefan*, 784 F.2d 1093, 1100 (11th Cir.), *cert. denied*, 479 U.S. 855 (1986); *United States v. Green*, 523 F.2d 229, 231 n.2 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976). The judge should take a criminal case from the jury only if there is no evidence upon which a reasonable jury could reach a conclusion of guilt beyond a reasonable doubt. *See United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); *United States v. Adamo*, 742 F.2d 927, 935 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985).

In civil cases a verdict can be directed for either the plaintiff or the defendant, *see* Fed. R. Civ. P. 50, but in a criminal case the judge may direct only a verdict of acquittal. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); Fed. R. Crim. P. 29.

100. *See* Fed. R. Crim. P. 29(c); *see, e.g., United States v. Rosenthal*, 793 F.2d 1214, 1247 (11th Cir.), *modified in part*, 801 F.2d 378 (11th Cir. 1986), *cert. denied*, 480 U.S. 919 (1987); *Morris v. United States*, 156 F.2d 525, 531 (9th Cir. 1946). A motion for judgment of acquittal is only appropriate when no rational jury, viewing the evidence in

for new trials in the interest of justice.¹⁰¹

Despite these traditional safeguards and the deference traditionally given criminal jury verdicts,¹⁰² courts have deemed it necessary to take other steps to protect a defendant from the danger of being convicted by a jury that does not believe every element of a crime has been proved beyond a reasonable doubt.¹⁰³ For example, the defendant is entitled to an instruction on a lesser included offense, even if it is not charged in the indictment, when conviction of the lesser included offense could be supported by the evidence and is not totally encompassed by the greater offense.¹⁰⁴

the light most favorable to the prosecution, could have found the defendant guilty beyond a reasonable doubt. *See* United States v. Wilson, 598 F. Supp. 138, 140 (E.D. Pa. 1984); United States v. Martorano, 596 F. Supp. 621, 624 (E.D. Pa. 1984), *aff'd*, 767 F.2d 63 (3d Cir.), *cert. denied*, 474 U.S. 949 (1985).

101. *See* Fed. R. Crim. P. 33. A motion based on a claim that the verdict was contrary to the weight of the evidence should be granted only in exceptional circumstances where it would be a miscarriage of justice to allow the verdict to stand. *See* United States v. Lanier, 838 F.2d 281, 284-85 (8th Cir. 1988); United States v. Martinez, 763 F.2d 1297, 1313 (11th Cir. 1985).

102. *See* Johnson v. Louisiana, 406 U.S. 356, 399 (1972) (Stewart, J., dissenting).

103. When sanity was an element of offenses that the prosecution had to prove beyond a reasonable doubt, courts were concerned that a jury would improperly convict a legally insane defendant if it thought a not guilty by reason of insanity verdict would result in the defendant's freedom. *See* United States v. McCracken, 488 F.2d 406, 422 (5th Cir. 1974); United States v. Grimes, 421 F.2d 1119, 1125 (D.C. Cir. 1969), *cert. denied*, 398 U.S. 932 (1970); Lyles v. United States, 254 F.2d 725, 734 (D.C. Cir. 1957) (Bazelon, J., dissenting), *cert. denied*, 356 U.S. 961 (1958). Thus, despite the traditional rule that jurors are not instructed on issues relating to punishment, *see* McCracken, 488 F.2d at 423, the D.C. Circuit instructed jurors that a not guilty by reason of insanity verdict might result in commitment. *See* Grimes, 421 F.2d at 1124; Lyles, 254 F.2d at 728. One circuit recently approved this instruction because, in passing the law that made insanity an affirmative defense, Congress endorsed the instruction. *See* United States v. Neavill, 868 F.2d 1000, 1003-05 (8th Cir.), *reh'g granted*, 877 F.2d 1394 (1989). It must be noted that this procedure gives the jury more rather than less information than they would ordinarily receive.

One commentator has suggested that the decision of whether to inform the jury about the consequences of a not guilty by reason of insanity verdict be placed in the trial judge's discretion. *See* Schwartz, *supra* note 40, at 176-78.

104. *See* Sansone v. United States, 380 U.S. 343, 349-50 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Fed. R. Crim. P. 31(c).

The rationale behind the lesser included offense charge is that

if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction—in this context or any other—precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Keeble v. United States, 412 U.S. 205, 212-13 (1973) (emphasis in original); *accord* United States *ex rel.* Moore v. Thieret, No. 86-5099, slip op. at 4 (N.D. Ill. June 17, 1988) (WESTLAW, DCT database) (“[t]he lesser-included offense doctrine is premised on the fear that a jury might convict a defendant of a serious offense, even though it held a reasonable doubt as to an element of the offense, because the jury could not stomach an outright acquittal”); *see also* P. DiPerna, *Juries on Trial* 195 (1984) (in prosecution of

In a RICO case, the defendant may face "the substantial risk that the jury's practice will diverge from theory."¹⁰⁵ The danger in a RICO case is that the jury, convinced that the defendant committed one predicate act, will resolve its doubts on other predicate acts against the defendant in order to convict and punish him.¹⁰⁶ The Constitution, however, requires that the prosecutor prove every element of the crime beyond a reasonable doubt.¹⁰⁷

Although the *Coonan* procedure can protect the defendant from this danger, it can also pose risks to the defendant in other situations. As the interrogatories must be answered before a general verdict is rendered, their use may create the danger of leading a jury toward conviction, which is one of the reasons that special interrogatories are disfavored in criminal trials.¹⁰⁸ There is also a possibility that a jury bent on punishing the defendant will find all the predicate acts proved, regardless of the evidence, if the number needed to convict is not disclosed to the jury.¹⁰⁹ The *Coonan* procedure cannot be justified after considering merely the defendant's interests and deciding that it is beneficial to the defendant. The interests of the prosecutor, which are implicated by using the procedure, must be considered as well. If the procedure creates greater problems than it solves, it should not be used.

B. *Prosecution's Perspective*

The prosecutor's right to a fair trial must be considered. This right is protected by procedural rules. For example, the prosecutor is entitled to jury challenges,¹¹⁰ and severance of defendants or counts if his case will be prejudiced.¹¹¹ The prosecutor can also submit requests to charge and

Jean Harris, juror claimed that, although jury thought murder charge was too severe, it felt that defendant should not go free and found her guilty of murder absent other alternative).

105. *Keeble*, 412 U.S. at 212.

106. This is especially dangerous when the RICO count is the only charge against the defendant in the indictment and the prosecution has presented strong proof as to one particularly heinous predicate act, or other crimes offered to prove the existence of an illegal enterprise because the jury may not be able to "stomach an outright acquittal." *United States ex rel. Moore v. Thieret*, No. 86-5099, slip op. at 4 (N.D. Ill. June 17, 1988) (WESTLAW, DCT database). On the other hand, when there are other counts in the indictment, the jury may assume that the defendant will be punished for these acts and be less concerned with punishment when making its RICO determination.

107. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979); *In re Winship*, 397 U.S. 358, 364 (1970); *United States v. Alvarez*, 755 F.2d 830, 842 n.12 (11th Cir.), *cert. denied*, 474 U.S. 905 (1985). Indeed, instructions that allow the jury to convict without finding the facts necessary to prove every element cannot be rendered harmless by an appellate court's determination that the jury could have found all the elements proven beyond a reasonable doubt. *See United States v. Voss*, 787 F.2d 393, 398 (8th Cir.), *cert. denied*, 479 U.S. 888 (1986).

108. *See United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969).

109. *See Brief for the United States of America at 29, United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988) (No. 88-3007).

110. *See Fed. R. Crim. P. 24(b)*.

111. *See Fed. R. Crim. P. 14*.

raise objections to the court's charge.¹¹²

The prosecution's right to a fair trial also encompasses the right to present a cohesive, comprehensive picture of the defendant's behavior to prove a violation of a criminal statute. The prosecutor, therefore, can insist on proving an element of a crime, even if the defendant is willing to stipulate to it.¹¹³ Thus, in a RICO case, the prosecutor can prove the enterprise element even though it will involve presenting evidence of uncharged crimes to the jury and the defendant is willing to stipulate to the enterprise's existence.¹¹⁴ This prosecutorial interest is also considered when a defendant requests severance¹¹⁵ and has been cited to prevent bifurcation of the presentation of evidence of elements of a crime.¹¹⁶

In *Coonan*, the prosecution thought that use of the special procedure would impair their ability to present their case as a cohesive unit. One of the reasons they opposed the *Coonan* proposal was the fear that the jury would view the predicate acts as unconnected to the rest of the case.¹¹⁷ However, unlike the prejudice that is caused when defendants' trials are severed,¹¹⁸ or elements are bifurcated,¹¹⁹ the *Coonan* procedure does not prevent the prosecution from presenting all the evidence to the jury in its proper context. The jury may use the evidence of the predicate acts to infer the existence of the enterprise.¹²⁰ The jury may also use evidence of the nature of the enterprise to find the relatedness and continuity requirements of the pattern element.¹²¹ Thus, the jury has all the evidence

112. See Fed R. Crim. P. 30.

113. See *United States v. Blade*, 811 F.2d 461, 465-66 (8th Cir.), *cert. denied*, 108 S. Ct. 124 (1987); *United States v. Gantzer*, 810 F.2d 349, 351 (2d Cir. 1987); *United States v. Cutler*, 806 F.2d 933, 936 (9th Cir. 1986). This is subject to Federal Rule of Evidence 403, which allows for the exclusion of relevant evidence if its probative value is substantially outweighed by its prejudicial effect. See *United States v. Ellison*, 793 F.2d 942, 949 (8th Cir.), *cert. denied*, 479 U.S. 937 (1986).

114. See *Ellison*, 793 F.2d at 949.

115. Even if the defendant can show he will be prejudiced by a joint trial, the prejudice must be substantial enough to outweigh the need for speedy and efficient trials, see *United States v. Gallo*, 763 F.2d 1504, 1525-26 (6th Cir. 1985), *cert. denied*, 475 U.S. 1017 (1986), and the interests of the prosecutor whose case may be prejudiced by preventing him from presenting the case in its entirety to the jury, see *United States v. Castellano*, 610 F. Supp. 1359, 1410-11 (S.D.N.Y. 1985). In addition, the prosecutor's case may be prejudiced because he may be forced to prove the same charges twice and his witnesses will be burdened by having to testify repeatedly. *Id.* This balance is weighed in favor of a joint trial in "all but the most unusual circumstances." See *United States v. Arvanitis*, 676 F. Supp. 840, 846 (N.D. Ill. 1987).

116. See *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989).

117. See *United States v. Coonan*, 839 F.2d 886, 890 (2d Cir. 1988); see also *United States v. Roman*, 870 F.2d 65, 76 (2d Cir.) ("jury is entitled to consider the evidence in its entirety"), *cert. denied*, 109 S. Ct. 3164 (1989).

118. See *supra* note 115.

119. See *Collamore*, 868 F.2d at 28.

120. Some circuits allow the prosecution to use evidence of the predicate acts as part of the evidence that an enterprise exists. See, e.g., *United States v. Perholtz*, 842 F.2d 343, 363 (D.C. Cir.), *cert. denied*, 109 S. Ct. 65 (1988); *United States v. Qaoud*, 777 F.2d 1105, 1115 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986); *United States v. Mazzei*, 700 F.2d 85, 89 (2d Cir.), *cert. denied*, 461 U.S. 945 (1983).

121. See *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) (en banc).

before it and can make all the permissible inferences during deliberations.

Another potential problem for the prosecution is that it is generally not considered good trial practice for an attorney to promise something to the jury in the opening or closing statement that he cannot deliver.¹²² The prosecutor's case may be prejudiced if the jury believes that the absence of instruction on a pattern of racketeering activity is an indication that the prosecution has failed to prove that element. On the other hand, if the prosecutor does not mention a pattern of racketeering activity in the opening statement, he may lose an opportunity to explain his theory of the case to the jury. This problem can be remedied by informing the parties¹²³ and the jurors that they will be deliberating in two phases.

Other interests of the prosecution are not so easily accommodated. Traditionally, criminal juries deliberate with knowledge of the effect that its findings will have on the ultimate verdict and, therefore, do not arrive at verdicts based on false assumptions.¹²⁴ This danger to the prosecution has been recognized in connection with other proposed new procedures in criminal trials.¹²⁵ The *Coonan* procedure poses the danger that the jurors will be more willing to compromise if they do not know the significance of the predicate acts as they relate to their verdict on the RICO count. Thus, when a jury has already determined that a defendant committed one predicate act, jurors may forego finding other predicate acts because they think the defendant will be punished anyway.¹²⁶ As a result, the prosecutor risks losing a conviction he might otherwise have obtained¹²⁷ and has no way of challenging such a verdict.¹²⁸

122. See At Lee, *Opening Statement*, 27 Air Force L. Rev. 67, 72 (1987); Hughes & Hsiao, *Does the Opening Determine the Verdict?*, 22 Trial 66, 68 (Feb. 1986).

123. In civil cases the judge is advised to inform the parties what form the verdict will take before the closing arguments, so the parties can prepare their arguments accordingly. See *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1374 (9th Cir. 1987).

124. See *United States v. McCracken*, 488 F.2d 406, 423 (5th Cir. 1974); see also *United States v. Johnson*, 469 F.2d 973, 976 n.3 (5th Cir. 1972) (trier of fact not required to look at evidence in isolation or vacuum).

125. Cf. *United States v. Collamore*, 868 F.2d 24, 28 (1st Cir. 1989) (jurors might not understand why possession of weapon was crime if judge bifurcated elements of possession of weapon by felon and they did not know defendant was felon).

126. See, e.g., *United States v. Powell*, 469 U.S. 57, 65 (1984); *Hyde v. United States*, 225 U.S. 347, 383 (1912); *United States v. Marques*, 600 F.2d 742, 746 (9th Cir.), cert. denied, 444 U.S. 1019 (1979). "Whenever juries seem troubled over a case, they seem to turn eagerly for a compromise solution." Van Dyke, *supra* note 97, at 239, see also V. Hans & N. Vidmar, *supra* note 23, at 110 (if there are multiple charges against a defendant, minority jurors may be able to get compromise verdict).

127. On the other hand, when more than two predicate acts are charged, even if the jury compromises they might still find two predicate acts and a conviction on a RICO substantive count would be possible.

Procedures such as instructing the jury on a lesser included offense do not pose the same degree of risk to the prosecutor's case as the procedure proposed in *Coonan*. If the jury compromises when it is instructed on a lesser included offense, the prosecutor may still obtain a conviction. See P. DiPerna, *Juries on Trial* 182-89 (1984) (discussion of murder case in which jurors favoring murder conviction and jurors favoring acquittal compromised on manslaughter conviction).

The *Coonan* procedure should be used only in those cases where the risk to the defendant outweighs this potential prejudice to the prosecutor's case. This is likely to occur when the defendant is charged with one heinous predicate act for which the prosecution has presented strong proof and the evidence is too close as to other predicate acts for the judge to direct a verdict.

CONCLUSION

In some criminal RICO cases, there is a danger that the jury will convict a defendant to punish him even though the prosecution has not proven the commission of two predicate acts beyond a reasonable doubt. The *Coonan* procedure alleviates this danger by helping the jury focus on each predicate act as it relates to each individual defendant and by ensuring that the jury does not use its nullification power to punish a defendant who it does not believe violated the RICO statute. This process, however, also creates a danger that a jury will make determinations based on uninformed speculation. The trial judge is in the best position to balance the competing interests and dangers which use of this procedure implicates in any particular case. When the risk to the defendant is greatest,¹²⁹ the trial judge should have the discretion to allow the jury to deliberate in two stages. In the first stage, the jury would render general verdicts on any counts in the indictment other than RICO and also answer special interrogatories as to any predicate acts not charged in the indictment. In the second stage, the jury would be instructed on RICO and render a general verdict on the RICO count.

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128. See *United States v. Powell*, 469 U.S. 57, 65 (1984). For this reason, convictions on compound offenses do not have to be reversed even when there is an inconsistent acquittal on an underlying predicate offense. See *id.* Thus, in a RICO case, if the defendant is convicted on the RICO substantive count but the jury does not find that he committed at least two predicate acts, the conviction does not automatically have to be reversed. See *United States v. Chang An-Lo*, 851 F.2d 547, 559-60 (2d Cir.), *cert. denied*, 109 S. Ct. 493 (1988); *United States v. Kragness*, 830 F.2d 842, 859 (8th Cir. 1987); *United States v. Tinsley*, 800 F.2d 448, 451-52 (4th Cir. 1986).

129. See *supra* note 106.

