

1980

## RICO: The New Darling of the Prosecutor's Nursery

Barry Tarlow

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Fordham L. Rev. 165 (1980).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol49/iss2/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## RICO: The New Darling of the Prosecutor's Nursery

### Cover Page Footnote

Member of the California Bar. A.B. 1961, Boston University; LL.B. 1964, Boston University; Chairman, RICO Prosecution Committee of the National Association of Criminal Defense Lawyers; Chairman, RICO Committee of the California Att'ys for Criminal Justice; Member, ABA Committee on Prosecution and Defense of RICO Cases. The author wishes to express his appreciation to Mr. Terrence V. Scott, J.D. 1978, U.C.L.A., for his invaluable assistance in the preparation of this Article.

# RICO: THE NEW DARLING OF THE PROSECUTOR'S NURSERY

Barry Tarlow\*

## TABLE OF CONTENTS

INTRODUCTION .....	167
I. GENERAL SCOPE OF TITLE IX .....	171
A. <i>Section 1962</i> .....	171
B. <i>Influence of Antitrust Law on Title IX</i> .....	173
C. <i>Criminal Penalties</i> .....	174
D. <i>Liberal Construction Clause</i> .....	177
II. SECTIONS 1962(a) AND 1962(b) .....	180
A. <i>Elements of a Section 1962(a) Offense</i> .....	180
1. <i>Mens Rea Requirement</i> .....	180
a. <i>Existence of a Mens Rea Element</i> .....	180
b. <i>Appropriate Level of Intent</i> .....	182
2. <i>Application of Section 1962(a) to Reinvested Money</i> .....	183
3. <i>Liability of Recipients of Racketeering Income</i> ..	184
B. <i>Proof of a Section 1962(a) Violation</i> .....	185
C. <i>Proposed Amendments of Section 1962(a)</i> .....	189
D. <i>Section 1962(b)</i> .....	189
III. SECTION 1962(c) .....	190
A. <i>Limitation to Infiltration of Legitimate Business</i> ...	191
1. <i>Congressional Intent</i> .....	192
2. <i>Rules of Statutory Construction</i> .....	195
3. <i>Eighth Circuit Approach to Illegal Enterprise Problem</i> .....	198
B. <i>Enterprise</i> .....	199
1. <i>Illegal Enterprise</i> .....	199
a. <i>Single Person Enterprise</i> .....	201
b. <i>Effect of Broad Construction of Enterprise</i> ..	202
2. <i>Foreign Enterprises</i> .....	203
3. <i>Government Enterprises</i> .....	205
4. <i>Enterprise Pleading Problems</i> .....	208
C. <i>Pattern of Racketeering</i> .....	209
1. <i>Continuity Analysis of "Pattern"</i> .....	209

---

\* Member of the California Bar. A.B. 1961, Boston University; LL.B. 1964, Boston University; Chairman, RICO Prosecution Committee of the National Association of Criminal Defense Lawyers; Chairman, RICO Committee of the California Att'ys for Criminal Justice; Member, ABA Committee on Prosecution and Defense of RICO Cases. The author wishes to express his appreciation to Mr. Terrence V. Scott, J.D. 1978, U.C.L.A., for his invaluable assistance in the preparation of this Article.

	2. "Common Scheme" Analysis of "Pattern" . . . . .	213
	a. Criticism of "Common Scheme" Approach . . . . .	215
	b. Single Transaction Illegal Activity . . . . .	216
	3. "Common Scheme" and Joinder . . . . .	219
D.	<i>Racketeering Activity</i> . . . . .	220
	1. Incorporated Federal Offenses . . . . .	220
	a. Marijuana Offenses . . . . .	222
	b. Conspiracy as a Predicate Offense . . . . .	224
	2. Incorporated State Offenses . . . . .	224
	a. Generic Designation of State Offenses . . . . .	224
	b. Applicability of State Procedure . . . . .	226
E.	<i>Relationship Between Illegal Activity and the Affairs of the Enterprise: The "Through" Element</i> . . . . .	228
	1. Private Business Enterprises . . . . .	229
	2. Union Enterprises . . . . .	231
F.	<i>Mens Rea</i> . . . . .	235
G.	<i>Impact on Interstate Commerce</i> . . . . .	237
	1. Necessity of Proof of Interstate Commerce Effect . . . . .	237
	2. Connection Between Illegal Activity and Interstate Commerce . . . . .	237
	3. Standard of Proof . . . . .	239
	4. Pleading of Interstate Commerce Element . . . . .	241
	5. Federally Created Jurisdiction . . . . .	242
H.	<i>Proposed Amendments</i> . . . . .	243
IV.	SECTION 1962(d)—RICO CONSPIRACY . . . . .	245
	A. <i>The Elliott View of RICO Conspiracy</i> . . . . .	245
	1. <i>United States v. Elliott</i> . . . . .	245
	2. Reaction to <i>Elliott</i> . . . . .	248
	3. Analysis of <i>Elliott</i> . . . . .	250
	4. <i>Elliott</i> and Legitimate Enterprises . . . . .	251
	5. <i>Elliott</i> and Common Scheme . . . . .	253
	B. <i>Application of Conspiracy Doctrines to Section         1962(d)</i> . . . . .	254
	C. <i>Proposed Federal Criminal Codes</i> . . . . .	256
V.	DEFENSES AND PRETRIAL OBJECTIONS TO RICO	
	INDICTMENT FORMAT . . . . .	257
	A. <i>Statute of Limitations</i> . . . . .	257
	B. <i>Double Jeopardy</i> . . . . .	257
	1. Multiple RICO Indictments . . . . .	257
	2. Separate Indictments of Section 1962(d) Conspiracy and Conspiracy Charged Under Other Statutes . . . . .	260
	3. Separate Punishment of Section 1962(c) and Predicate Offenses . . . . .	262
	4. Trial on State Charges Prior to RICO Prosecutions . . . . .	264

C.	<i>Collateral Estoppel</i> .....	266
D.	<i>Duplicity and Multiplicity</i> .....	268
	1. Duplicity .....	268
	2. Multiplicity .....	269
E.	<i>Joinder and Severance</i> .....	270
	1. Joinder of Offenses .....	270
	a. <i>Joinder of Predicate Offenses</i> .....	270
	b. <i>Joinder of RICO Offense and Non-Predicate         Offenses</i> .....	273
	2. Retroactive Joinder .....	274
	3. Prejudicial Joinder .....	274
VI.	CRIMINAL FORFEITURE .....	276
A.	<i>General Structure and Scope of RICO Forfeiture</i> ..	276
B.	<i>RICO Forfeiture Procedure</i> .....	278
	1. Pleading Requirements .....	278
	2. Forfeiture Verdict .....	279
	3. Mandatory v. Discretionary Forfeiture .....	280
C.	<i>Forfeitable Interests</i> .....	282
	1. Forfeiture of Third-Party Interests .....	284
	a. <i>Complete Transfer of Defendant's Interest</i> ..	284
	b. <i>Forfeiture of Property in Which Defendant         Owns Only Part Interest</i> .....	287
	2. Forfeiture of Profits .....	290
	3. Forfeiture of Government or Union Offices ...	291
D.	<i>Eighth Amendment Problems of Section 1963(d)</i> ...	292
E.	<i>Section 1963(b) Order</i> .....	295
	1. Procedure for Granting Order .....	295
	2. Forfeiture and Discovery .....	304
	CONCLUSION .....	305

## INTRODUCTION

**B**EFORE 1970, prosecutors relied on conspiracy charges to join large numbers of defendants in a single trial<sup>1</sup> and to obtain con-

---

1. Courts have often condemned mass conspiracy trials. See, e.g., *United States v. Eubanks*, 591 F.2d 513, 521-24 (9th Cir. 1979) (Ely, J., concurring); *United States v. Sperling*, 506 F.2d 1323, 1340-41 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). Justice Jackson described the difficulties accompanying criminal conspiracy cases in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440 (1949). "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other." *Id.* at 454 (Jackson, J., concurring).

victions based upon weak circumstantial evidence.<sup>2</sup> The liberal standards of proof and the procedural advantages resulting from charging this crime were responsible for Judge Learned Hand's description of conspiracy as "that darling of the modern prosecutor's nursery."<sup>3</sup> Prosecutors have not been content with these advantages<sup>4</sup> and have increasingly employed Title IX<sup>5</sup> of the Organized Crime Control Act of 1970,<sup>6</sup> popularly known as RICO.<sup>7</sup> Although it punishes participa-

---

2. See generally *United States v. Radlick*, 581 F.2d 225 (9th Cir. 1978); *United States v. Miller*, 508 F.2d 444 (7th Cir. 1974); *United States v. Castanon*, 453 F.2d 932 (9th Cir.), cert. denied, 406 U.S. 922 (1972). In *Iannelli v. United States*, 420 U.S. 770 (1975), the Supreme Court approved the use of circumstantial evidence but cautioned that "[i]n some cases reliance on such evidence perhaps has tended to obscure the basic fact that the agreement is the essential evil at which the crime of conspiracy is directed." *Id.* at 777 n.10 (citations omitted).

3. *Harrison v. United States*, 7 F.2d 259, 263 (2d Cir. 1925).

4. See *Blakey & Goldstock, "On the Waterfront": RICO and Labor Racketeering*, 17 Am. Crim. L. Rev. 341, 346-48 (1980). For perhaps the first time since the federal conspiracy statute was adopted by Congress, commentators have characterized it as "restrictive." *Id.* at 347. They believe that prosecutors are "severely" limited by the requirement that a conspiracy be based on a common objective, *id.* at 347 n.51, a requirement they claim diminishes the "likelihood that multi-faceted, syndicated criminal activity would be found to be one conspiracy." *Id.* at 360. The authors have exaggerated the impact of this requirement; defendants are often found to be part of conspiracies that include people whom they do not know and whose functions do not directly affect the success of the defendant's transactions. See, e.g., *United States v. Taylor*, 562 F.2d 1345 (2d Cir.), cert. denied, 432 U.S. 909 (1977); *United States v. Baxter*, 492 F.2d 150 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974). Although these commentators assert that in conspiracy cases the jury cannot consider the defendant's related offenses, relevant evidence is admissible if offered to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Evid. 404(b).

5. 18 U.S.C. §§ 1961-1968 (1976). Title IX has been adopted as a model for some state statutes. See, e.g., Fla. Stat. Ann. §§ 905.34, 943.46-.464 (West Supp. 1980); Hawaii Rev. Stat. §§ 842-1 to 842-12 (1976); 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1973).

6. Pub. L. No. 91-452, 84 Stat. 922 (codified at scattered sections of 18 U.S.C. & 28 U.S.C.). Title IX is one of 12 substantive titles of the Organized Crime Control Act. The purpose of the Act is to deal with the "eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923 (Statement of Findings and Purpose). The other titles are: Title I, Special Grand Jury, 18 U.S.C. §§ 3331-3334 (1976); Title II, General Immunity, *id.* §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826 (1976); Title IV, False Declarations, 18 U.S.C. § 1623 (1976); Title V, Protected Facilities for Housing Government Witnesses, uncodified; Title VI, Depositions, 18 U.S.C. § 3503 (1976); Title VII, Litigation Concerning Sources of Evidence, *id.* § 3504; Title VIII, Syndicated Gambling, *id.* § 1511; Title X, Dangerous Special Offender Sentencing, *id.* §§ 3575-3578; Title XI, Regulation of Explosives, *id.* §§ 841-848, Title XII, National Commission on Individual Rights, uncodified.

7. RICO is an acronym for the heading of Title IX. "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. §§ 1961-1968 (1976).

tion in an "enterprise" through racketeering activity,<sup>8</sup> the enterprise concept has been construed as little more than a person or group of persons involved in the commission of two crimes.<sup>9</sup>

Until 1975, the complex language of the statute discouraged prosecutions.<sup>10</sup> The government, encouraged by recent cases broadly construing Title IX, has ignored the rising chorus of criticism by employing the statute more frequently and urging even broader constructions.<sup>11</sup> RICO violations have been alleged against an astonish-

---

8. 18 U.S.C. § 1962 (1976).

9. See notes 139-41, 191, 259-68 *infra* and accompanying text.

10. See *United States v. Anderson*, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980); Atkinson, "Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-63: *Broadest of the Federal Criminal Statutes*, 69 J. Crim. L. & Criminology 1, 3 n.21 (1978).

11. Although six RICO cases were reported between 1970 and 1974, 31 were reported between 1975 and 1977, and more than twice that amount have been reported since then. Lavine, *Court Blunts Major U.S. Rackets Law*, Nat'l L.J., Sept. 17, 1979, at 1, col. 4. The attempts to expand the scope of RICO have incurred sharp criticism from defense attorneys and judges. *E.g.*, *United States v. Anderson*, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980); *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J. dissenting), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Rone*, 598 F.2d 564, 573-74 (9th Cir. 1979) (Ely, J. dissenting), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Altese*, 542 F.2d 104, 107-11 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977). See *Fordham Seminar For Corporate Counsel Explores Variety of Criminal Issues*, in 26 Crim. L. Rptr. (BNA) 2302, 2306 (1980) (James Catterson, Jr. described RICO as a "loose cannonade which threatens to hull entities never contemplated in its enactment."); ABA Section of Criminal Justice, *The Prosecution and Defense of RICO & Mail Fraud Cases 4-6* (1980) (Francis Sams observed that a typical RICO indictment in high visibility cases contains 60 to 80 counts, charges 20 to 30 defendants, and runs 120 to 150 pages); Nat'l L.J., Sept. 15, 1980, at 3, col. 1 (defense attorney Mark Slatkin criticized RICO prosecution tactics whereby the government "set out to show every possible fact that occurred in a five-year period. . . . Where they could have paraded four witnesses, they paraded 150."). In *United States v. Union Oil, Inc.*, No. H-79-41 (S.D. Tex., indictment filed Mar. 7, 1979), the court dismissed the RICO indictments, stating that RICO "was designed to keep racketeers out of business, not to make racketeers out of business." Yet, proponents of the government's views have continued to urge even broader constructions. See Blakey, *Materials on RICO: Criminal Overview*, in 1 Cornell Institute on Organized Crime, *Techniques in the Investigation and Prosecution of Organized Crime* 1, 4, 27 (1980) (urging liberal construction of RICO criminal provisions and describing RICO as applicable "not just [to] political corruption and white collar crime, but [to] violent offenses generally"); Criminal Division, U.S. Dep't of Justice, *An Explanation of the Racketeer Influenced and Corrupt Organizations Statute* 2, 34-33 (4th ed. 1978) (describing RICO as providing tools for "imaginative prosecutions" and urging a broad reading of the term "enterprise"); *Newsweek*, Aug. 20, 1979, at 82, col. 2 (Attorney General Civiletti declared that the Justice Dep't would not "shy away from using [RICO] to pursue corrupt enterprises which do not fit the layman's view of organized crime."). Despite these pronouncements, even ardent advocates of broad constructions recognize that overly aggressive employment of RICO may "kill the goose that potentially can lay for you a golden egg." Blakey, *supra*, at 34.

ing variety of defendants, including members of the Hell's Angels motorcycle club,<sup>12</sup> a factory worker at General Motors,<sup>13</sup> a large Japanese corporation manufacturing electrical cable,<sup>14</sup> magistrates, constables, and employees of the Allegheny County court system,<sup>15</sup> and union leaders accused of junketeering.<sup>16</sup> Most defendants charged with violating RICO could not conceivably be included within the traditional<sup>17</sup> or newly expanded definitions<sup>18</sup> of organized crime.

The advantages of charging a RICO violation include (1) multiple punishment of the same act when state offenses are the alleged racketeering activities;<sup>19</sup> (2) elimination of the statute of limitations on the racketeering activities;<sup>20</sup> (3) expanded doctrines governing admissibility of evidence;<sup>21</sup> (4) availability of enhanced punishment and novel sanctions;<sup>22</sup> (5) injunctions that bar a defendant from using available assets to obtain legal representation or prepare a defense;<sup>23</sup> and (6) the prejudicial effect on judges and juries resulting from the use of the pejorative term "racketeering" in RICO indictments.<sup>24</sup>

12. *United States v. Barger*, No. CR-79-0226-SC (N.D. Cal., indictment filed June 13, 1979) (indictment charging Hell's Angels with procurement and distribution of drugs, intimidation, murder of witnesses, and bribery). *Time*, May 26, 1980, at 10, col. 1.

13. *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978) (employee collected usurious debts from fellow workers on General Motors premises).

14. *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980) (defendants alleged to have obtained confidential bidding information by bribing a public utility).

15. *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977) (bail bond agency made systematic payments to magistrates and other employees of a county court in return for referrals).

16. *United States v. Ladmer*, 429 F. Supp. 1231 (E.D.N.Y. 1977). (union leaders accused of conducting conventions as excuse for junketeering and of embezzling union funds).

17. A member of organized crime has been defined as "a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life." *Masiello v. Norton*, 364 F. Supp. 1133, 1135 (D. Conn. 1973).

18. The Organized Crime Control Commission of the California Department of Justice has urged a broad definition incorporating: "1) Syndicated organized crime and related illegal enterprises including white collar crime and narcotic trafficking operations; 2) 'Prison gangs,' which is a misnomer since members are criminally active both on the street and in penal institutions; 3) Outlaw motorcycle gangs; and 4) Terrorist organizations." California Organized Crime Control Comm'n, First Report 11 (1978) (footnotes omitted).

19. See notes 544-57 *infra* and accompanying text.

20. See notes 493-95 *infra* and accompanying text.

21. See generally *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *Blakey & Goldstock*, *supra* note 4, at 347-48; *Newsweek*, Aug. 20, 1979, at 82, col 2.

22. See notes 42-54 *infra* and accompanying text; pt. VII *infra*.

23. See notes 755-86 *infra* and accompanying text.

24. See *United States v. Anderson*, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980); *Newsweek*, Aug. 20, 1979, at 82, col. 2; *cf. United States v. Bonanno*, 177 F. Supp.



It is questionable whether Congress intended to create such a potent prosecutorial tool. The legislative history of Title IX manifests only a concern with the infiltration of legitimate business by organized crime, not an intent to punish participation generally in criminal activity.<sup>25</sup> However, the language of Title IX is sufficiently vague<sup>26</sup> to support both broad and narrow interpretations.

The major obstacles to an informed understanding of the RICO offense are the complex interrelationships among the various elements of Title IX and the broader relationships between Title IX and other statutory and constitutional provisions. This article will provide a comprehensive discussion of RICO criminal actions and attempt to clarify these relationships. The analysis is intended to expose the defects in both unnecessarily broad statutory constructions and unduly restrictive constitutional interpretations and reveal the areas in which legislative reform is essential.

## I. GENERAL SCOPE OF TITLE IX

### A. Section 1962

Title IX incorporates a series of substantive criminal and civil statutes as well as innovative remedies and procedures. Its central provision is 18 U.S.C. § 1962,<sup>27</sup> which defines the RICO offense.<sup>28</sup> Prior

---

106, 116 (S.D.N.Y. 1959) (deleting prejudicial surplusage from indictment alleging grand jury investigation into "racketeering and criminal syndicates"), *rev'd on other grounds sub nom.* United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960). In United States v. Scotto, Nos. 1131-32 (2d Cir. Sept. 2, 1980), the defendant proposed an instruction informing the jury that the word "racketeering" and the prejudicial connotations thereof "should not be regarded as having anything to do with the guilt or innocence of the defendants." N.Y.L.J., Criminal Trials: Courtroom Techniques in Representing Clients Accused of White Collar & Racketeering Crimes 304 (1980).

25. See notes 151-59 *infra* and accompanying text.

26. See note 138 *infra* and accompanying text.

27. 18 U.S.C. § 1962 (1976).

28. Section 1962 provides: "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or 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.

to the decisions interpreting section 1962, the prevailing view among commentators was that its subsections defined three distinct offenses corresponding with three methods by which organized crime infiltrates legitimate businesses.<sup>29</sup> Under this view, section 1962(a) proscribed the legal acquisition of a business with money derived from racketeering or loansharking; section 1962(b) prohibited an illegal acquisition of a business through racketeering<sup>30</sup> or loansharking; and section 1962(c) proscribed the operation of a business through racketeering or loansharking.<sup>31</sup> Many decisions have rejected this initial interpretation. In the structure as modified by these courts, section 1962(a) is still viewed as prohibiting the use of "dirty money" for the legal acquisition or operation of a legitimate enterprise.<sup>32</sup> The meaning of section (b), however, is unclear. Although the small number of cases construing section 1962(b) have involved extortionate or fraudulent acquisitions of legitimate businesses,<sup>33</sup> one court has also applied

(b) 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.

(c) 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.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

29. Comment, *Racketeer Influenced and Corrupt Organizations Act (RICO)—Application of RICO in the Third Circuit*, 24 Vill. L. Rev. 263, 265 n.16 (1979) [hereinafter cited as *Third Circuit*]; Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 193-94, 202 (1975) [hereinafter cited as *Organized Crime*]; Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 Va. L. Rev. 109, 110-11, 117 (1979) [hereinafter cited as *Conspiracy Law*]; Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 Yale L.J. 1491, 1492-93 (1974) [hereinafter cited as *Investing Dirty Money*].

30. Racketeering is established by proof of multiple violations of the federal and state laws enumerated in 18 U.S.C. § 1961(1) (1976).

31. See D. Cressey, *Theft of the Nation* 100 (1969).

32. See Comment, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 Vand. L. Rev. 441, 447 (1980) [hereinafter cited as *RICO Analysis*]. See generally *United States v. Cappelto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

33. See *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976); *United States v. Ricciardi*, No. 707-73 (D.N.J. Aug. 10, 1976); *United States v. Quasarano*, No. 79-88644 (E.D. Mich., indictment filed Nov. 15, 1979). The large number of prosecutions under § 1962(c) and the comparatively few prosecutions under § 1962(b) indicate the government's recognition that § 1962(b) requires a

section 1962(b) to the acquisition of an interest in illegal organizations.<sup>34</sup> Similarly, the majority of courts have held that section 1962(c) is not directed solely at the illegal operation of legitimate businesses, but also at involvement in illegal activities having little or no relationship to the traditional concepts of a business.<sup>35</sup>

### B. Influence of Antitrust Law on Title IX

Title IX seems to have adapted principles of antitrust law to the problem of organized crime.<sup>36</sup> Although one court has emphasized the similarity of the substantive provision, section 1962, to antitrust principles,<sup>37</sup> the resemblance is more apparent in the area of remedies. In section 1964, Title IX authorizes civil actions resembling those traditionally used against antitrust violators against violators of section 1962.<sup>38</sup> A civil judgment under section 1964 can result in the divestiture of the defendant's interest in the enterprise, the reorganization of the enterprise, and the award of treble damages to private parties whose business or property has been harmed.<sup>39</sup>

The civil investigative demand established in section 1968 is another procedure derived from antitrust law.<sup>40</sup> This demand, an

---

greater burden of proof than that necessitated under § 1962(c). See *Third Circuit, supra* note 29, at 265 n.16 (comments from interview of member of U.S. Attorney's office in Pennsylvania). Another theory for the disparity in the number of prosecutions under these subsections is the government's belief that § 1962(b) applies only to illegal conduct in the acquisition of legitimate enterprises. See *United States v. Forsythe*, 429 F. Supp. 715, 720 (W.D. Pa.), *rev'd*, 560 F.2d 1127 (3rd Cir. 1977).

34. *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

35. See pt. III (A) *infra*.

36. *United States v. Anderson*, 626 F.2d 1358, 1368 (8th Cir. 1980); see *United States v. Forsythe*, 429 F. Supp. 715, 720-21 (W.D. Pa.), *rev'd*, 560 F.2d 1127 (3d Cir. 1977); *Organized Crime, supra* note 29, at 192. An examination of earlier proposed RICO statutes makes it apparent that antitrust law was a major influence on the formulation of the RICO statute. Earlier versions were intended as amendments to the Sherman Act rather than as independent criminal statutes. Antitrust Section of the ABA, Report on S. 2048 and 2049 (Aug. 26, 1969), reprinted in *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on the Judiciary*, 91st Cong., 1st Sess. 556, 557-58 (1969) [hereinafter cited as *Measures Relating to Organized Crime*]. The Antitrust Section of the ABA objected to the proposals as an undesirable commingling of goals of criminal enforcement with goals of regulating competition. *Id.*

37. *United States v. Forsythe*, 429 F. Supp. 715, 720-21 (W.D. Pa.), *rev'd*, 560 F.2d 1127 (3d Cir. 1977).

38. *Organized Crime, supra* note 29, at 192.

39. 18 U.S.C. § 1964 (1976). Another procedure borrowed from antitrust laws is the expediting certificate authorized by 18 U.S.C. § 1966 (1976). The government can obtain an expedited hearing in § 1964 civil suits when the Attorney General files such a certificate. 18 U.S.C. §§ 1964, 1966 (1976).

40. 18 U.S.C. § 1968 (1976); *Investing Dirty Money, supra* note 29, at 1492 n.10.

alternative to the grand jury subpoena, permits the Attorney General to require any person or enterprise to produce any documentary materials relevant to a racketeering investigation prior to the institution of criminal or civil proceedings. However, the demand may not compel production of documents that would be unreasonable or involve privileged material<sup>41</sup> if requested in a subpoena duces tecum issued by a federal court.

### C. Criminal Penalties

While the civil remedies of section 1964 have rarely been used,<sup>42</sup> the government has frequently sought to invoke the harsh criminal penalties imposed by section 1963.<sup>43</sup> These sanctions are imprisonment for up to 20 years, a fine of \$25,000, or both, and forfeiture of any interest in the enterprise acquired in violation of section 1962.<sup>44</sup> An indirect sanction resulting from a conviction is that the verdict

---

41. Atkinson, *supra* note 10, at 18. Atkinson comments that "[a]lthough the fruits of an investigative demand would be about the same as those gained through normal discovery, the [civil investigative] demand gives the Attorney General more autonomy without court supervision." *Id.* Despite the similarities, the analogy to antitrust law has its limits. Generally, civil antitrust actions may be brought when criminal prosecution is not justified, even though the language of the statute on its face provides no basis for such a distinction. *Organized Crime, supra* note 29, at 208. RICO civil actions, however, involve conduct that is criminal by definition. *Id.* The government may be precluded from filing a RICO criminal prosecution not because of the absence of criminal behavior, but because of the difficulty of proof. *Id.*

42. 18 U.S.C. § 1964 (1976). Only two published opinions involving government civil actions have been found. See *United States v. Cappelto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Winstead*, 421 F. Supp. 295 (N.D. Ill. 1976).

43. 18 U.S.C. § 1963(a) (1976).

44. *Id.* These penalties have been inaccurately characterized as "the harshest penalty authorized by Title 18 of the United States Code, except for homicide offenses." Blakey & Goldstock, *supra* note 4, at 349 (footnote omitted). For example, in some instances assaults with intent to rob United States postal employees are punishable by a mandatory prison term of 25 years. 18 U.S.C. § 2114 (1976). The criminal penalties imposed under RICO, however, exceed those imposed for most of the underlying substantive racketeering activities. See Atkinson, *supra* note 10, at 15; *Conspiracy Law, supra* note 29, at 110-11, 117. The maximum penalty for two acts of mail fraud is a \$2,000 fine and ten years imprisonment, 18 U.S.C. § 1341 (1976), without the additional possibility of forfeiture. In holding that concurrent sentences are not required for a § 1962(c) conviction and for convictions on the underlying offenses, one court has said that "the maximum penalties for RICO violations [are] much less than those that might be obtained for the series of predicate crimes." *United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980). The *Rone* court may have envisaged cases in which numerous predicate crimes are involved. See, e.g., *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976).

may result in collateral estoppel against the criminal defendant in any subsequent RICO civil action.<sup>45</sup>

The severe criminal penalties may have been motivated by Congressional concern about the spread of organized crime,<sup>46</sup> a concern manifested by the statute's repeated use of the term "racketeering."<sup>47</sup> Nevertheless, a majority of courts have refused to limit RICO's scope to defendants involved in organized crime.<sup>48</sup> Although

---

45. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The application of collateral estoppel to RICO cases is questionable, however, because § 1964(c) specifically created a cause of action for private parties while § 1964(d) provides collateral estoppel only for the government. Failure to include private parties may imply a congressional intent to prevent offensive collateral estoppel by private plaintiffs. *But see* Wunsch, *The Use of a Prior Criminal Judgment as Collateral Estoppel*, in 2 Cornell Institute on Organized Crime, *Techniques in the Investigation and Prosecution of Organized Crime* 858, 888 (1980). A second indication that Congress did not intend to permit offensive collateral estoppel may be its rejection of earlier bills that specifically permitted collateral estoppel in all civil suits. See Sullivan, *RICO Civil Remedies and Public Corruption*, in 1 Cornell Institute on Organized Crime, *Techniques in the Investigation and Prosecution of Organized Crime* 272, 289 (1980).

46. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

47. See 18 U.S.C. §§ 1961-1968 (1976).

48. See *United States v. Aleman*, 609 F.2d 298, 302-03 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Barber*, 476 F. Supp. 182, 186-87 (S.D.W. Va. 1979); *United States v. Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979); *United States v. Mandel*, 415 F. Supp. 997, 1018 (D. Md. 1976). This reading is persuasively supported by Congress' rejection of proposals to incorporate a definition of organized crime into Title IX. See 116 Cong. Rec. 35344 (1970). In addition, congressional opponents of RICO observed that "the reach of this bill goes beyond organized crime activity." S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969) [hereinafter cited as *Senate Report*] (individual views of Sen. Hart and Sen. Kennedy). Requiring proof of membership in organized crime would also create impossible problems of proof and thus render § 1962 unenforceable. In construing 18 U.S.C. § 1952 (1970), the court in *United States v. Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971), observed that "[i]t would usually be difficult, if not impossible, to prove that an individual or business was associated with or controlled by a clandestine criminal organization. It might also be difficult to prove that a particular offense was of the kind commonly engaged in by organized criminals [in the year the statute was enacted]; and, in any event, such a restriction upon the statute's coverage would provide an easy avenue for evasion through adoption of new forms and techniques of illicit trafficking." *Id.* at 885, *quoted in* *United States v. Chovanec*, 467 F. Supp. 41, 44-45 (S.D.N.Y. 1979) (construing § 1962). Additionally, one commentator has asserted that a proscription on membership in organized crime would violate equal protection because an offense would be predicated on status. Atkinson, *supra* note 10, at 18. The impossibility of precisely defining the term "organized crime" compounds the problem of proof, see *United States v. Mandel*, 415 F. Supp. 997, 1018-19 (D. Md. 1976), and the resulting problems of vagueness. See note 138 *infra* and accompanying text. The objections to the use of the term "organized crime," however, are somewhat overstated. If it is

their opinions acknowledge that Congress was concerned primarily with organized crime when it adopted RICO,<sup>49</sup> these courts have found that all other indicia of legislative intent militate against the restrictive construction.<sup>50</sup>

The absence of an "organized crime" limitation, although justified as a matter of statutory construction, undermines the rationale for the severe RICO penalties. Such penalties could be justified by the serious threat to society posed by organized crime.<sup>51</sup> The application of these sanctions to individuals engaged in small-scale criminal conduct, however, punishes defendants who do not pose a similar threat and raises the issue of cruel and unusual punishment under the eighth amendment.<sup>52</sup> Perhaps in response to fears that Title IX will be employed indiscriminately, the Justice Department has repeatedly as-

impossible to define "organized crime," it is difficult to explain the use of the language "organized criminal activity" in 18 U.S.C. § 3503(a) (1976), the section of the Organized Crime Control Act dealing with depositions. This statute is limited to cases in which the Attorney General certifies "that the legal proceeding is against a person who is believed to have participated in an organized criminal activity." 18 U.S.C. § 3503(a) (1976). In the RICO context, this approach could have been employed by requiring that the Attorney General certify that a case involves organized crime before filing a criminal or civil RICO action.

49. See cases cited note 48 *supra*. The title, Organized Crime Control Act, manifests this concern. *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

50. Senator McClellan, the primary congressional sponsor of RICO, has observed that although Congress was concerned with organized crime, it chose to confront the problem by punishing those offenses that are characteristic of organized crime. McClellan, *The Organized Crime Act (S.30) Or Its Critics: Which Threatens Civil Liberties?*, 46 *Notre Dame Law.* 55, 142-44 (1970); see *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978).

51. *Investing Dirty Money*, *supra* note 29, at 1498.

52. *Atkinson*, *supra* note 10, at 2, 16-17; *cf.* *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (RICO may be overbroad if applied to individuals engaged in small-scale criminal activity), *cert. denied*, 441 U.S. 933 (1979). *But see* *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979) (rejecting eighth amendment argument because maximum sentence not mandatory), *cert. denied*, 100 S. Ct. 1345 (1980). The problem is exacerbated by the inclusion of minor offenses as RICO predicate crimes. For example, manufacturing or importing ten grams of marijuana, taking property valued at less than \$150 by threat, or playing poker in one's own home are all chargeable under RICO. *Atkinson*, *supra* note 10, at 2. Although a recent Supreme Court opinion has suggested in dicta that disproportionately long prison terms may be constitutionally valid, *Rummel v. Estelle*, 100 S. Ct. 1133, 1139 (1980) ("the length of the sentence actually imposed is purely a matter of legislative prerogative"), the Court's refusal to decide the issue may permit lower courts to strike a RICO penalty disproportionate to the crime for which it is imposed. See *Terrebonne v. Blackburn*, 624 F.2d 1363, 1368-71 (5th Cir. 1980); *Downey v. Perini*, 518 F.2d 1288, 1290 (6th Cir.), *vacated and remanded for reconsideration of statutory modification*, 423 U.S. 993 (1975); *cf.* *Weems v. United States*, 217 U.S. 349, 367 (1910) (referring to "precept of justice that punishment for crime should be graduated and proportionated to offense").

sured the public that RICO will be applied cautiously.<sup>53</sup> Despite the assurances, the actions of the Justice Department indicate that it will use the statute aggressively against those who are "in no way connected with organized crime or engaged in what is ordinarily thought of as racketeering."<sup>54</sup> The eighth amendment problem cannot be dismissed by vague public statements of the Justice Department. When considering the proper scope of RICO, Congress and the judiciary should not rely naively on prosecutorial discretion as a safeguard against excessively broad applications of the statute.

#### D. Liberal Construction Clause

Congress seems to have invited broad judicial interpretations by stating that RICO "shall be liberally construed to effectuate its remedial purposes."<sup>55</sup> The liberal construction clause has frequently been

53. See Atkinson, *supra* note 10, at 16; Newsweek, Aug. 20, 1979, at 82, col. 2. Atkinson quotes the chief of the Justice Department task force in charge of RICO cases as saying: "We're not going to power rape nickel and dime cases. It's just common sense . . . and good judgment. . . . We will only hit substantial conduct." The task force chief described a process by which proposed RICO prosecutions are reviewed by the Justice Department before an indictment is sought. This safeguard is of questionable significance as this review is not governed by any precise guidelines determining when a RICO prosecution should be initiated. Atkinson, *supra* note 10, at 16 (footnote omitted). The factors considered in the informal review process include legitimate advantages, such as the remedy of forfeiture, gained by alleging a RICO offense, the seriousness of the predicate offenses, and the "longevity of the impact on the community." ABA Section of Criminal Justice, *The Prosecution and Defense of RICO & Mail Fraud Cases* 4, 27-28 (1980).

54. Miller & Waxman, *A Blunt Instrument: Mob Not Only Victim of RICO*, Legal Times of Wash., Nov. 20, 1978, at 14, col. 1. An example of this type of prosecution occurred in *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978). In *Dennis*, the government filed a RICO action against a single defendant who collected usurious debts from fellow employees at a General Motors plant. The court dismissed the indictment that alleged the defendant operated General Motors' affairs through collection of an unlawful debt. *Id.* at 198. The Justice Department's actions have led some courts to caution against undue prosecutorial zeal in invoking RICO. In *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), the court warned that "the potentially broad reach of RICO poses a danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended." *Id.* at 395-96. The court cautioned "against undue prosecutorial zeal in invoking RICO [and] emphasize[d] to the district judges when RICO is invoked each set of facts must be evaluated independently." *Id.* at 396. The court in *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980), however, rejected a claim of abuse of prosecutorial discretion in a RICO case that involved three residential burglaries. The court anticipated that "government prosecutorial policy will reserve use of this statute for racketeers, leaving local crimes to local authorities." *Id.* at 306.

55. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904 (a), 84 Stat. 947. "The provisions of this title [enacting this chapter and amending sections 1505, 2516 and 2517 of this title] shall be liberally construed to effectuate its remedial purposes." *Id.*

cited in support of holdings that expand RICO criminal liability.<sup>56</sup> Yet, this use of the clause is questionable on both statutory and constitutional grounds. Significantly, the language of this clause permits liberal construction only to effectuate "remedial purposes"; it does not mandate that RICO be liberally construed to determine what conduct constitutes a violation of Title IX.<sup>57</sup> If the liberal construction clause is considered applicable to determine the scope of criminal liability under Title IX, the provision should be declared unconstitutional.<sup>58</sup>

In *United States v. Anderson*,<sup>59</sup> the Eighth Circuit indicated that this interpretation violates due process. The court noted that the extent of judicial deference to be accorded the clause was unclear in view of the traditional rule of statutory construction requiring that criminal statutes be construed in favor of lenity<sup>60</sup> and that they pro-

56. See *United States v. Grzywacz*, 603 F.2d 682, 686 n.6 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir.), *cert. denied*, 441 U.S. 933 (1979); *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3d Cir. 1977); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Parness*, 503 F.2d 430, 439 n.12 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Chovanec*, 467 F. Supp. 41, 45 (S.D.N.Y. 1979); *United States v. Pray*, 452 F. Supp. 788, 800-801 (M.D. Pa. 1978); *United States v. Frumento*, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978). *But see* *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976).

57. *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976); *see* *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 100 S. Ct. 2152 (1980). It seems likely that Congress intended the liberal construction clause to apply only to the remedies, considered to be the major innovation of Title IX at the time of its passage. *See id.* at 691. The introduction of antitrust civil remedies into this area of law was considered an essential feature of Title IX. *See* pt. I(B) *supra*. The liberal construction clause must be read in light of the legislative history as well as of the language of the statute. *United States v. Davis*, 576 F.2d 1065, 1071 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978).

58. *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Davis*, 576 F.2d 1065, 1069-71 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978); *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976); Atkinson, *supra* note 10, at 14; *Third Circuit*, *supra* note 29, at 276.

59. 626 F.2d 1358 (8th Cir. 1980).

60. *Bifulco v. United States*, 100 S. Ct. 2247, 2255 (1980); *United States v. Enmons*, 410 U.S. 396, 411 (1973); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). Professor Blakey, an outspoken advocate of a broad interpretation of Title IX, has asserted that the constitutional rule of strict construction is inapplicable to RICO. Blakey & Goldstock, *supra* note 4, at 349-50. He contends that RICO's purpose is merely "to build another remedy upon other criminal offenses," and, for a reason unexplained by the author, that this purpose removes RICO from constitutional rules applicable to criminal statutes. *Id.*; *see* Magarity, *RICO Investigations: A Case Study*, 17 Am. Crim. L. Rev. 367, 367 & n.6 (1980). Blakey's view is flawed in two respects.



vide a fair warning of the prohibited activities.<sup>61</sup> Recently, in *Dunn v. United States*,<sup>62</sup> the Supreme Court observed that the traditional rule was "rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."<sup>63</sup> *Dunn* cautioned against

---

First, the rule against broad construction has been applied to criminal remedy statutes as well as to substantive statutes. See note 711 *infra*. Second, § 1962 is not labeled a remedial statute and certainly appears to be a substantive criminal statute. If § 1962 were merely a remedial statute increasing punishment of the underlying racketeering acts, there would be no reason for the sentence enhancement provisions in Title X of the Organized Crime Control Act of 1970. 18 U.S.C. § 3575 (1976). Under Blakey's view, Congress presumably intended to create two separate sentence enhancement provisions in two titles of the Act. A more reasonable interpretation is that § 3575 is the sole remedial provision increasing punishment for multiple crimes, while Title IX is a substantive criminal offense. One case, *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979), has suggested that the strict construction doctrine does not apply to § 1961, a statutory provision merely defining terms used in Title IX. *Id.* at 139. This distinction is without substance. The policies underlying strict construction fully apply to a definitional statute because any construction of the statute will determine the scope of liability under the criminal provisions. If the government adopted Blakey's assertion that RICO is a remedial statute for purposes of strict construction, it would be manipulating the criminal-remedial distinction. The government should not be permitted to claim that RICO is a remedial statute that merely enhances sentences for habitual offenders, if, in other contexts, it claims that Title IX is a criminal offense distinct from the predicate offenses. An example of the latter claim has occurred in response to defendants' contentions that a RICO charge may not include predicate offenses committed beyond the statute of limitations periods. The government has successfully rebutted these contentions by asserting that the predicate offenses are not the subject of the prosecution, but are merely part of a continuing RICO offense that extends into the limitations period. See notes 494-95 *supra* and accompanying text.

61. *United States v. Anderson*, 626 F.2d 1358, 1369-70 (8th Cir. 1980). A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); accord, *United States v. Culbert*, 435 U.S. 371, 374 (1978); *Bouie v. Columbia*, 378 U.S. 347, 350 (1964).

62. 442 U.S. 100 (1979).

63. *Id.* at 112. *Dunn* may be of particular significance in the RICO context because the Court was construing 18 U.S.C. § 1623 (1976), another section of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified at scattered sections of 18 U.S.C. & 28 U.S.C.), of which RICO is a part. 18 U.S.C. §§ 1961-1968 (1976). The rule of strict construction is grounded in a second policy requiring that criminal activity be defined by legislatures rather than courts. In *United States v. Bass*, 404 U.S. 336 (1971), the Court observed that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* at 348 (quoting *Friendly, Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 196, 209 (1967)).

statutory constructions that impose punishment for actions that are not "plainly and unmistakably" prohibited.<sup>64</sup>

## II. SECTIONS 1962(a) AND 1962(b)

### A. *Elements of a Section 1962(a) Offense*

The first sentence of section 1962(a) sets forth the three elements of the crime. It must be shown that the defendant engaged in a pattern of racketeering activity,<sup>65</sup> derived money from that racketeering activity, and used this money to operate, maintain, or acquire an interest in a legitimate business.<sup>66</sup> The prohibition on maintaining an interest with racketeering funds significantly broadens the scope of section 1962(a). For example, a violation could arise from the use of racketeering funds to make insignificant purchases for the enterprise, such as purchases of janitorial supplies.<sup>67</sup> An exception to this offense is the purchase of securities on the open market amounting to less than one percent of the securities of a class of stock.<sup>68</sup>

### 1. Mens Rea Requirement

#### a. *Existence of a Mens Rea Element*

A mens rea requirement is conspicuously absent from the listed elements of section 1962(a). The most serious consequence of this omission is that a defendant may be convicted for investing tainted money without knowing that it is derived from racketeering activities.<sup>69</sup> Despite intimations that the Constitution may require a mental element,<sup>70</sup> this problem has been analyzed as presenting a question of legislative intent.<sup>71</sup> The prevailing approach to construing statutes without mens rea components focuses on whether the

64. 442 U.S. at 112.

65. The meaning of the term "pattern of racketeering activity" is discussed in pt. III(C) *infra*.

66. The text of § 1962 is set out in full at note 28 *supra*.

67. Punishment for this type of violation could pose eighth amendment problems. See note 716 *infra*.

68. 18 U.S.C. § 1962(a) (1976).

69. See notes 92-97 *infra* and accompanying text.

70. See *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting); *Morissette v. United States*, 342 U.S. 246, 263 (1952). In *Morissette*, the Court said that the effect of eliminating mens rea is "to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries." *Id.* at 263. This impact was described as a "manifest impairment of the immunities of the individual." *Id.*

71. *United States v. Balint*, 258 U.S. 250, 252 (1922). Generally, strict liability constructions are disfavored. *United States v. United States Gypsum Co.*, 438 U.S. 422, 437-38 (1978).

crime involves conduct that is wrong on principle or is wrong for social policy reasons.<sup>72</sup> Laws dealing with the first type of crime punish behavior not only because its recurrence must be prevented, but because the behavior is considered inherently wrong.<sup>73</sup> These laws are based on the principle of wrongful intent;<sup>74</sup> accordingly, courts will read mental elements into them.<sup>75</sup> Common law crimes, such as homicide and theft, fall within this category.<sup>76</sup> The second class of statutes punishes conduct for policy reasons even if that conduct is not blameworthy.<sup>77</sup> When confronted with social policy crimes, the courts have refused to impose a mens rea requirement because these laws punish harmful effect, rather than wrongful intent.<sup>78</sup>

One commentator on section 1962(a) found that the legislative record was inconclusive as to whether it is a social policy crime.<sup>79</sup> In view of the supposed ambiguity, the author concluded that two principles of statutory construction should control. First, he noted that social policy crimes are an exception to the common law rule requiring proof of mens rea. Because statutes are not to be construed in derogation of common law in the absence of contrary legislative intent,<sup>80</sup> the commentator urged that section 1962(a) be presumed to follow the common law rule requiring intent.<sup>81</sup> In addition, he distinguished section 1962(a), which carries harsh sanctions,<sup>82</sup> from social policy crimes, which traditionally impose milder penalties.<sup>83</sup>

This view fails to recognize that Congress would not have created the one percent stock exception<sup>84</sup> had it regarded investment of

72. See *Morissette v. United States*, 342 U.S. 246, 258-61 (1952); *United States v. Balint*, 258 U.S. 250, 252 (1922).

73. *Investing Dirty Money*, *supra* note 29, at 1502.

74. *Id.* at 1503-04.

75. *Id.* at 1505-06.

76. See *Morissette v. United States*, 342 U.S. 246, 251-52 (1952).

77. *Id.* at 252-53.

78. Cf. *Investing Dirty Money*, *supra* note 29, at 1505-06 (mental intent attributed to statutes aimed at benefiting society).

79. *Id.* at 1507.

80. *Id.*; see *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

81. *Investing Dirty Money*, *supra* note 29, at 1507-08.

82. *Id.*

83. *Id.*; see *Morissette v. United States*, 342 U.S. 246, 252-53 (1952).

84. 18 U.S.C. § 1962(a) (1976). A second commentator has agreed that § 1962(a) does not proscribe inherently blameworthy behavior. Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 884 (1980). He states that "[t]o whatever degree society may have been disadvantaged by the original racketeering activity, it is not harmed further by investment of the proceeds. . . . [T]he potential for misuse depends not on whether the funds invested were derived from a pattern of racketeering activity, but on whether the individual involved is a racketeer. . . . Thus, subsection 1962(a) [forbids] merely conduct that Congress feared might later lead to harm." *Id.* (footnote omitted).

money derived from racketeering activity as blameworthy conduct. The exception can be justified only by a social policy of preventing control of legitimate business by organized crime.<sup>85</sup> This policy is evident from the last clause of the exception, which proscribes even those stock purchases of less than one percent if the investor has the power to elect one or more directors of the issuing corporation.<sup>86</sup> Although the harsh penalties imposed by Title IX are uncommon in social policy crimes, the one percent stock exception seems to preclude any contention that section 1962(a) is intended to punish blameworthy conduct. Nevertheless, rather than characterize section 1962(a) as a social policy crime, the social policy-blameworthiness analysis should be inappropriate when a crime, regardless of its nature, involves "any major sanction."<sup>87</sup> Eighth amendment considerations alone should mandate a mens rea requirement when severe penalties are imposed.<sup>88</sup>

#### b. *The Appropriate Level of Intent*

If an intent element is to be read into section 1962(a), the courts must determine the standard to be applied. They could require either the actual knowledge that the invested money is derived from racketeering or the conscious desire to invest this money. The latter standard is termed specific intent while the former corresponds with the concept of general intent.<sup>89</sup> Generally, the distinction between acting with guilty knowledge and acting with conscious desire is not important since "there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results."<sup>90</sup> This observation applies to the section 1962(a) situation. In theory, there would be a distinction between the two mental states when an individual derives an equal amount of income from two sources, one legitimate and the other illegal. That person may knowingly use the illegal source to invest but not care which source he uses because either source is sufficient for the investment purpose. Although he knowingly uses the dirty money, he does not intend to violate section 1962(a) by using that money.

---

85. This policy does not apply to all the subsections of § 1962. If § 1962(c) proscribes involvement in illegal operations, it cannot be based on a policy of protecting legitimate business from infiltration by organized crime. See notes 70-73 *supra* and accompanying text.

86. 18 U.S.C. § 1962(a) (1976).

87. Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097, 1109 (1952); see *United States v. United States Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978).

88. *Lambert v. California*, 355 U.S. 225, 231 (1957) (Frankfurter, J., dissenting) (recognizing the relationship between mens rea and the eighth amendment).

89. See Model Penal Code § 2.02, Comment, at 125. (Tent. Draft No. 4, 1955).

90. *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978) (quoting *W. LaFave & A. Scott, Handbook on Criminal Law* § 28, at 197 (1972)).

A specific intent standard, however, is inappropriate because a defendant would have no reason to prefer one source of money over the other. Investing dirty money in the enterprise does not conceal that money or transform it into ostensibly legitimate money. The excess of income earned over legitimate income remains as evidence of illegally earned income.<sup>91</sup> Because a defendant would have no reason to intend to use dirty money to invest in violation of section 1962(a), the knowledge standard must be the appropriate intent requirement.<sup>92</sup> This standard adequately protects defendants whose funds are so commingled that he cannot distinguish illegal money sources from clean money. Although this result means that a defendant with commingled funds may escape prosecution, at least one commentator has implied that the thrust of the statute is not undermined.<sup>93</sup> He reasons that section 1962(a) was intended only to aid in situations in which illegal money actually *can* be traced.<sup>94</sup>

## 2. Application of Section 1962(a) to Reinvested Money

The intent issue is related to a second problem of statutory construction, the application of section 1962(a) to money derived from racketeering that is invested within the section 1962(a) exception for stocks and then reinvested outside the exception after the sale of the stock.<sup>95</sup> A commentator has urged that RICO should be construed to prohibit this laundering tactic.<sup>96</sup> This view, however, postulates a simple situation in which the defendant intends to manipulate section 1962(a). A more common and ambiguous situation would involve a person who has invested dirty money in a series of legitimate investments. In this fact pattern, the dirty money is so commingled with

---

91. The "laundering" of money occurs when the excess of income representing illegal income ostensibly disappears. For example, defendant S, owner of a legitimate vending machine business, would "launder" profits from illegal gambling by commingling those profits with the income from the vending machine business and claiming that both legal and dirty money was earned by that business.

92. The knowledge standard is applied in criminal antitrust actions. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 445-46 (1978). If the substantive provisions of Title IX are modeled on antitrust provisions, see pt. II(B) *supra*, the antitrust intent standard would be applicable by analogy.

93. Blakey, *Materials on RICO: Criminal Overview*, in 1 Cornell Institute on Organized Crime, *Techniques in the Investigation and Prosecution of Organized Crime I*, 17 (1980).

94. *Id.*

95. *Investing Dirty Money*, *supra* note 29, at 1501-02. The issue may be broader than the 1% exception method of reinvesting. The commentator cited above implies that § 1962(a) does not extend to expenditures of dirty money for consumer goods. *Id.* at 1501-02 n.45. It would seem that dirty money could be reinvested by purchasing jewelry, antiques, or consumer goods, selling them, and then investing the proceeds in enterprises.

96. *Id.* at 1502.

clean money that the accused does not know whether his investment has been made with dirty or clean money. The prohibition on reinvested money does not impose significant hardship on a defendant if an intent requirement relates to the source of the money. If there is no mens rea element, however, the prohibition is unfair. The term "proceeds"<sup>97</sup> then includes money so thoroughly commingled by means of repeated investments that one cannot recognize it as money derived from racketeering. While it may be unnecessary both to require proof of intent and to permit reinvestment, it is essential that at least one of these positions be adopted.

### 3. Liability of Recipients of Racketeering Income

Section 1962(a) arguably extends beyond the investor who participates in the racketeering activity to an individual who is not involved in the racketeering but who receives the invested money knowing it is from an illegal source.<sup>98</sup> This interpretation is based on the phrase "any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt," in section 1962(a).<sup>99</sup> This language is followed immediately by the clause, "in which such person has participated as a principal,"<sup>100</sup> which should limit section 1962(a) to principals in the commission of the racketeering acts and exclude these recipients, who would be accessories after the fact.<sup>101</sup> The government, however, has apparently not applied this interpretation in its prosecution of RICO violations.<sup>102</sup> Possibly based on a theory that the clause modifies only "the collection of an unlawful debt," and not "a pattern of racketeering activity," the government's view would extend liability to the recipient of money who is not involved in the racketeering activity.<sup>103</sup>

---

97. 18 U.S.C. § 1962(a) (1976).

98. See *Investing Dirty Money*, *supra* note 29, at 1496.

99. 18 U.S.C. § 1962(a) (1976).

100. *Id.*

101. 18 U.S.C. § 3 (1976) provides: "Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact. Except as otherwise expressly provided by any Act of Congress, an accessory after the fact shall be imprisoned not more than one-half the maximum term of imprisonment or fined not more than one-half the maximum fine prescribed for the punishment of the principal, or both; or if the principal is punishable by death, the accessory shall be imprisoned not more than ten years."

102. See *United States v. Rittenberg*, No. 80-0256-S (S.D. Cal., indictment filed April 21, 1980) (one defendant charged with RICO violations based on investment of funds from racketeering activity in which he did not participate as a principal).

103. *Investing Dirty Money*, *supra* note 29, at 1496. The commentator offers no policy justification for limiting the modifying clause to "collection of an unlawful debt."

The legislative history indicates that the modifying phrase was inserted for the purpose of requiring participation as a principal in a pattern of racketeering activity.<sup>104</sup> In addition, no policy justification exists for limiting the application of the "participated as a principal" clause to the "collection" offense. The absence of this clause in both sections 1962(b) and (c) indicates that the language was intended to resolve a problem unique to section 1962(a), rather than any problem with the "collection" offense. It was unnecessary to insert this clause into (b) and (c) because it is apparent from the face of those subsections that they are inapplicable to accessories after the fact. These subsections require that a person acquire or operate an enterprise "through" a pattern of the predicate offenses.<sup>105</sup> Because an accessory after the fact acts only after the substantive crime is completed, he is not regarded as having committed the crime<sup>106</sup> and cannot be regarded as acting "through" an offense incorporated within RICO.<sup>107</sup>

### B. Proof of a Section 1962(a) Violation

The most significant criticism of section 1962(a) is that a violation is difficult to prove. The Justice Department has conceded that this is the most difficult violation to establish because it is necessary to trace

---

104. The clause was inserted at the suggestion of the Justice Department because it believed that § 1962(a) was directed at a person who was an active participant in the illegal activities. See Letter from Deputy Att'y Gen. Richard G. Kleindienst to Sen. John L. McClellan (Aug. 11, 1969), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 406.

105. 18 U.S.C. § 1962(b)-(c) (1976).

106. *United States v. Barlow*, 470 F.2d 1245, 1252-53 (D.C. Cir. 1972); *Virgin Islands v. Aquino*, 378 F.2d 540, 552-54 (3d Cir. 1967).

107. Another indication that the "accessory after the fact" statute, 18 U.S.C. § 3 (1976), is inapplicable to Title IX is that the RICO punishment cannot be computed for such accessories. Under § 3, an accessory after the fact is only subject to half the maximum punishment imposed for punishment of the principal. The following hypothetical illustrates the problem of adapting § 3 to RICO. A defendant is prosecuted under § 1962(c) with a pattern of racketeering activity because he is an accessory to a murder and a principal in an arson. No rational method exists by which the § 3 half-punishment rule could be applied to RICO. Would the RICO punishment be halved even though he was an accessory after the fact to only one of the predicate offenses? Would the RICO punishment be reduced by a quarter under the rationale that each predicate offense is half of the RICO punishment and that § 3 reduces one of those offenses by one half? A more difficult issue involves the recipient's liability under the conspiracy provision, § 1962(d). The recipient might contend that if he cannot be convicted of a substantive offense, he cannot conspire to commit that offense. See *United States v. Galardi*, 476 F.2d 1072, 1079 (9th Cir.), cert. denied, 414 U.S. 839 (1973). Many cases, however, have held that an individual in this position can be guilty of conspiracy. See *United States v. Parker*, 469 F.2d 884, 894 (10th Cir. 1972); *United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966), cert. denied, 385 U.S. 1002 (1967).

the racketeering funds into the enterprise.<sup>103</sup> When the defendant has commingled illegitimate money with substantial amounts of legitimate income, the illegitimate source of the invested money cannot readily be traced by direct evidence.<sup>109</sup> This problem is compounded when a substantial length of time has elapsed between the racketeering activities and the investment, and when the money has changed hands frequently.<sup>110</sup> The government can avoid these problems only by relying on inferences.<sup>111</sup> Yet, unless the defendant maintains separate accounts, no logical inferences can determine the source of money for an investment when the defendant receives substantial amounts of income from both illegal and legitimate sources.

These difficulties are highlighted by a comparison with an analogous problem in community property law. In community property cases, a party often attempts to show that a particular piece of property was acquired with separate funds, rather than with community earnings.<sup>112</sup> The "family expense" method for tracing the property to separate funds, when the funds are commingled with community earnings, determines the amount of community property available at the time the property at issue was purchased.<sup>113</sup> This method is based on the presumption that family living expenses are paid from

---

108. Criminal Division, U.S. Dep't of Justice, *An Explanation of the Racketeer Influenced and Corrupt Organizations Statute* 4 (4th ed. 1978). Professor Blakey, the chief counsel to the U.S. Senate subcommittee that drafted Title IX, concedes that § 1962(a) is ineffective because of the difficulty in uncovering evidence of how much illegitimate income the defendant has gained. Blakey & Goldstock, *supra* note 4, at 357. He asserts that criminal syndicates do not keep records demonstrating that their income is legitimate. *Id.* Surprisingly, however, some criminals keep precise records of their illegitimate income and expenses. *See, e.g.,* *United States v. Quick*, 128 F.2d 832, 837 (3d Cir. 1942) (still operator kept books of disbursements made in connection with operation of still).

109. *Investing Dirty Money*, *supra* note 29, at 1510-11. *But see* *United States v. McNary*, 620 F.2d 621, 628-29 (7th Cir. 1980) (in absence of specific tracing, sufficient nexus existed between illicit money and acquisition; requiring direct use of illicit income would render statute ineffective in commingling situations).

110. *Investing Dirty Money*, *supra* note 29, at 1511 n.97. Similarly, intent cannot generally be established directly. Proof that a defendant knew the invested money was dirty would probably be directly available only through the defendant's own statements, through wiretaps, or through the testimony of informers. *Id.*

111. *Id.* at 1511-12. An inference is permissible only if it is more likely than not that the inferred fact flows from the proven facts or is obvious from common experience. *See Turner v. United States*, 396 U.S. 398 (1970). *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Gainey*, 380 U.S. 63 (1965).

112. *See See v. See*, 64 Cal. 2d 778, 415 P.2d 776, 51 Cal. Rptr. 888 (1966) (en banc); *Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 264 P.2d 626 (1953), *overruled on other grounds in See v. See*, 64 Cal. 2d at 785-86, 415 P.2d at 781, 51 Cal. Rptr. at 893.

113. *E.g., Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 126, 264 P.2d 626, 632-33 (1953), *overruled on other grounds in See v. See*, 64 Cal.2d 778, 785-86, 415 P.2d 776, 781, 51 Cal. Rptr. 888, 893 (1966) (en banc).



community funds.<sup>114</sup> If community earnings are exhausted by family living expenses before the purchase, the property is deemed to have been acquired with separate funds.<sup>115</sup> This technique could be employed in section 1962(a) prosecutions if the government could eliminate legal income by offsetting it with family living expenses. There is no justification, however, for assuming that family living expenses are more likely to be paid from legitimate income rather than from racketeering income.<sup>116</sup> Moreover, when a defendant has made a series of investments, only some of which are within the section 1962(a) exception, the government cannot offset the legal income with the lawful investments because there is no justification for assuming that the lawful investments are made from the legal source.

Under the "direct tracing" method, another means of identifying separate property, a party can establish that there was sufficient separate property income to purchase a particular asset and that the intent was to use the separate income to purchase the asset.<sup>117</sup> Applying this approach to section 1962(a), the government could trace racketeering income to an interest in an enterprise if it could show sufficient racketeering income to cover the purchase and an intent to use that income. Unfortunately, the "direct tracing" method would require proof that the defendant consciously desired to use racketeering income. Direct tracing assumes that the investing party can intend to use a particular source and that the existence of this intent raises the probability that this source was used. Although a party investing separate income may have a reason to prefer the use of that source because of his greater interest in it, specific intent is meaningless in a section 1962(a) context because a person would generally have no reason to prefer using racketeering income rather than legitimate income.<sup>118</sup> This distinction between community property law and section 1962(a) undermines a fundamental assumption of direct tracing.

When substantial amounts of both clean and dirty money have been commingled, section 1962(a) should be enforceable only if the

---

114. *Id.* at 126, 264 P.2d at 632.

115. See *v. See*, 64 Cal. 2d 778, 783, 415 P.2d 776, 780, 51 Cal. Rptr. 858, 892 (1966)(en banc).

116. The merits of the family expense presumption are debatable in a community property dispute as well. Nevertheless, it may be rational to assume that a person will pay community living expenses from community funds rather than deplete his or her own separate property. *Thomasset v. Thomasset*, 122 Cal. App. 2d 116, 126, 264 P.2d 626, 632 (1953), *overruled on other grounds in See v. See*, 64 Cal.2d 778, 785-86, 415 P.2d 776, 781, 51 Cal. Rptr. 888, 893 (1966) (en banc). In a § 1962(a) case, however, no relationship exists similar to that between family living expenses and community income; an individual has an equal interest in both legitimate and illegitimate sources of income and is not motivated to use one source rather than another.

117. See *In re Mix*, 14 Cal. 3d 604, 536 P.2d 479, 122 Cal. Rptr. 79 (1975) (en banc); *Hicks v. Hicks*, 211 Cal. App. 2d 144, 27 Cal. Rptr. 307 (1962).

118. See notes 90-92 *supra* and accompanying text.

community property tracing methods can be used.<sup>119</sup> These methods, however, incorporate presumptions and requirements that render them useless in determining the source of an investment in a RICO enterprise. Consequently, section 1962(a) may be ineffective in a commingling situation.

Despite these theoretical difficulties, the government successfully traced income from an illegitimate source to an enterprise in *United States v. McNary*.<sup>120</sup> In *McNary*, the government alleged that the defendant, a town mayor, received payments from building developers in return for ensuring passage of favorable zoning ordinances. The defendant first deposited the proceeds, more than \$65,000, in an account belonging to his business, B & M. He subsequently transferred over \$103,000 from that account to the enterprise, Ports of Call. Even though the illegal money in the B & M account was commingled with legitimate income, the court held that this indirect investment was a violation of section 1962(a) because the racketeering proceeds enabled the mayor to invest the larger amount in Ports of Call, and the clean money in the account was not sufficient to permit the defendant to invest without the illegal funds.<sup>121</sup> Nevertheless, the case does not resolve the far more complex problem that occurs, for example, when \$20,000 of dirty money is deposited in an account with \$150,000 in clean money, \$25,000 is withdrawn, and then \$40,000 is invested in a legitimate business.

---

119. In a situation involving commingled money, principles that could be employed to compute the amount of dirty money possessed by the defendant are of limited utility. A widely employed concept, for example, is the "net worth" method developed in criminal tax prosecutions. Under this method, the government attempts to establish the total net value of the taxpayer's assets at the beginning and at the end of a given year. The taxpayer's nondeductible personal expenditures are added to the increase in net value. If this figure is substantially greater than the taxable income reported by the taxpayer, the excess may be considered unreported taxable income. See *Holland v. United States*, 348 U.S. 121 (1954) (approving this rule although urging caution in its application). In a § 1962(a) situation, this approach might enable the government to establish the amount of legitimate and racketeering income by computing the increase in the net worth of the defendant's assets, and then adding the defendant's personal expenditures to it. The excess of this sum over the amount of income from legitimate sources and illegal sources not covered by RICO would equal the amount of racketeering income. The "net worth" method, however, can yield a figure representing only the amount of racketeering income. It cannot reveal whether that income was used to purchase a particular interest in an enterprise. *But see United States v. McPartland*, No. 76-52 (D. Or., indictment filed Mar. 24, 1976) ("net worth" method used to trace funds derived from narcotics sales into a restaurant business). In *McPartland*, the defendant's legitimate net worth was computed and found to be significantly lower than the amount of money invested in the business. The government claimed, therefore, that this finding established the probability that funds invested in the restaurant were derived from racketeering.

120. 620 F.2d 621 (7th Cir. 1980).

121. *Id.* at 628-29.

### C. Proposed Amendments of Section 1962(a)

Congress has considered a number of proposals for the creation of a single code incorporating federal criminal provisions. The most recent proposals are S. 1722,<sup>122</sup> the Senate version, and H.R. 6915,<sup>123</sup> the House version. Both versions include subchapters<sup>124</sup> corresponding to Title IX in which section 1962(a) is transformed into a separate section<sup>125</sup> incorporating a significant change from the present language of section 1962(a). Unlike section 1962(a), neither of the proposed statutes includes a clause limiting liability to accomplices or principals in the racketeering activity. This change may expand criminal liability to the recipient of racketeering income who is not involved in the underlying racketeering activity. The major difference between the two versions is the treatment of the mens rea issue. Section 2702 of the House version requires that the defendant "knowingly" commit the offense,<sup>126</sup> while section 1803 of the Senate version is silent on this point.<sup>127</sup>

### D. Section 1962(b)

Like section 1962(a), subsection (b) focuses on the acquisition of an enterprise.<sup>128</sup> Section 1962(b) differs, however, in that the acquisition must be accomplished directly through racketeering activity such as bribery, extortion, or a scheme to defraud, rather than by income derived from that activity.<sup>129</sup> Although tracing the acquired interest to the racketeering activity is not always simple, it is considerably easier than proving a connection between the acquired interest and income under section 1962(a).<sup>130</sup>

---

122. S. 1722, 96th Cong., 1st Sess. (1979) (available from the Government Printing Office).

123. H.R. 6915, 96th Cong., 2d Sess. (1980) (available from the Government Printing Office).

124. S. 1722 incorporates these provisions in chapter 18, subchapter A, §§ 1801-07, while H.R. 6915 incorporates them in chapter 27, subchapter I, §§ 2701-07.

125. Section 1803(a) of the Senate bill is entitled "Washing Racketeering Proceeds" and provides that "[a] Person is guilty of an offense if, by using or investing proceeds from a pattern of racketeering activity, he acquires or maintains an interest in, or establishes or conducts, an enterprise." S. 1722, 96th Cong., 1st Sess. § 1803(a) (1979). Section 2702(a) of the House version is entitled "Laundering racketeering proceeds" and states that "[w]hoever knowingly uses or invests proceeds from a pattern of racketeering activity and thereby conducts, acquires or maintains an interest in, or establishes, an enterprise commits a class C felony." H.R. 6915, 96th Cong., 2d Sess. § 2702(a) (1980).

126. H.R. 6915, 96th Cong., 2d Sess. § 2702(a) (1980).

127. S. 1722, 96th Cong., 1st Sess. § 1803(a) (1979).

128. 18 U.S.C. § 1962(b) (1976).

129. *Id.* One commentator has said that § 1962(b) refers to cases of "illegal 'take-overs'" through criminal activity. *RICO Analysis, supra* note 32, at 447.

130. See pt. II(B) *supra*.

The situation covered by section 1962(b) is illustrated by the facts in *United States v. Quasarano*.<sup>131</sup> Raffaele Quasarano, a.k.a. "Jimmy Q.," and Peter Vitale allegedly gained control of a Wisconsin corporation manufacturing mozzarella cheese sold throughout the country. Through a straw man, the defendants obtained fifty percent of the common stock of the company by deterring the collection of debts owed to the former controlling shareholders and by threatening shareholders with violence.<sup>132</sup>

Sections 1962(a) and (b) violations are rarely charged and have not been analyzed by the courts.<sup>133</sup> Prosecutors have preferred to charge section 1962(c), as it has been construed to require proof only of racketeering activity, rather than of both the racketeering activity and the subsequent acquisition of an interest thereby.<sup>134</sup> This trend may have been altered, however, by restrictions on the scope of forfeiture in section 1962(c) cases; the government may choose to allege section 1962(a) violations to forfeit income from racketeering.<sup>135</sup>

### III. SECTION 1962(c)

Section 1962(c),<sup>136</sup> the central provision of Title IX, provides that

131. *United States v. Quasarano*, No. 79-80644 (E.D. Mich., indictment filed Nov. 15, 1979).

132. *Id.* The defendants' ability to carry out these threats was apparent to the victims from reports that Quasarano and Vitale had disposed of ten bodies of murder victims in a large shredder, compactor, and incinerator on their premises, Central Sanitation Services. Affidavits filed by F.B.I. agents in support of a warrant to search those premises described those activities as including the disposal of the body of James Hoffa. S. Brill, *The Teamsters* 56 (1978). For several years thereafter, Vitale and Quasarano collected large sums of money for cheese brokerage services that the government alleged were never performed. *See* Det. News, Nov. 16, 1979, § B., at 1, col. 3; Wall St. J., Nov. 16, 1979, at 27, col. 2.

133. The few cases involving § 1962(a) charges include *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980); *United States v. Ostrer*, 481 F. Supp. 407 (S.D.N.Y. 1979); *United States v. McPartland*, No. 76-52 (D. Or., indictment filed Mar. 24, 1976); *United States v. Alvarado*, No. 76-318 (S.D. Cal., indictment filed April 1, 1976). In *Alvarado*, the defendant, a trustee of the San Diego County Construction Laborer's Pension Fund, was indicted under § 1962(a). The pattern of racketeering involved embezzlement from the pension fund whereby the defendants allegedly voted themselves "deferred compensation" to which they were not entitled, and charged the fund for fraudulent "expense" advances. The government claimed that the defendant invested these funds in his company and then arranged for the payment of large fees by the pension fund to that company for the administration of the trust fund. Section 1962(b) cases include *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976); *United States v. Ricciardi*, No. 707-73 (D.N.J., Aug. 10, 1976); *United States v. Quasarano*, No. 79-80644 (E.D. Mich., indictment filed Nov. 15, 1979).

134. *See* pt. III(A) *infra*.

135. *See* notes 696-705 *infra* and accompanying text.

136. 18 U.S.C. § 1962(c) (1976).

[i]t 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.<sup>137</sup>

Its broad and ambiguous language has so obscured its meaning, however, that even the essential thrust of the statute cannot easily be discerned.<sup>138</sup>

#### A. *Limitation to Infiltration of Legitimate Business*

The government has frequently alleged violations of section 1962(c) based solely on illegal activities unrelated to the acquisition or operation of legitimate businesses.<sup>139</sup> Defendants have argued that RICO was intended to prohibit only the infiltration and operation of legiti-

137. *Id.*

138. The "less than pellucid" language of Title IX has precipitated frequent contentions that various portions of Title IX are unconstitutionally vague. See *United States v. Pantone*, 609 F.2d 675, 679 (3rd Cir. 1979); *United States v. Aleman*, 609 F.2d 298, 305-06 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Hawes*, 529 F.2d 472, 478-79 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Parness*, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Cappetto*, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Thevis*, 474 F. Supp. 134, 139-40 (N.D. Ga. 1979); *United States v. Field*, 432 F. Supp. 55, 60 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 612-13 (S.D.N.Y. 1973); *United States v. Scalzitti*, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975), *appeal dismissed*, 556 F.2d 569 (3d Cir. 1977); *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); notes 57-64 *supra* and accompanying text. Though unsuccessful, some of these objections have had the salutary effect of requiring the courts to clarify the broad language of Title IX. See, e.g., *United States v. Thevis*, 474 F. Supp. 134, 139-41 (N.D. Ga. 1979) (excluding forfeiture of profits from § 1963 in response to vagueness challenge); *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974) (adopting "common scheme" construction of "pattern" in response to vagueness objection to § 1962).

139. See *United States v. Sutton*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980) (en banc); *United States v. Provenzano*, 620 F.2d 955, 992-93 (3d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 14, 1980) (No. 80-78); *United States v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980); *United States v. Aleman*, 609 F.2d 298, 304-06 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Malatesta*, 583 F.2d 748, 754 n.3 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379, *cert. denied*, 444 U.S. 846

mate enterprises through patterns of racketeering activity<sup>140</sup> and that section 1962(c) criminal liability should not be imposed on those involved in an enterprise composed of individuals connected solely by their commission of a series of criminal offenses. The majority of courts have rejected this argument and agreed with the government.<sup>141</sup> Judicial support for the more restrictive view has included recent First and Eighth Circuit opinions,<sup>142</sup> a Sixth Circuit panel opinion reversed *en banc*,<sup>143</sup> a Second Circuit district court opinion and dicta in a Fourth Circuit opinion, both of which were subsequently overruled *sub silentio*,<sup>144</sup> and dicta in a Supreme Court opinion.<sup>145</sup> However, the restrictive position is the more soundly reasoned view, based on congressional intent and rules of statutory construction.

### 1. Congressional Intent

As with all questions of statutory construction, debate concerning the applicability of section 1962(c) to illegal operations must focus on legislative intent.<sup>146</sup> The language of a statute is the starting point

(1979); *United States v. Altese*, 542 F.2d 104, 106-07 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Fineman*, 434 F. Supp. 189, 192-93 (E.D. Pa. 1977). Commentators have unanimously criticized the illegal enterprise theory. *E.g.*, Bradley, *supra* note 84, at 892-93; Comment, *United States v. Sutton and the Scope of Title IX of the Organized Crime Control Act of 1970: The Sixth Circuit's Narrow Interpretation of the Meaning of "enterprise."* 68 Ky. L.J. 468, 485-87 (1980); *RICO Analysis, supra* note 32, at 456-67; *Conspiracy Law, supra* note 29, at 116-21 (1979).

140. See cases cited note 139 *supra*.

141. See *id.*

142. *United States v. Turkette*, Nos. 79-1545, 79-1546 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

143. See *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980).

144. See *United States v. Mandel*, 591 F.2d 1347, 1375 (4th Cir.), *aff'd per curiam en banc*, 602 F.2d 653 (1979), *cert. denied*, 100 S. Ct. 1647 (1980); *United States v. Moeller*, 402 F. Supp. 49, 58-59 (D. Conn. 1975). *Mandel* appears to have been overruled in *United States v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980). *Moeller* appears to have been overruled in *United States v. Altese*, 542 F.2d 104, 106-07 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

145. *Iannelli v. United States*, 420 U.S. 770 (1975). According to the Supreme Court, Title IX was intended "to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity." *Id.* at 787 n.19. The Fifth Circuit has minimized the significance of this dictum, concluding that the *Iannelli* comment was not a full description of the scope of Title IX. *United States v. McLaurin*, 557 F.2d 1064, 1073 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978).

146. See *Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975); *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 4 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358, 1365-66 & n.11 (8th Cir. 1980). *But see United States v. Thevis*, 474 F. Supp. 134, 138 & n.3 (N.D. Ga. 1979) (congressional intent only one

for determining that intent.<sup>147</sup> Indeed, the absence of any language in Title IX limiting the term "enterprise" to legitimate organizations is the only indication that the present majority view might be correct in its interpretation of the scope of RICO.<sup>148</sup> Although "enterprise" is defined in section 1961(4),<sup>149</sup> neither that section nor section 1962(c) contains any explicit language restricting the scope of the term. The Sixth Circuit *en banc* opinion has reasoned that had Congress intended to qualify section 1962(c), it easily could have done so by modifying "enterprise" with the word "legitimate."<sup>150</sup>

Although the broad language of Title IX appears to include enterprises engaged solely in illegal activities, this analysis is not dispositive of the issue. In addition to focusing on statutory language to determine legislative intent, the courts are required to examine the object and policy of a statute as reflected in its legislative history.<sup>151</sup> The legislative history of Title IX is replete with references to the congressional concern with the infiltration of legitimate business by organized crime.<sup>152</sup> The Congressional Statement of Findings and

---

factor to consider in construing statute; court is not bound by desire of Congress). Sharply criticizing *Thevis*, the *Anderson* court stressed the paramount importance of congressional intent in interpreting RICO and stated that expanding the scope of a statute "beyond congressional intent is judicial legislation violative of the separation of powers doctrine established in the United States Constitution." *United States v. Anderson*, 626 F.2d 1358, 1366 n.11 (8th Cir. 1980).

147. *Dupuy v. Dupuy*, 511 F.2d 641, 642 (5th Cir. 1975); see *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 4-6 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358, 1365 (8th Cir. 1980).

148. Courts refusing to restrict the scope of § 1962(c) have frequently pointed to the absence of any explicit limitation in the language of § 1962(c). See *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880, 897 n.17 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

149. An "enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976).

150. *United States v. Sutton*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980) (*en banc*); see *United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Castellano*, 416 F. Supp. 125, 129 (E.D.N.Y. 1975). If, however, § 1962(a), which lacks the word "legitimate," applies only to investment in legitimate enterprises, *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), the absence of the word "legitimate" in § 1962(c) should not control.

151. *E.g.*, *Ozawa v. United States*, 260 U.S. 178, 194 (1922); *United States v. National Marine Eng'rs' Beneficial Ass'n*, 294 F.2d 385, 390-91 (2d Cir. 1961); see *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 4 (1st Cir. Sept. 23, 1980).

152. *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 10-11 (1st Cir. Sept. 23, 1980); *cf.* *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 769 n.11

Purpose,<sup>153</sup> Senate and House Committee reports,<sup>154</sup> and Justice Department testimony before the House Judiciary Committee<sup>155</sup> establish that prevention of this infiltration was the principal goal. This view was also expressed repeatedly by congressmen in floor debates.<sup>156</sup> Indeed, few statements in the legislative history rebut the

---

(9th Cir. 1980) ("We believe anyone who reads the legislative history must be struck by the singlemindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime. This purpose must be the linchpin of any construction of RICO.")

153. Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 922-23. Findings (3) and (4) state: "(3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens."

154. The Report of the Senate Judiciary Committee declared that Title IX "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." *Senate Report, supra* note 48, at 76; *accord*, H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56-57 (1970) [hereinafter cited as *House Report*], reprinted in [1970] U.S. Code, Cong. & Ad. News 4007, 4032-34. The Senate Report, *supra* note 48, at 81-82, indicates that the "illegal enterprise" issue is related to the question whether § 1962 is a remedial statute rather than a penal statute for purposes of strict construction. See note 60 *supra*. The Report contends that Title IX is remedial because it is not intended as a penalty against an individual but as "a protection of the public against parties engaging in certain types of business after they have shown that they are likely to run the organization in a manner detrimental to the public interest." *Id.* at 82. If the "illegal enterprise" theory is adopted, Title IX punishes individuals and cannot be regarded as remedial.

155. The Justice Department's position was that "Title IX is designed to inhibit the infiltration of legitimate business by organized crime, and . . . to reach the criminal syndicates' major sources of revenue. . . . The statute would also proscribe the acquisition, maintenance, or control of any interest in a business enterprise through a pattern of racketeering activity or the collection of unlawful debts. Here the emphasis is against illegally acquired ownership or control of businesses by members and associates of the Mafia . . ." *Organized Crime Control: Hearings on S.30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 170 (1970) (statement of Att'y Gen. Mitchell) [hereinafter cited as *House Hearings*]. The original bill (S. 1861) was called "[a] bill . . . to prohibit the infiltration or management of legitimate organizations by racketeering activity." S.1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9512 (1969).

156. See, e.g., 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska); *id.* at 603 (remarks by Sen. Yarborough); *id.* at 607 (remarks by Sen. Byrd); *id.* at 953 (remarks of Sen. Thurmond); *id.* at 35193 (remarks by Rep. Poff); *id.* at 35196 (remarks of Rep. Celler); *id.* at 35200 (remarks of Rep. St. Germain); *id.* at 35201 (remarks of Rep. McCulloch); *id.* at 35206 (remarks of Rep. Kleppe); *id.* at 35304 (remarks of Rep. Railsback); *id.* at 35318-19 (remarks of Rep. Anderson). Representative Poff noted that "Title IX of S.30 provides the machinery whereby the infiltration of racketeers into legitimate businesses can be stopped and the process reversed when such infiltration does occur." *Id.* at 35295. In a law review article, Senator McClellan, the



restrictive view.<sup>157</sup> One commentator has suggested that the very selection of crimes "adapted to commercial exploitation" as predicate offenses<sup>158</sup> further indicates that Congress was primarily concerned with the infiltration of legitimate organizations.<sup>159</sup>

## 2. Rules of Statutory Construction

In addition to examining the legislative record, courts have attempted to discern the scope of section 1962(c) by analyzing various judicially created rules of statutory construction that aid in determining intent.<sup>160</sup> However, cases extending section 1962(c) to illegal enterprises have rejected or ignored canons of construction that indicate this subsection should be narrowly construed to proscribe only the infiltration of legitimate businesses.<sup>161</sup> These rules include a pre-

original sponsor of the Organized Crime Control Act in the Senate, observed that "Title IX is aimed at removing organized crime from our legitimate organizations." McClellan, *supra* note 50, at 141. He further commented that unless an individual uses a pattern of racketeering to obtain or operate an interstate business, no prosecution is possible under Title IX. *Id.* at 144.

157. *United States v. Anderson*, 626 F.2d 1358, 1371 n.20 (8th Cir. 1980) (quoting *Organized Crime*, *supra* note 29, at 204-05). Two isolated statements in the congressional record intimated that Title IX could be employed in a situation other than infiltration of legitimate business. 116 Cong. Rec. 35328 (1970) (remarks of Rep. Meskill); *id.* at 844 (remarks of Sen. Magnuson). The court in *United States v. Capetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), did cite to legislative history to support the inclusion of illegitimate enterprises within the scope of § 1962(c). Unfortunately, the material quoted by the court, *Senate Report*, *supra* note 48, at 73, referred not to Title IX, but to Title VIII, which prohibits gambling in 18 U.S.C. § 1955(a) (1976). Bradley, *supra* note 84, at 852-53.

158. 18 U.S.C. § 1955(a) (1976). Bradley, *supra* note 84, at 852-53.

159. McClellan, *supra* note 50, at 161-62. Additionally, the promulgation of new remedies such as forfeiture furthers the view that Congress did not intend to prosecute illegitimate enterprises, but acted to prevent racketeering influence on legitimate business. The Senate Report on the Organized Crime Control Act stated that forfeiture under 18 U.S.C. § 1963 (1976) would free the channels of commerce from racketeering influence by removing "the leaders of organized crime from the sources of their economic power" by preventing "their positions [from] being filled by successors no different in kind." *Senate Report*, *supra* note 48, at 80.

160. The courts are authorized to examine legislative intent under the firmly established rule "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Muniz v. Hoffman*, 422 U.S. 454, 469 (1975) (quoting *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892)); *accord*, *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201 (1979); *United States v. Anderson*, 626 F.2d 1358, 1365 n.11 (8th Cir. 1980). *But see* *United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979) (courts not required to analyze legislative history if no ambiguity is apparent on face of statute), *cert. denied*, 100 S. Ct. 1345 (1980).

161. *See* *United States v. Aleman*, 609 F.2d 298, 304-06 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d

sumption against statutory constructions that disturb federal-state relationships by expanding federal jurisdiction;<sup>162</sup> a due process requirement that criminal statutes be construed in favor of lenity;<sup>163</sup> and the rule of *ejusdem generis*, which cautions against expansive interpretations of the broad definition of enterprise contained in section 1961(4).<sup>164</sup>

---

1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Malatesta*, 583 F.2d 748, 754 n.3 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379, (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States v. Altese*, 542 F.2d 104, 106-07 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Fineman*, 434 F. Supp. 189, 192-93 (E.D. Pa. 1977).

162. *See generally* *Perrin v. United States*, 444 U.S. 37, 49-50 (1979); *United States v. Bass*, 404 U.S. 336, 349-50 (1971); *Rewis v. United States*, 401 U.S. 808, 812 (1971). Defendants have contended that prosecutions of purely illegal enterprises under § 1962(c) would extend federal jurisdiction to virtually every crime by effectively transforming a single person who has committed two state violations into a RICO enterprise. *See United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Moeller*, 402 F. Supp. 49, 56, 59 (D. Conn. 1975). Such an extension would constitute a serious intrusion on state criminal jurisdiction since the Title IX definition of racketeering activity in § 1961(1)(A) encompasses nearly all major state crimes. *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 15 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358, 1370 (8th Cir. 1980); 542 F.2d at 107; 402 F. Supp. at 59, Atkinson, *supra* note 10, at 6.

163. *See* notes 60-64 *supra* and accompanying text. The majority of courts have applied the liberal construction clause of Title IX and ignored this constitutional doctrine. *See United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Altese*, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

164. The rule of *ejusdem generis* cautions against expansive interpretation of broad language that immediately follows narrow and specific terms and admonishes courts to construe "the broad in light of the narrow." *United States v. Insko*, 496 F.2d 204, 206 (5th Cir. 1974). *See also United States v. Baranski*, 484 F.2d 556, 566 (7th Cir. 1973). Applying *ejusdem generis* to § 1961(4), defendants have argued that the general language, "any union or group of individuals associated in fact although not a legal entity," should be construed to describe enterprises similar to the preceding specific terms, "individual, partnership, corporation, association." Therefore, if the specific language refers to legitimate organizations, the general terms should be construed as referring only to other forms of legitimate organizations. *See United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 6 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358, 1366 (8th Cir. 1980); *Conspiracy Law*, *supra* note 29, at 119-20. Courts permitting § 1962(c) prosecutions of illegal enterprises, however, have emphasized only the broad language of § 1961(4), which defines enterprise as "any union or group of individuals associated in fact although not a legal entity," and have ignored the preceding language. *See, e.g., United States v. Rone*, 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). The major obstacle to an *ejusdem generis* construction of § 1961(4) is that the rule is riddled with vague and conflicting exceptions. One case has held that the rule is inappropriate if the specific terms vary in meaning and refer to different objects. *Goldsmith v. United States*, 42 F.2d 133, 137-38 (2d Cir.), *cert. denied*, 282 U.S. 837 (1930). Another court has observed that the rule is inappropriate because the

The fourth, and most significant, applicable rule of statutory construction is that a statute must be read as a whole, giving some effect to each element of the crime defined in the statute.<sup>165</sup> Applying section 1962(c) to illegal operations violates this rule by eviscerating the term "enterprise." The term "enterprise" retains independent significance within the statute only if section 1962(c) is limited to legitimate enterprises. The legitimate enterprise is then an entity separate from the racketeering activity, but one whose affairs are conducted by individuals through that activity. When section 1962(c) is applied to illegal enterprises, an individual or group of individuals is transformed into an enterprise by the performance of a pattern of racketeering.<sup>166</sup> Therefore, section 1962(c) becomes a simple proscription against the commission of a pattern of racketeering, effectively eliminating the enterprise element.<sup>167</sup>

---

terms preceding the general language are also general and "contain no particular aspects of diversity of meaning." *United States v. Baranski*, 484 F.2d 556, 567 (7th Cir. 1973). A third case has rejected the rule, emphasizing "the contrast between the narrow scope" of the specific terms and "the enlarged grasp" of the general language. *United States v. Davis*, 231 U.S. 183, 188 (1913). The combined impact of these cases is that application of *ejusdem generis* is a subjective matter that renders the doctrine useless as a tool of statutory analysis.

165. *E.g.*, *Weinberger v. Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 633 (1973); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955); *see Administrator, Fed. Aviation Admin. v. Robertson*, 422 U.S. 255, 261 (1975).

166. If an organization formed solely for illegal purposes is considered a RICO enterprise, the enterprise element of a RICO offense can be proved merely by evidence of a simple association to commit the racketeering acts. *United States v. Anderson*, 626 F.2d 1358, 1368 (8th Cir. 1980). This type of proof would be the same as that required to prove a RICO conspiracy under 18 U.S.C. § 1962(d) (1976). *Id.* at 1368-69. The *Anderson* court pointed out that "Congress's inclusion of subsection (d) . . . indicates that Congress intended to establish two distinctly separate offenses in subsections (c) and (d). If a simple criminal conspiracy to commit the predicate crimes were to fulfill the "enterprise" element of a section 1962(c) violation, then a conspiracy to commit a 1962(c) violation would be defined as when a person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts. The awkwardness and duplication inherent in the structure of this articulation of the offense should be sufficient to suggest that we search for an alternate interpretation." *Id.* at 1369 (citations omitted).

167. *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 6 (1st Cir. Sept. 23, 1980); *United States v. Anderson*, 626 F.2d 1358, 1365-66 & n.13 (8th Cir. 1980). Bradley, *supra* note 84, at 854; *see United States v. Sutton*, 605 F.2d 260, 266 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980). The panel opinion in *Sutton* commented that a simple prohibition on patterns of racketeering was unlikely because "the draftsmen would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more. A straightforward prohibition against engaging in 'patterns of racketeering activity' would have sufficed, and there would have been no need for a reference to 'enterprise' of any sort." *Id.* at 266. The *Anderson* court stated that "[t]he term 'enterprise' must signify an association that is substantially

Permitting punishment of illegal enterprises under section 1962(c) also distorts the meaning of that subsection within the context of section 1962 as a whole because the scope of the word will vary from one subsection to another. In *United States v. Sutton*,<sup>168</sup> the panel opinion relied on the one percent exception for purchases of corporate stock in enterprises as an indication that the section 1962(a) offense encompasses only legitimate enterprises.<sup>169</sup> If section 1962(a) refers only to legitimate enterprises, it is doubtful that section 1962(c) employs the term "enterprise" in a different sense.<sup>170</sup> This result cannot be reconciled with the existence of section 1961(4),<sup>171</sup> a definition of "enterprise" that is applicable to all subsections of section 1962.<sup>172</sup>

### 3. Eighth Circuit Approach to Illegal Enterprise Problem

Because an "illegal enterprise" allegation can have the paradoxical effect of eliminating the independent significance of the "enterprise" element, the Eighth Circuit<sup>173</sup> and a Fifth Circuit district court<sup>174</sup> permit only formally structured illegal enterprises. In *United States v. Anderson*,<sup>175</sup> the defendants, two county administrators in Arkansas, allegedly received kickbacks from a person selling goods to two

---

different from the acts which form the 'pattern of racketeering activity'. A contrary interpretation would alter the essential elements of the offense as determined by Congress." *United States v. Anderson*, 626 F.2d 1358, 1365 (8th Cir. 1980) (footnote omitted).

168. 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980).

169. *Id.* at 268-69; *see* *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

170. *Organized Crime*, *supra* note 29, at 201-03. In *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980), the panel opinion asserted that "[s]ubsection (a) is talking about legitimate enterprises only. Logic dictates that the provisions which follow—subsection (b), prohibiting the use of racketeering to 'acquire or maintain . . . any interest in or control of any enterprise,' and subsection (c), prohibiting 'the conduct of [an] enterprise's affairs through a pattern of racketeering activity'—should be read *in pari materia*." *Id.* at 269.

171. 18 U.S.C. § 1961(4) (1976).

172. *United States v. Anderson*, 626 F.2d 1358, 1366 n.12 (8th Cir. 1980); *United States v. Sutton*, 605 F.2d 260, 268-69 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980); *United States v. Altese*, 542 F.2d 104, 110 n.5 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977); *see* *Bradley*, *supra* note 84, at 853 n.88; *Organized Crime*, *supra* note 29, at 201-02.

173. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980).

174. In *United States v. Drummond Coal Co.*, No. 79-M002765 (N.D. Ala. July 8, 1980), the court dismissed the RICO charges because "the alleged racketeering of itself could not constitute an 'enterprise.'" Lempert, *Judge Braves Tide with Narrow RICO Reading*, *Legal Times of Wash.*, July 28, 1980, at 1, col. 1.

175. 626 F.2d 1358 (8th Cir. 1980).

counties in return for the defendants' approval of payment for goods those counties never received. The court held that an enterprise must have "an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the 'pattern of racketeering activity.'"<sup>176</sup> Because the alleged enterprise was a group of individuals, the two defendants and a prosecution witness, the illegal enterprise allegation failed to satisfy the formal structure requirement, and the court reversed the convictions.

The *Anderson* court was motivated by concern about the implications of the expanding scope of the RICO statute; it warned that "[b]road interpretation and simplistic resolution of the complicated statutory language pose the danger of enhancing this popularity beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."<sup>177</sup> The court feared that the effective elimination of the enterprise element, resulting from a broad illegal enterprise theory combined with the broad range of racketeering acts, would permit "greater and more pervasive intrusion upon state and local law enforcement authority."<sup>178</sup>

## B. Enterprise

### 1. Illegal enterprise

The majority of courts have not adopted the view that section 1962(c) is limited to infiltration of legitimate business.<sup>179</sup> Therefore, the subsequent discussion of the elements of section 1962(c) assumes that it includes illegal enterprises.

Proving the existence of an illegal enterprise is not difficult. Based upon the broad definition of enterprise in section 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity,"<sup>180</sup> the enterprise concept has been liberally construed

176. *Id.* at 1372.

177. *Id.* at 1364.

178. *Id.* at 1370.

179. See *United States v. Aleman*, 609 F.2d 298, 304-06 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Malatesta*, 583 F.2d 748, 754 n.3 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States v. Altese*, 542 F.2d 104, 106-07, (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Fineman*, 434 F. Supp. 189, 192-93 (E.D. Pa. 1977).

180. 18 U.S.C. § 1961(4) (1976). In *United States v. Forsythe*, 429 F. Supp. 715 (W.D. Pa.), *rev'd*, 560 F.2d 1127 (3d Cir. 1977), the court described an enterprise as

to encompass any conceivable combination of individuals or groups of individuals.<sup>181</sup>

Courts have rejected arguments that a RICO enterprise must be a formal, legally recognized entity.<sup>182</sup> For example, in *United States v. Elliott*,<sup>183</sup> the Fifth Circuit interpreted this language to include any informal, loosely organized, de facto association,<sup>184</sup> and held that six co-defendants had participated in an enterprise encompassing twenty distinct aspects of criminal conduct.<sup>185</sup> Although one defendant was implicated in all of the criminal conduct, none of the crimes involved all the defendants; none of the defendants knew every other member of the enterprise or their activities, nor were they united by a common objective.<sup>186</sup> One explanation offered for this broad construction is that the list of entities in section 1961(4) is not exhaustive because the statutory definition uses the word "includes" rather than

"a separate and independent unit in the marketplace, discerned operationally through its behavior or functioning, regardless of its legal or proprietary structure." *Id.* at 721.

181. Many courts have commented that the word "enterprise" is a broad term that should be liberally construed. *See United States v. Morris*, 532 F.2d 436, 441-42 (5th Cir. 1976); *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Frumento*, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); notes 12-16 *supra* and accompanying text; note 191 *infra* and accompanying text.

182. *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Elliott*, 571 F.2d 880, 897-98 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Parness*, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Cappetto*, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979); *United States v. Frumento*, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *see cases cited note 179 supra*.

183. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

184. *Id.* at 897-98. *Elliott* did not acknowledge two elements that might limit the extent to which an enterprise can be informal and diverse. One is that the term "pattern" may require that a common scheme, plan or motive underly the enterprise. *Id.* at 899 n.23; *see notes 241-49 infra* and accompanying text. *Elliott* also did not discuss whether a mens rea requirement exists in § 1962(c). To require knowledge of the existence and general scope of the enterprise, however, would place some practical limit on the extent of diversity because a defendant could not be liable for an enterprise encompassing acts beyond the scope of the enterprise of which he has knowledge.

185. 571 F.2d at 911. The conduct included burning an unoccupied nursing home, furnishing counterfeit tiles and stealing cars, stealing a truckload of meat, attempting to influence the outcome of the stolen meat trial, theft of a truck, murder, intimidation of a witness, theft of additional meat and dairy products, theft of a forklift, theft of a truckload of shirts, and various illegal drug transactions.

186. *Id.* at 898.

the term "means."<sup>187</sup> The Supreme Court has characterized the word "includes" as signifying "a general class, some of whose particular instances are those specified in the definition."<sup>188</sup> In contrast, "means" is a more narrow term indicating that "the term and its definition are to be interchangeable equivalents."<sup>189</sup> Employing this distinction, courts have rejected arguments that a particular entity is not within the literal terms of "enterprise."<sup>190</sup>

#### a. Single Person Enterprise

The most controversial form of illegal enterprise, one consisting of a single person, has been approved in dictum by the Fifth and Ninth Circuits.<sup>191</sup> This view is based on the words "[e]nterprise includes any individual" in section 1961(4).<sup>192</sup> The single person enterprise concept, however, distorts the meaning of section 1962(c). A defendant violates section 1962(c) only when he is "employed by or associated with" the enterprise.<sup>193</sup> If the enterprise is the defendant,

187. *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979).

188. *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934). Although *Helvering* has been cited by a court construing § 1961(4), *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979), there is an obvious distinction. *Helvering* was applying a rule for construing civil and tax statutes. The rules governing construction of criminal statutes may differ as due process requires narrow construction of criminal statutes to avoid vagueness. See notes 57-64 *supra* and accompanying text. The word "includes" contained in a criminal statute must be read in this light and cannot authorize broad construction. See note 138 *supra* and accompanying text.

189. *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934).

190. See, e.g., *United States v. Huber*, 603 F.2d 387, 393-94 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979). In *Huber*, the defendant contended that a group of corporations could not constitute an enterprise because § 1961(4) defines enterprise in the singular by referring to any "corporation." He also contended that the term "group of individuals associated in fact" cannot be a group of corporations since the definition of "person" in § 1961(4) distinguishes between an "individual" and an "entity." Noting that § 1961(4) is not exhaustive, the court rejected this reasoning, 603 F.2d at 393-94. In *Thevis*, the indictment alleged an enterprise consisting of "a group of individuals associated in fact with various corporations to operate a pornography business through certain unlawful means." 474 F. Supp. at 137. The defendant claimed that § 1961(4) did not specifically include an enterprise as alleged in the indictment. The court dismissed his contention, relying on use of the word "includes" in § 1961(4). *Id.* at 137-38.

191. See *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 767 n.8 (9th Cir. 1980); *United States v. Elliott*, 571 F.2d 880, 898 n.18 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Ohlson*, 552 F.2d 1347, 1349 (9th Cir. 1977); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979). See also *Atkinson*, *supra* note 10, at 14-15. However, a recent First Circuit opinion seems to condemn single person enterprises. See *United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 15 (1st Cir. Sept. 23, 1980).

192. 18 U.S.C. § 1961(4) (1976).

193. 18 U.S.C. § 1962(c) (1976).

he is convicted for employing himself or associating with himself. Accordingly, the language implies that at least two parties are necessary.<sup>194</sup>

Prosecution of single person enterprises also raises eighth amendment problems to the extent that it permits RICO to be used against individual burglars, gamblers, or other minor criminals. The severe penalties imposed by RICO may be difficult to justify in these situations.<sup>195</sup> The statutory and constitutional defects in the single person enterprise concept should discourage these prosecutions.

#### b. *Effect of Broad Construction of Enterprise*

The majority view permitting the allegation of an illegal operation as an enterprise<sup>196</sup> has the practical effect of causing the "enterprise" element to disappear, leaving only the question whether the government can establish a pattern of racketeering activity.<sup>197</sup> Combining this view with the courts' refusal to require that an enterprise have any elements of formality or continuity results in granting the government virtually unlimited freedom to allege any one of the many possible enterprises that may arise in a particular fact pattern.<sup>198</sup> As-

---

194. This point can be analogized to the principle in conspiracy law that a person cannot conspire with himself; therefore, a conspiracy requires the agreement of two persons. See *United States v. Chase*, 372 F.2d 453, 459 (4th Cir.), *cert. denied*, 387 U.S. 907 (1967); *Poller v. C.B.S., Inc.*, 284 F.2d 599, 603 (D.C. Cir. 1960), *rev'd on other grounds*, 368 U.S. 464 (1962).

195. See notes 51-54 *supra* and accompanying text.

196. See pt. III(A) *supra*.

197. *United States v. Sutton*, 605 F.2d 260, 265-66 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980); *Bradley*, *supra* note 84, at 854. In *United States v. Fineman*, 434 F. Supp. 189, 193 (E.D. Pa. 1977), the defendant contended that an enterprise must be "characterised by continuity and structure [that renders] them recognizable as businesses." The court, however, held that RICO does not "impose a continuity requirement, except to the extent necessary to show a 'pattern of racketeering activity.'" *Id.* In illegal enterprise cases, the converse situation may occur, that is, "pattern" issues may be treated as an "enterprise" problem. In *United States v. Moeller*, 402 F. Supp. 49, 60 (D. Conn. 1975), the court held that "enterprise" could not be interpreted to cover a venture designed to result in a single criminal episode. Normally, this analysis is directed at the question of what constitutes a pattern. See notes 259-68 *infra* and accompanying text. Likewise, in a subsequent case, *United States v. Aleman*, 609 F.2d 298, 308 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980), the court incorrectly decided that certain evidence was relevant to corroborate an "enterprise relationship." Relationship is also an issue in deciding whether a pattern existed. See pt. III(C)(2) *infra*.

198. This freedom relieves the prosecution of deciding whether and when to use the RICO statute; its most difficult decision becomes the manner in which the statute should be employed. Magarity, *RICO Investigations: A Case Study*, 17 Am. Crim. L. Rev. 367, 368 (1980).



sume, for example, that two defendants, "X" and "Y", join in bribing public officials to gain favors for their two legitimate businesses, "X" Corporation and "Y" Corporation. At least seven enterprises can be alleged against "X" and "Y": (1) "X" is the enterprise with which "Y" is associated; (2) "Y" is the enterprise with which "X" is associated; (3) "X" and "Y" together are the enterprise; (4) "X" Corporation is the enterprise with which "X" and "Y" are associated; (5) "Y" Corporation is the enterprise with which "X" and "Y" are associated; (6) "X" Corporation and "Y" Corporation are the enterprise with which "X" and "Y" are associated; and (7) "X" Corporation, "Y" Corporation, "X," and "Y" are the enterprise. The choice of enterprise may be dictated by considerations such as venue, scope of forfeiture,<sup>199</sup> and differing proof requirements.<sup>200</sup>

## 2. Foreign Enterprise

Another question arising under section 1962(b) is whether the word "enterprise" was intended to encompass foreign enterprises. In *United States v. Parness*,<sup>201</sup> the defendant contended that section 1962(b) was not intended to include acquisitions of foreign businesses through criminal conduct committed in the United States.<sup>202</sup> Relying on Labor Management Relations Act<sup>203</sup> cases holding that federal law may not be applied to foreign businesses unless "the affirmative intention of Congress [is] clearly expressed,"<sup>204</sup> he asserted that a

199. 18 U.S.C. § 1963(c) (1976). Allegation of an illegal enterprise will often reduce the impact of forfeiture under Title IX. The capital investment in an illegal enterprise may be difficult to forfeit because of the absence of specific evidence reflecting the full extent of the defendant's capital interest. See note 108 *supra*.

200. The government is confronted with a tactical choice. If it alleges that a corporation is the enterprise, it must establish a nexus between the affairs of the enterprise and the defendant's racketeering activities, but it need not show that the racketeering activity affected interstate commerce as long as the enterprise's activities did. See pt. III(E) *infra*; notes 367-72 *infra* and accompanying text. Conversely, if the government alleges an illegal enterprise, it need not prove a nexus between the enterprise and the racketeering, but it may have more difficulty establishing impact of the racketeering on interstate commerce. See pt. III(G) *infra*.

201. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

202. *Parness* involved a complex fraudulent scheme. Milton Parness gained control of a 90% stock interest in an Antillean hotel and casino by withholding debts owed to the hotel. His failure to pay those debts forced the victim to borrow from third parties to meet the hotel expenses. *Id.* at 434-35. Through straw men, Parness loaned funds to pay the third-party obligations. *Id.* The straw men then foreclosed and Parness obtained control of the hotel-casino. *Id.* at 435.

203. Labor Management Relations Act, 29 U.S.C. §§ 141-191 (1976).

204. *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138, 147 (1957); *accord*, *Windward Shipping (London) Ltd. v. American Radio Ass'n*, 415 U.S. 104 (1974); *McCulloch v. Sociedad Nacional de Marineros*, 372 U.S. 10 (1963). These cases involved application of the Labor Management Relations Act to aliens aboard foreign vessels operating in United States territorial waters.

foreign corporation was not an enterprise within the meaning of RICO.<sup>205</sup> The court rejected this argument, holding that the legislative history manifested Congress' intent to apply Title IX to foreign enterprises.<sup>206</sup> It characterized that history as supporting a policy of broad construction of the term "enterprise"<sup>207</sup> and reasoned that Title IX was directed at the problem of organized crime in the United States and not merely the infiltration of domestic enterprises.<sup>208</sup>

This logic has been undermined by subsequent cases permitting the government to allege that defendants' illegal activities are a section 1962(c) enterprise.<sup>209</sup> The issue is not, as the *Parness* court perceived, whether the defendants could avoid RICO liability by acquiring a foreign enterprise because the defendants themselves could constitute a punishable enterprise under section 1962(c).<sup>210</sup> Therefore, the ability of the prosecution to charge an illegal enterprise would satisfy the supposed congressional intent to prohibit organized crime activities directly.<sup>211</sup>

In light of the expansive interpretations of section 1962(c) to include illegal enterprises, the foreign enterprise question requires a narrower inquiry. The focus of the analysis should not be whether a defendant's activities are exempt from Title IX, but whether the government should prosecute this activity by alleging a foreign business as an enterprise. The principal advantages of alleging an enterprise are the remedies that can be applied. The government can seek forfeiture of a convicted person's interest in that enterprise under section 1963(a),<sup>212</sup> or it can divest that interest and reorganize or dissolve the enterprise in a civil suit under section 1964(a).<sup>213</sup> Absent treaty arrangements, however, a foreign country would not be required to accept the judgment of an American court that dissolves or

---

205. 503 F.2d at 438-40.

206. *Id.*

207. *Id.* at 439. *Parness* relied on a statement in the legislative history of § 1962 that "any acquisition meeting the test of subsection (b) is prohibited without exception." *House Report, supra* note 154, at 57, reprinted in [1970] U.S. Code Cong. & Ad. News at 4033. *Parness*, however, ignored the necessity of first determining the scope of the term "enterprise" before determining whether the acquisition meets the test of subsection (b).

208. 503 F.2d at 439; *accord, RICO Analysis, supra* note 32, at 469. To support this reasoning, *Parness* cited the Statement of Findings and Purposes of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922.

209. *See* pt. III(A) *supra*.

210. The court was concerned that limiting Title IX to infiltration of domestic enterprises "would permit those whose actions ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise." 503 F.2d at 439.

211. *See* notes 206-08 *supra* and accompanying text.

212. 18 U.S.C. § 1963(a) (1976).

213. 18 U.S.C. § 1964(a) (1976).

reorganizes a corporation established and operated under that country's laws.<sup>214</sup> Moreover, the foreign nation could refuse to compel or even permit its corporations to comply with a forfeiture or divestiture judgment of the United States.<sup>215</sup> Even if the remedies could be enforced, they have the disturbing potential for creating international friction.<sup>216</sup> When the limited advantages of the foreign enterprise theory are weighed against the interests of international relations, the use of the foreign enterprise allegation should not be permitted.

### 3. Government Enterprises

The government has persistently prosecuted government corruption cases under the theory that the public office is the enterprise.<sup>217</sup> Generally, the courts have accepted this theory and rejected contentions that a government entity is not an enterprise within the meaning of Title IX.<sup>218</sup> These decisions have focused on the

---

214. Although American courts will not examine a taking by a foreign sovereign of United States property within its own territory, they permit confiscations of property within the United States only if they do not conflict with United States law and foreign policy. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1027 (5th Cir.) (citing *Republic of Iraq v. First Nat'l City Bank*, 353 F.2d 47, 51 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966)), *cert. denied*, 409 U.S. 1060 (1972). Employing a similar principle, a foreign country could refuse to accept an American decree imposing dissolution or reorganization on the grounds that it affects property in that foreign state.

215. See note 214 *supra*.

216. Cf. *Nat'l. L.J.*, Jan. 14, 1980, at 24, col. 1 (Great Britain opposed application of antitrust laws to British companies).

217. *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980); *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980); *United States v. Bachelor*, 611 F.2d 443 (3d Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Grzywacz*, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *United States v. Dozier*, 493 F. Supp. 554 (M.D. La. 1980); *United States v. Sisk*, 476 F. Supp. 1061 (M.D. Tenn. 1979); *United States Barber*, 476 F. Supp. 182 (S.D.W. Va. 1979); *United States v. Vignola*, 464 F. Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976).

218. This contention was adopted only in *United States v. Mandel*, 415 F. Supp. 997, 1020-22 (D. Md. 1976). To the extent that it precluded all governmental enterprises, however, *Mandel* was overruled in *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980), and in *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980). The government has succeeded in alleging the following government organizations as enterprises: (1) police departments, *United States v. Grzywacz*, 603 F.2d 652, 654-57 (7th Cir. 1979) (officers received bribes in exchange for protection of illegal activities including prostitution and operation of taverns after closing hours), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Brown*, 555 F.2d 407, 412, 415-16 (5th Cir. 1977) (similar facts), *cert. denied*, 435 U.S. 904 (1978); (2) state administrative agencies, *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977) (employees of Pennsylvania Bureau of Cigarette and Beverage Taxes received bribes to permit importation of untaxed cigarettes), *cert. denied*, 434 U.S. 1072 (1978); *United States v.*

immaterial issue of whether Title IX was intended to prevent corruption of government agencies.<sup>219</sup> It cannot be disputed that Title IX is directed at corruption of government organizations; this is evident from the inclusion of bribery under state and federal law within the definition of "racketeering activity" in section 1961(1).<sup>220</sup>

Nevertheless, the definition does not resolve the government enterprise issue. The question is not whether public officials are immune from RICO criminal actions, but what is the *appropriate* enterprise to be alleged. Even if a government entity were not considered an enterprise under Title IX, corrupt public officials would not escape prosecution under RICO because the prevailing law would permit the prosecutor to charge that the parties to the bribery constituted an illegal enterprise in violation of section 1962(c).<sup>221</sup> In

Dozier, 493 F. Supp. 554, 554 (M.D. La. 1980) (Louisiana Dep't of Agriculture); United States v. Barber, 476 F. Supp. 182, 184 (S.D.W. Va. 1979) (West Virginia Alcohol Beverage Control Commission); (3) governor's office, United States v. Sisk, 476 F. Supp. 1061, 1062-63 (M.D. Tenn. 1979) ("Governor's office of the State of Tennessee"); (4) city traffic court, United States v. Bachelier, 611 F.2d 443, 444-45, 450 (3d Cir. 1979) (employees of Philadelphia Traffic Court received bribes), *cert. denied*, 100 S. Ct. 2152 (1980); United States v. Vignola, 464 F. Supp. 1091, 1094-97 (E.D. Pa.) (defendant, Presiding Judge of Philadelphia Traffic Court received bribes in exchange for appointing people to serve arrest warrants), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980); (5) county sheriff's office, United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (Sheriff of Wilson County, N.C. arranged for bribes in return for protecting prostitution); and (6) county prosecutor's office, United States v. Altomare, 625 F.2d 5, 7 (4th Cir. 1980) (Prosecuting Attorney of Hancock County, W. Va. attempted to elicit false testimony and facilitate illegal gambling).

219. See United States v. Grzywacz, 603 F.2d 682, 687 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980); United States v. Frumento, 563 F.2d 1083, 1091 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Brown, 555 F.2d 407, 415-16 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); United States v. Barber, 476 F. Supp. 182, 184-85 (S.D.W. Va. 1979). These cases cited the Statement of Findings and Purpose of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. Finding (3) refers to the tendency of organized crime "to subvert and corrupt our democratic processes." 84 Stat. 923. Judge Swygert's dissenting opinion in United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980), minimized the significance of these findings. *Id.* at 690 n.1 (Swygert, J., dissenting). Other authorities have contended that from a policy standpoint, it is logical to apply RICO to government organizations. They reason that the need to remove racketeering activity from government is as compelling as the need to remove this activity from private business. United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); Atkinson, *supra* note 10, at 13. In United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), the court responded that government entities have more adequate resources to combat corruption than private businesses, which need the protection of RICO. *Id.* at 1021.

220. 18 U.S.C. § 1961(1)(A) (1976). The court emphasized this fact in United States v. Sisk, 476 F. Supp. 1061, 1062 (M.D. Tenn. 1969).

221. United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976). The *Mandel* court noted that its holding "does not, as the government contends, provide some immu-

this context, it is difficult to discern any legislative intent to include government units as enterprises. Indeed, the legislative history contains no explicit references to government bodies as enterprises within Title IX.<sup>222</sup>

In addition, the government cannot obtain any significant advantage by alleging a government enterprise rather than an illegal enterprise. Indictment of legitimate entities normally benefits the government by triggering the operation of various remedies that affect the organization alleged as the enterprise. Use of the government enterprise theory does not offer this advantage because section 1964(a) civil remedies and section 1963 forfeitures are inappropriate when applied to government organizations.<sup>223</sup> If applied to a state government office, these remedies would raise serious constitutional questions concerning Congress' authority under the commerce clause "to structure the integral operations . . . of traditional [state] governmental functions."<sup>224</sup>

---

nity from prosecution to a public official that would be unavailable to a private party. As the Court has previously noted, whoever engages in prohibited patterns of racketeering activities comes within the purview of the statute, including public officials." *Id.* at 1022.

222. *RICO Analysis*, *supra* note 32, at 474. Some cases approving the government enterprise theory have acknowledged that no specific reference to government enterprises appears in the legislative history. *See, e.g.*, *United States v. Frumento*, 563 F.2d 1083, 1089 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978), *United States v. Barber*, 476 F. Supp. 182, 186 (S.D.W. Va. 1979). The opinion in *United States v. Mandel*, 415 F. Supp. 997, 1020 (D. Md. 1976) and Judge Swygert's dissenting opinion in *United States v. Grzywacz*, 603 F.2d 682, 690 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 2152 (1980), emphasized the absence of such references in the 2,097 pages of hearings, two congressional reports, and Title IX itself. These opinions viewed this silence as undermining any inference of authority to include government enterprises within Title IX.

223. *United States v. Grzywacz*, 603 F.2d 682, 691 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 100 S. Ct. 2152 (1980); *United States v. Barber*, 476 F. Supp. 182, 189 (S.D.W. Va. 1979). Judge Swygert's dissent in *Grzywacz* concluded that, because of the importance Congress attached to the novel remedies created by Title IX, the inapplicability of these remedies indicated that Congress did not intend to punish government enterprises. 603 F.2d at 691 (Swygert, J., dissenting). *Barber*, however, found no connection between the inapplicability of remedies and the inapplicability of substantive provisions. It cautioned that the characterization of the remedies as combating "takeovers of private businesses through illegal activity" did not inevitably lead to the conclusion that "had Congress specifically addressed the question, it would have excluded public entities from the substantive provisions of section 1962." 476 F. Supp. at 189. *Barber* failed to consider that Title IX employs a uniform definition of "enterprise" that should not vary from one section to another. If Congress did not intend to include public entities as enterprises for remedial purposes in §§ 1963 and 1964, it could not have intended to include them within the definition of "enterprise" in § 1962. *See* notes 170-72 *supra* and accompanying text.

224. *See National League of Cities v. Usery*, 426 U.S. 833, 852 (1976). The Supreme Court limited the application of federal minimum hour provisions to state employees, holding that Congress does not have authority under the commerce clause to regulate the integral operations of traditional state governmental functions.

The government enterprise issue is also closely related to the permissible scope of the enterprise. If, as mandated by the prevailing law, the prosecution can charge an illegal enterprise composed of any conceivable combination of individuals and corporations, the government enterprise concept does not significantly benefit the prosecution. On the other hand, if the illegal enterprise alternative is unavailable to prosecutors, the allegation of government enterprises may be the only means of furthering the legislative purpose of combating corruption in state government.

#### 4. Enterprise Pleading Problems

One of the few limitations on the "enterprise" term is that it may not be unnecessarily vague.<sup>225</sup> For example, *United States v. Vignola*,<sup>226</sup> distinguished a valid enterprise, the Philadelphia Traffic Court, from an enterprise described as the "State of Maryland" on the grounds that the latter was a "totally amorphous and intangible notion."<sup>227</sup> Even if an imprecise description of the "enterprise" is not impermissibly vague, the lack of precision may result in the reversal of a conviction if at trial the government establishes a different enterprise from that alleged in the indictment.<sup>228</sup>

*Id.* at 852-53. The "authority to make . . . fundamental employment decisions," *id.* at 851, is one of these functions. Mandatory forfeiture or divestiture of state offices under Title IX would obviously deprive the state of its authority to make "fundamental employment decisions." These remedies are a far greater intrusion on state sovereignty than the restrictions on wages and hours involved in *Usery*.

225. See note 138 *supra* and accompanying text.

226. 464 F. Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

227. *Id.* at 1096 n.17 (citing *United States v. Cianfrani*, 448 F. Supp. 1102 (E.D. Pa.), *rev'd and remanded*, 573 F.2d 835 (3d Cir. 1978)). In *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980), the alleged enterprise was a county sheriff's department. The court distinguished *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), on the ground that *Mandel* involved an allegation that a state was the enterprise. 617 F.2d at 1061. This distinction may impliedly adopt the *Vignola* criticism of the "State of Maryland" form of allegation.

228. The government may not allege an enterprise and then prove a different one at trial. See *Stirone v. United States*, 361 U.S. 212, 217 (1960) (variance between pleading and proof destroyed defendant's right to be tried only on charges in indictment). Few RICO cases have considered in detail the problem of proof at trial that is at variance with the indictment, and none have explicitly reversed convictions on that basis. See *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Hawes*, 529 F.2d 472, 480 (5th Cir. 1976); *United States v. Thevis*, 474 F. Supp. 117, 126 (N.D. Ga. 1979); *United States v. Frumento*, 426 F. Supp. 797, 803 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 620 (S.D.N.Y. 1973). Some cases assumed such a variance is impermissible, but held that variance did not occur in the particular case. See *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979) ("While the government might be faulted for imprecise language on occasion, it is clear that the indictment was predicated on a one-enterprise theory, and that that was the basis on which proof was offered and on

### C. Pattern of Racketeering

#### I. Continuity Analysis of "Pattern"

To the extent that courts permitting illegal enterprises have eliminated the enterprise element from section 1962(c), they have transformed that subsection into a direct prohibition against the commission of a pattern of racketeering activity or the collection of an unlawful debt.<sup>229</sup> Section 1961(5) does not actually define a "pattern

---

which the jury was charged."), *cert. denied*, 445 U.S. 927 (1980); *United States v. Frumento*, 426 F. Supp. 797, 803 (E.D. Pa. 1976), *aff'd*, 563 F.2d 1053 (3d Cir. 1977) ("The Government never suggested at trial, either by proof or argument, that there was any enterprise other than the Bureau upon which this prosecution was based. The Government's pleading and proof were in conformity."), *cert. denied*, 434 U.S. 1072 (1978). In addition, the Government can prove violations only of the predicate acts alleged in the indictment. *See United States v. Thevis*, 474 F. Supp. 117, 126 (N.D. Ga. 1979); *United States v. Stofsky*, 409 F. Supp. 609, 620 (S.D.N.Y. 1973). A variance as to the enterprise does not occur when the enterprise established at trial consists of fewer individuals than those alleged in the indictment. *United States v. Hawes*, 529 F.2d 472, 480 (5th Cir. 1976).

229. An alternative to proving a pattern of racketeering is proving that an enterprise was acquired or operated by means of collection of an unlawful debt defined in § 1961(6) as "a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." The term "business" is not defined, although it implies that the defendant was earning some amount of income from one of these illegal activities. Criminal Division, U.S. Dep't of Justice, *Racketeer Influenced and Corrupt Organizations Statute* 48 (4th ed. 1978). The defendant may argue that the term "business of gambling" should be defined by analogy to the term "illegal gambling business" contained in 18 U.S.C. § 1955(b)(1) (1976). If that definition were applied, the government would be compelled to establish the existence of a gambling business that involves five or more persons and that has been or is "in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day." 18 U.S.C. § 1955(b)(1)(iii) (1976). *But see United States v. Nerone*, 563 F.2d 836, 853 (7th Cir. 1977) (§ 1955 definition of illegal gambling business not applicable to § 1962), *cert. denied*, 435 U.S. 951 (1978). Although the government may contend that imputing the § 1955 definition to § 1962 would effectively merge the two statutes, a distinction remains if Title IX is limited to infiltration of legitimate businesses. Section 1955 would apply to businesses organized for the purpose of conducting illegal gambling. In contrast, § 1962(c) would apply to a legitimate business that has been modified to facilitate gambling. The most convincing argument against incorporating the § 1955 definition is based on an analogy to the reasoning in *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62). In rejecting the imputation of the definition of "pattern" in 18 U.S.C. § 3575(e) to Title IX, *DePalma* reasoned that, had Congress intended such a definition for Title IX, it would have specifically included it. *Id.* at 784. It seems reasonable to assume, as the *DePalma* court did, that when Congress

of racketeering activity,"<sup>230</sup> but states that it "requires at least two acts of racketeering activity, 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 of racketeering activity."<sup>231</sup>

includes language in one statute but not in another statute—particularly one passed in the same legislative act—it did not intend that the language apply to the latter. See note 251 *infra* and accompanying text. Few reported cases employ this alternative and none discuss its requirements in significant detail. See *United States v. Salinas*, 564 F.2d 688 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978). A significant difference between a pattern of racketeering and the collection of unlawful debts may be that no explicit requirement exists that the defendant perform two or more acts involving collections of unlawful debts. One collection may be sufficient, while at least two acts of racketeering are required. This conclusion is questionable, however. The Senate Report on RICO, *Senate Report, supra* note 48, can be characterized as excluding isolated or sporadic collection activity as well as isolated racketeering activity because it states that "[t]he target of title IX is thus not sporadic activity." *Id.* at 158; see notes 232-34 *infra* and accompanying text. It could be argued that, if a single racketeering act does not justify severe RICO penalties, neither should a single collection. Nevertheless, the response to this contention is that even one collection is not isolated or sporadic because the debt must be incurred in connection with an ongoing business of either gambling or usurious lending. 18 U.S.C. § 1961(6) (1976).

230. Although § 1961 is titled "Definitions," § 1961(5) is not actually a definition. In *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977), the court pointed out that, rather than define "pattern," § 1961(5) explains how to prove it. The phrase "pattern of racketeering activity" is vulnerable to constitutional challenges on vagueness grounds. The commonly applied constitutional standard for vagueness is that a criminal statute is void when it fails to give "a person of ordinary intelligence fair notice that this contemplated conduct is forbidden." *Palmer v. City of Euclid*, 402 U.S. 544, 545 (1971) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)); see note 61 *supra*. The Ninth Circuit has acknowledged that, if "pattern of racketeering activity" were undefined, the term would be unmanageable. *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). This court asserted that any ambiguity was cured by the definitions of "pattern" and "racketeering activity" in § 1961. *Id.* However, it ignored the fact that § 1961(5) does not actually define "pattern." *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977).

231. 18 U.S.C. § 1961(5) (1976). Title IX may violate the constitutional prohibition on ex post facto laws, U.S. Const. art. I, § 9, cl. 3, because it permits the prosecution of activities that occurred prior to its effective date. See *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States v. Brown*, 555 F.2d 407, 418-21 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *United States v. Campanale*, 518 F.2d 352, 357, 365 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). This contention has been rejected based upon a statement in a Senate Report on Title IX: "One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder." *Senate Report, supra* note 48, at 158; see *United States v. Brown*, 555 F.2d 407, 417 n.19 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *United States v. Campanale*, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976). Another case con-



In accordance with section 1961(5), the courts have insisted that one isolated racketeering act does not constitute a "pattern."<sup>232</sup> How-

---

cluded that the ex post facto clause is not violated because the RICO offense is not complete until a racketeering act occurs after the effective date. *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). *Field* reasoned that the statute theoretically notified a defendant who committed racketeering acts prior to that date that a further act will violate Title IX. *Id.* Unfortunately, this "notice" argument is meaningless in illegal enterprise cases if no intent requirement or meaningful common scheme element exists. *See* note 2 *supra*; pt. III(C)(2) *infra*; pt. III(F) *infra*. The hypothesized notice, for example, would not inform the defendant whose proscribed act occurs after the effective date, if he does not know that his diverse criminal activities constitute an enterprise. RICO conspiracies raise more complex ex post facto questions. Unlike the § 1962(c) offense, which is complete upon the commission of two racketeering acts, one occurring after the effective date, a RICO conspiracy is complete upon agreement. *See United States v. Forsythe*, 429 F. Supp. 715, 720 n.2 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977). If the agreement occurred prior to the effective date, the crime was committed prior to that date. Nevertheless, courts have held that a RICO conspiracy formed prior to the effective date can be punished if it continues after that date. *See United States v. Pantone*, 609 F.2d 675, 679 (3d Cir. 1979); *United States v. Herman*, 589 F.2d 1191, 1198 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979); *United States v. Campanale*, 518 F.2d 352, 365 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). The reasoning is that § 1962(d) does not punish acts committed prior to the effective date, rather, the defendant who is put on notice that subsequent acts would combine to produce the proscribed pattern of racketeering is convicted for performing acts in furtherance of the conspiracy after that date. The Fifth Circuit adopted this approach but reversed convictions because the trial court had failed to instruct the jury that the conspiracy must continue after the effective date. *United States v. Brown*, 555 F.2d 407, 419-20 & n.26 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). This analysis, however, is based on the erroneous assumption that § 1962(d) punishes acts performed after the effective date; in fact, it punishes only the agreement. Any acts in furtherance of the agreement are merely evidence of that conspiracy and are not elements of the crime. Furthermore, in a jurisdiction following the *Elliott* view of conspiracy, *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), the *Campanale* theory is meaningless because a defendant can be convicted even if he does not know that his acts are part of a § 1962(d) conspiracy. *See* notes 433-37 *infra* and accompanying text. *Elliott* can be read in a manner that substantially alleviates the ex post facto problem. *Elliott* punishes those who agree to "participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes." 571 F.2d at 902. It therefore effectively punishes an agreement to commit the elements satisfying the pattern requirement, and an element of a pattern is that one of the acts occur after the effective date. It is logical to construe § 1962(d) as requiring that each defendant agree and intend to commit a racketeering act after the effective date. Accordingly, a defendant could not be convicted merely because the conspiracy continued past the effective date if he did not commit any overt acts in furtherance of the conspiracy after the effective date. If one accepts the view that § 1962(d) requires the actual commission of racketeering activities, RICO can be regarded as punishing acts performed after its effective date. *See* note 488 *infra* and accompanying text.

232. *See United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 363 n.32 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Ladmer*, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977); *United States v. Moeller*, 402 F. Supp. 49, 58, 60 & n.9 (D. Conn. 1975).

ever, the more significant and complex question that arises is whether the commission of two or more acts of racketeering will always constitute a "pattern." The Report of the Senate Judiciary Committee on the proposed Organized Crime Control Act<sup>233</sup> cautioned that "[t]he target of Title IX is thus *not* sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which combines to produce a pattern."<sup>234</sup>

It is easy to conceive of a defendant who has committed two acts of racketeering that can be characterized as "sporadic activity." The two acts might be widely separated in time from one another and from the date of the indictment. The length of time from the last racketeering act to the indictment is particularly important as the passage of time may be sufficient to remove "the threat of continuing activity."<sup>235</sup> If this situation occurs, the finding of a "pattern" would require the assumption that, once he commits the two acts, a defendant perpetually poses "the threat of continuing activity."<sup>236</sup> Most cases, however, have involved patterns arising from the commission of many racketeering acts in relatively short periods of time.<sup>237</sup> Con-

233. *Senate Report*, *supra* note 48. The report has been a major influence on courts construing the meaning of the term "pattern." *See* *United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352, 363 n.32 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. DePalma*, 461 F. Supp. 778, 783 n.6 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

234. *Senate Report*, *supra* note 48, at 158 (emphasis added). The report cautioned that "[o]ne isolated 'racketeering activity' [is], though, insufficient to trigger the remedies provided under the proposed chapter, largely because the net would be too large and the remedies disproportionate to the gravity of the offense." *Id.* Sen. McClellan vigorously asserted that the commission of two racketeering acts does not establish a pattern in the absence of a relationship between the acts. 116 Cong. Rec. 18940, 91st Cong., 2d Sess. (1970); *see House Hearings*, *supra* note 155, at 664 (statement of Ass't Att'y Gen. Wilson).

235. *Cf. United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977) ("The language of the Act, which makes a pattern of conduct the essence of the crime, 'clearly contemplates a prolonged course of conduct.'" (quoting *Toussie v. United States*, 397 U.S. 112, 120 (1970)), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978). *But see United States v. Altese*, 542 F.2d 104, 108 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (assuming that only two acts constitute a pattern), *cert. denied*, 429 U.S. 1039 (1977).

236. Diligent application of the "threat of continuing activity" language might assuage the fears of those who contend that the government could "collect a batch of minor crimes and call it general racketeering." *Newsweek*, Aug. 20, 1979, at 82, col. 2; *id.* at 83, col. 1; *see Investing Dirty Money*, *supra* note 29, at 1492 n.10.

237. *See United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976) (several illegal card games within 19 months found to be a pattern and not merely sporadic activity); *United States v. Fineman*, 434 F. Supp. 189, 193 (E.D. Pa. 1977) (acceptance of four

sequently, the effect of the "continuity factor" has not yet been tested in a borderline situation involving two acts widely separated in time from one another and from the date of the indictment. *United States v. DePalma*<sup>238</sup> most closely resembled this borderline fact pattern. The case involved a securities fraud in 1973 and a bankruptcy fraud in 1977, both of which occurred in the operation of a legitimate business. The court held that the two fraudulent schemes constituted a pattern within the meaning of the continuity criterion of the Senate Report.<sup>239</sup>

In terms of a "continuity" analysis, it is possible to distinguish between the *DePalma* situation involving illegal operation of a legitimate business and one involving an illegal enterprise. In the former, the continuity is supplied by the continuing corporate existence of the legitimate business as a vehicle for the criminal scheme. As long as the legitimate enterprise exists, the defendant poses a "threat of continuing activity." In contrast, an illegal operation generally includes a group of people with a constantly changing membership, a loose organizational structure, and a stop-and-start existence.<sup>240</sup> Frequently, the mere existence of an illegal enterprise does not supply continuity because, unlike a stable, continuing business, the parties to an illegal operation are likely to come together temporarily for single-purpose ventures.

## 2. "Common Scheme" Analysis of "Pattern"

Some authorities have not emphasized the continuity factor, and have construed "pattern" to require proof of a common scheme, plan, or motive connecting the racketeering acts.<sup>241</sup> Under this approach,

---

bribes over a two and one-half year period sufficient to establish a pattern); *United States v. Field*, 432 F. Supp. 55, 60 (S.D.N.Y. 1977) (14 separate acts within four year period constituted pattern), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (two separate acts within a one and one-half year period could constitute pattern).

238. 461 F. Supp. 778 (S.D.N.Y. 1978), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

239. 461 F. Supp. at 783 n.6.

240. *See, e.g.*, *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

241. *United States v. Kaye*, 556 F.2d 855, 860-61 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977); *United States v. Stofsky*, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973); *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); *see* H. Devitt & C. Blackmar, 2 *Federal Jury Practice and Instructions* §§ 56.20, 56.23 (3d ed. Supp. 1979); Atkinson, *supra* note 10, at 11; *RICO Analysis*, *supra* note 32, at 452-53. In *United States v. Anderson*, 626 F.2d 1358, 1367 (8th Cir. 1980), the court stated that "the ordinary and natural meaning" of "pattern" requires a relationship between the acts. The government also seems to recognize the existence of the common scheme element. *See* Criminal Division, U.S. Dep't of Justice, *An Explanation of Racketeer Influenced and Corrupt Organizations Statute* 22, 24, 26 (4th ed. 1978). Some

the word "pattern" requires more than accidental or unrelated instances of proscribed conduct.<sup>242</sup> The origin of the common scheme approach cannot be found in any explicit reference in the language of Title IX, although there is some support for it in the legislative history.<sup>243</sup> Courts requiring a common scheme have based their approach on a general understanding of the term "pattern,"<sup>244</sup> the need for such a requirement to prevent the use of section 1962(c) against "the isolated acts of an independent criminal,"<sup>245</sup> and an analogy to a separate provision of the Organized Crime Control Act of 1970.<sup>246</sup> That provision, 18 U.S.C. § 3575,<sup>247</sup> includes the phrase "pattern of conduct criminal under applicable laws" as a predicate for the special offender status that is used for sentencing purposes. The definition of pattern of criminal conduct in section 3575(e) embraces "criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."<sup>248</sup> One court has reasoned that the definition in section 3575(e) is applicable to Title IX because statutes that are part of the Organized Crime Control Act are to be construed similarly under the principle of *in pari materia*.<sup>249</sup>

courts, however, have refused to read this element into the statute. *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62); *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Thevis*, 474 F. Supp. 134, 139 n.7 (N.D. Ga. 1979).

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

243. *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

244. In *United States v. White*, 386 F. Supp. 882 (E.D. Wis. 1974), the court asserted that in common usage the term "pattern" connoted a "combination of qualities or acts forming a consistent or characteristic arrangement." *Id.* at 883. The use of "pattern" in the context of § 1962 suggested "that the two must have a greater interrelationship than simply commission by a common perpetrator" and must be "part of a particular continuing criminal activity." *Id.*; *accord, Investing Dirty Money*, *supra* note 29, at 1499. The racketeering acts in *White* involved, *inter alia*, mail fraud and interstate transportation of stolen property.

245. *United States v. White*, 386 F. Supp. 882, 884 (E.D. Wis. 1974); *accord, United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973). In *White*, the court reasoned that, "[a]bsent a showing of a 'pattern' or interrelatedness of such activity, § 1962(c) could be used against the isolated acts of an independent criminal; such was not the intended target of the challenged statute." 386 F. Supp. at 884.

246. Pub. L. No. 91-452, 84 Stat. 922 (codified at scattered sections of 18 U.S.C. & 28 U.S.C.); *United States v. Stofsky*, 409 F. Supp. 609, 613-14 (S.D.N.Y. 1973).

247. 18 U.S.C. § 3575 (1976).

248. *Id.*

249. *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973). The court noted that, "[w]hile § 3575 concerns a pattern discerned for post-conviction purposes

a. Criticism of "Common Scheme" Approach

The most extensive criticism of the common scheme approach is found in *United States v. Weisman*.<sup>250</sup> *Weisman* rejected the analogy to section 3575(e), noting that, when Congress chooses to include language in one statute and not another, it does not intend that the language apply to the latter provision.<sup>251</sup> This argument has considerable merit. The analogy to section 3575(e) is a misapplication of *in pari materia* because that doctrine is to be used to construe only the same ambiguous term within the same statute.<sup>252</sup>

*Weisman* offered a second, broader criticism of the common scheme view. The court asserted that Congress had supplied the interrelationship element by requiring that the "pattern" be related to the affairs of an enterprise; accordingly, the term "pattern" does not require any relationship between the two acts<sup>253</sup> beyond the re-

and thus involving considerations somewhat different from those involved in § 1961 et. seq., the policies which have led Congress to create a separate crime for a pattern of criminal activity are not very different from those which have led it to create increased penalties for a pattern of conduct which is criminal. Without opining whether § 3575(e) is sufficient for its purposes, it would seem that it may be used to cast light on the word "pattern" as used in § 1961." *Id.* *In pari materia* is defined as "upon the same matter or subject." Black's Law Dictionary 898 (Rev. 4th ed. 1951). The rule is "applicable when construing contemporaneous legislation concerned with a specific subject," *Northern Pacific Ry. v. United States*, 156 F.2d 346, 350 (7th Cir. 1946), *aff'd*, 330 U.S. 248 (1947), and is used only when the meaning of the statute is "ambiguous or doubtful." *Id.*

250. *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

251. *Id.* at 1122-23; *see General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968).

252. *See General Elec. Co. v. Southern Constr. Co.*, 383 F.2d 135, 138 n.4 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); *Northern Pacific Ry. v. United States*, 156 F.2d 346, 350 (7th Cir. 1946), *aff'd*, 330 U.S. 248 (1947). The analogy fails because it inserts the specific language of another statute.

253. 624 F.2d at 1122-23. The lower court reasoned that "[t]wo significant amendments to the definition of pattern of racketeering, prior to the enactment of the statute, lend further support to this view. Prior to these amendments the definition was as follows: 'The term pattern of racketeering activity includes at least one act occurring after the effective date of this chapter.' Since 'the term "pattern" indicates that what is intended to be proscribed is not a single isolated act of "racketeering activity," but at least two such acts' the statute was amended to read as follows: 'The term "pattern of racketeering activity" means at least two acts, one of which occurred after the effective date of this chapter.' There was no requirement that the two acts . . . even be related in time. This was the cause of some concern to those who commented on the proposed bill. Such concerns led to the enactment of the ten year limitation in the statute. It was this ten year limitation that provided any requirement of nexus between the two predicate acts. In its final form the statute simply required that the person commit at least two acts of racketeering activity within a ten year period." *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978) (citations omitted).

quirement that they occur within ten years of each other.<sup>254</sup> By requiring that the pattern be related to the enterprise, *Weisman's* reasoning is applicable only when a legitimate enterprise is involved. This point is facile, however, in view of the majority rule that an illegal operation can constitute an enterprise, an interpretation that effectively eliminates the enterprise element and transforms section 1962(c) into a prohibition of patterns of racketeering activity.<sup>255</sup> In illegal enterprise cases, the interrelationship of the pattern to the enterprise is not apparent because the enterprise has no independent existence.

An advantage of the common scheme approach is that it effectively precludes the government from compiling all crimes committed by a person and prosecuting the individual as an illegal enterprise under section 1962(c). This advantage results because a series of unrelated crimes could not be charged as a pattern in the absence of a common scheme, plan, or motive. In contrast, the "continuity" analysis would not remedy this problem because it does not require a relationship between the acts except that the racketeering activity be of sufficient quantity and character to pose a threat of continuing activity. However, the government could be prevented from alleging unrelated crimes without construing "pattern" to require a common scheme if the courts read a mens rea requirement into section 1962(c) so that knowledge of the existence and general scope of the pattern were required.<sup>256</sup> The government would have difficulty satisfying the mental element when the acts are unrelated because the defendant could not reasonably know that unrelated acts are part of a pattern.<sup>257</sup> Therefore, analyzing the problem of unrelated racketeering activities as an intent issue is a viable alternative to a common scheme interpretation of "pattern."<sup>258</sup>

### b. *Single Transaction Illegal Activity*

A major defect in the common scheme approach to "pattern" is that it does not resolve the issue whether a pattern is formed from acts

---

254. *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62); *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

255. See pt. III(A) *supra*; notes 355-60 *infra* and accompanying text.

256. See pt. III(F) *infra*.

257. It is possible that courts adopting the common scheme approach assume that no mens rea requirement exists. If there were a mens rea requirement, there might be no need to require a "pattern" element relating to the racketeering activities.

258. It is arguable that even the common scheme interpretation of "pattern" does not ensure any meaningful relationship between the acts. The "pattern" definition in § 3575(e), supposedly applicable by analogy, extends beyond common scheme, plan, or motive, to include the "same or similar purposes, results, participants, victims, or methods of commission." 18 U.S.C. § 3575(e) (1976). Rarely would two acts be so unrelated that no pattern could be found under the broad standard of § 3575(e).

that are so closely related in time and space that they are part of the same transaction.<sup>259</sup> The clearest example of the single transaction problem is found in *United States v. Moeller*.<sup>260</sup> In that case, the two racketeering acts, burning a factory and kidnapping three employees, occurred at the same place, on the same day, and in the course of the same criminal episode. Although previous cases considering the single transaction problem had held that a pattern can be composed of closely related racketeering acts,<sup>261</sup> *Moeller* questioned these holdings. The court believed that a "common sense interpretation" of "pattern" implies acts "occurring in different criminal episodes, episodes that are at least somewhat separated in time and place yet sufficiently related by purpose to demonstrate a continuity of activity."<sup>262</sup> Because it was precluded by Second Circuit authority from adopting this construction, however, the district court found that a pattern could be based on the two acts in the arson scheme.<sup>263</sup>

The *Moeller* analysis is essential if section 1962(c) is to be rationally applied. Generally, any racketeering act can violate at least two of the federal and state offenses incorporated into Title IX. Therefore, absent a requirement that the two racketeering acts be part of different transactions, a single criminal act could often be sufficient for pros-

---

259. This issue is most often litigated in prosecutions of alleged patterns consisting of two violations of the mail fraud statute, 18 U.S.C. § 1341 (1976), in furtherance of a single scheme to defraud. See *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978); *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979); *United States v. Salvitti*, 451 F. Supp. 195, 200 (E.D. Pa.), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978). The preponderance of mail fraud cases may confuse the law in this area. Statutes such as § 1341, requiring some act in furtherance of a scheme to defraud, are difficult to apply in the context of Title IX. The difficulty is evident in *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), which involved violations of a statute similar to the mail fraud statute. In *Parness*, the defendant was charged with multiple violations of 18 U.S.C. § 2314 (1976) based on acts of interstate transportation in furtherance of a scheme to defraud. The defendant argued that the "pattern" element was unconstitutionally vague because he could not know whether the RICO requirement of racketeering acts referred to two fraudulent schemes or two acts of transportation during a single scheme. The court assumed arguendo that, under some circumstances, ambiguity might exist. 503 F.2d at 442.

260. 402 F. Supp. 49 (D. Conn. 1975).

261. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); *United States v. Chovanec*, 467 F. Supp. 41 (S.D.N.Y. 1979); *United States v. Salvitti*, 451 F. Supp. 195 (E.D. Pa.), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978).

262. 402 F. Supp. at 57 (emphasis deleted).

263. *Id.* at 58. While criticizing single transaction patterns, *Moeller* was controlled by the decision in *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), which upheld such patterns.

ecution under RICO,<sup>264</sup> and the congressional condemnation of patterns based on isolated or sporadic activity would be undermined.<sup>265</sup>

The "common scheme" construction of "pattern" does not remedy the single transaction problem. Indeed, *United States v. Weatherspoon*<sup>266</sup> asserted that a common scheme element is inconsistent with a requirement that the racketeering acts be part of different transactions. The court reasoned that the defendant's challenge to the single transaction pattern "would require a showing of separate and unrelated schemes."<sup>267</sup> While the common scheme element may not compel a single transaction pattern as *Weatherspoon* contended, it does not preclude this type of pattern because there is no requirement of any temporal or spatial separation between the racketeering acts. In contrast, the continuity analysis adequately deals with the troublesome single transaction issue. Using this mode of analysis, the

---

264. Atkinson, *supra* note 10, at 11-12. Fearing that "pattern" would be reduced to a single criminal act, the commentator endorsed the *Moeller* view. *Id.* at 12. Even if a single act did not violate different statutes, the pattern could be supplied by a single act and offenses concealing that act. Enumerated as racketeering acts in § 1961(1)(B), the concealment offenses are obstruction of justice, 18 U.S.C. § 1503 (1976), obstruction of criminal investigations, 18 U.S.C. § 1510 (1976), and obstruction of state or local law enforcement, 18 U.S.C. § 1511 (1976). The Fourth Circuit opinion in *United States v. Altomare*, 625 F.2d 5, 8 & n.9 (4th Cir. 1980), seems to permit the government to allege patterns including an obstruction act committed to conceal other racketeering acts in the pattern. *Cf.* *United States v. Fineman*, 434 F. Supp. 189, 195-96 (E.D. Pa. 1977) (government must allege and prove obstruction of justice activities directed against witness who is not member of enterprise). A pattern consisting of a single act and a concealment offense may involve more than one transaction and may have more continuity than the pattern consisting of a single act violating two statutes. Arguably, the concealment pattern, like the single transaction pattern, does not pose a threat of continuing criminal activity. If the concealment is successful, the criminal activity of the enterprise ceases and the threat disappears. If the concealment is unsuccessful, only the threat of continued concealment remains rather than the threat of independent criminal activities. In either case, it is difficult to justify the imposition of harsh RICO penalties for one criminal act and concealment activities generally occurring in criminal ventures. *Cf.* *Grunewald v. United States*, 353 U.S. 391 (1957) (concealment activities do not extend the duration of a conspiracy for purposes of the statute of limitations and the co-conspirator non-hearsay rule because all conspiracies involve some form of concealment).

265. Congress cautioned that, in light of the harsh penalties imposed, one isolated activity is insufficient for the RICO offense. *Senate Report, supra* note 48, at 158; *see* notes 233-34 *supra* and accompanying text.

266. 581 F.2d 595 (7th Cir. 1978).

267. *Id.* at 601 n.2. *See also* *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979). *Weatherspoon* concluded that a common scheme, plan, or motive interpretation might be required to prevent the RICO statute from being attacked on constitutional grounds of vagueness. 581 F.2d at 601 n.2. *Weatherspoon*, however, is a mail fraud case that should be assessed with caution because of the difficulty in applying that statute to Title IX. *See* note 259 *supra*.



defendant can contend that, even though one criminal transaction produced two racketeering acts, those acts were merely sporadic and do not pose a threat of continuing activity.<sup>268</sup>

### 3. "Common Scheme" and Joinder

The deficiency of the "common scheme" approach in relation to the single transaction issue, together with the absence of support for that construction in both the statutory language and the legislative history, might undermine the validity of that construction. There is, however, a broader question of the relationship between section 1962 and rule 8(a) of the Federal Rules of Criminal Procedure. Rule 8(a) permits joinder of an individual defendant's offenses only if they "are of same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."<sup>269</sup>

Application of this standard to a RICO offense for which no common scheme or other relationship between the racketeering acts is required could produce considerable confusion. If a defendant were charged with a pattern of racketeering activity consisting of two unrelated offenses, joinder of the two offenses and the RICO count in a single trial might be barred.<sup>270</sup> Two alternative conclusions are possible. One is that Congress intended to create a RICO offense that precludes joinder of unrelated predicate offenses in a single trial. A second, more logical hypothesis is that Congress intended that section 1962(c) racketeering acts be sufficiently related so that joinder of the predicate offenses in the crime is possible.

The common scheme construction of "pattern" is a useful approach to reconciling RICO with the joinder rules. If this analysis is adopted, however, the "pattern" definition must also resolve the "single transaction" problem by requiring that the racketeering acts be separated from one another by a substantial period of time. This could be accomplished by adopting the "series of transactions" language of rule 8. A pattern would be composed of two or more transactions that are part of a common scheme or plan, but not so closely related in time as to be part of the same transaction. This formulation may ensure that the defendants' activities are characterized by sufficient continuity to pose the serious threat to society that justifies the imposition of severe RICO penalties.

---

268. See *United States v. Moeller*, 402 F. Supp. 49, 57 (D. Conn. 1975) (emphasizing the "continuity" element in the legislative history as support for its criticism of single transaction patterns); see notes 232-34 *supra* and accompanying text.

269. Fed. R. Crim. P. 8(a).

270. The two offenses are not transformed into connected transactions under rule 8(a) merely because RICO incorporates them into a single offense. Rule 8(b) contains the language "constituting an offense," which would support this construction. Rule 8(a), however, contains no such language. See notes 595-96 *infra*.

### D. Racketeering Activity

The racketeering acts<sup>271</sup> forming a pattern must come within the definition of "racketeering activity" in section 1961(1). That definition includes eight state offenses and twenty-four categories of federal offenses.<sup>272</sup>

#### 1. Incorporated Federal Offenses

Few significant issues relating to the federal offenses described in section 1961(1) have been litigated.<sup>273</sup> One problem has been the

---

271. A person can only be charged with those racketeering acts in which he participated as a principal, that is, when he commits an offense or aids and abets its commission. 18 U.S.C. § 2 (1976); see notes 104-07 *supra* and accompanying text. Moreover, racketeering acts cannot be imputed to a person through vicarious liability. See *United States v. Cryan*, 490 F. Supp. 1234, 1240-43 (D.N.J. 1980). *Cryan* rejected the vicarious liability doctrine in the context of a discussion of RICO conspiracy and evidentiary principles. See notes 480-83 *infra* and accompanying text.

272. 18 U.S.C. § 1961(1) (1976). Section 1961(1) defines "racketeering activity" as: "(A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), . . . sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(C) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy, fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States." Different rules of statutory construction apply to §§ 1961(1)(B) and (C), which refer to specific incorporated statutes, and subsections (A) and (D), which employ general references to incorporated offenses. If a statute enumerated in (B) and (C) is or has been amended or repealed after October 15, 1970, the effective date of Title IX, the courts may be required to ignore those developments and apply the law existing on that date. This approach follows from the rule of statutory construction providing that when a statute specifically incorporates another statute an amendment to the incorporated statute will not affect the adopting statute unless contrary legislative intent is clearly shown. *Hassett v. Welch*, 303 U.S. 303, 314 (1938). Because of the absence of a clear congressional intent to the contrary, statutes enumerated in § 1961(1)(B) and (C) must be construed as if no amendments had occurred after October 15, 1970. In contrast, amendments to the offenses mentioned in § 1961(1) (A) and (D) would be effective for purposes of Title IX because those subsections refer to the law generally relating to a particular subject. See generally *Professional and Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274, 294 (D. Mont. 1958).

273. One litigated issue concerned § 1961(1)(C), defining racketeering activity as "any act which is indictable under title 29, United States Code, section 186." In *United States v. Kaye*, 556 F.2d 855, 859 (7th Cir.) cert. denied, 434 U.S. 921 (1977), the defendant unsuccessfully pointed out that a violation of 29 U.S.C. § 186(b)(1) is a misdemeanor and, as such, was not intended to fall within the scope of the term "indictable." He described the inclusion of § 186 into § 1961(1)(C) as a mistake and asserted that § 186 should be stricken from the statute. In rejecting this

puzzling insertion of parentheticals in section 1961(1)(B) and (C) explaining the nature of the crimes set forth in the enumerated statutes.<sup>274</sup> These summaries have caused difficulties when the indictment alleges actions that would normally constitute violations of the predicate offense but that do not violate the statute as described in the parentheticals.<sup>275</sup> The Fifth Circuit has held that the summaries were merely intended to aid in identifying the enumerated statutes, not to limit the scope of those offenses.<sup>276</sup> Unfortunately, the court neither explained why an aid to identification is needed nor considered rules of statutory construction that discourage interpretations rendering statutory language redundant or superfluous.<sup>277</sup> Nevertheless, the brief descriptions are unnecessary to express the intent of

---

argument, the court noted that misdemeanors are indictable in the sense that, under Fed. R. Crim. P.7(a), they can be prosecuted either by indictment or information. 556 F.2d at 859-60. A more significant issue may arise from attempts by the government to include nonenumerated offenses within the broad language of predicate crimes such as mail fraud, 18 U.S.C. § 1341 (1976), and interstate transportation of stolen property. 18 U.S.C. §§ 2314, 2315 (1976). For example, the government has alleged that violations of copyright laws, which are misdemeanors, constituted transportation of stolen property. *United States v. Gottesman*, No. 80-59 (S.D. Fla., indictment filed Feb. 12, 1980). In *Gottesman*, a defendant was accused of pirating video cassettes and charged with a RICO violation under the theory that the pirated movies were stolen property. *Id.*

274. 18 U.S.C. § 1961(1) (1976); see note 272 *supra*.

275. See *United States v. Herring*, 602 F.2d 1220, 1223 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 734 (1980). In *Herring*, the predicate offense, 18 U.S.C. § 2314 (1976), was described in § 1961(1) with the following summary: "(Relating to interstate transportation of stolen property)." 18 U.S.C. § 1961(1) (1976). The indictment, however, alleged a violation of § 2314 resulting from interstate transportation of property *converted or taken* by fraud rather than interstate transportation of *stolen* property. The defendant contended that, even if the alleged conduct was a violation of § 2314, the description of § 2314 in § 1961(1) limited its use, for RICO purposes, to transportation of stolen property. 602 F.2d at 1223.

276. See *United States v. Herring*, 602 F.2d 1220, 1223 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 734 (1980). *Herring* contrasted the language in § 1961(1) limiting the incorporation of 18 U.S.C. § 659 offenses with the language in § 2314 and said that "[i]f Congress had intended to exclude the interstate transportation of property obtained by fraud from its definition in section 1961, it specifically could have limited the incorporation of section 2314 as it did the incorporation of section 659, where only felonious acts under section 659 are included." 602 F.2d at 1223.

277. The courts have often held that, if possible, all parts of an act are to be given effect. See, e.g., *Administrator, Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 262 (1975); *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 634 (1973). This rule cautions against a construction that renders any words and provisions redundant, superfluous, or insignificant. E.g., *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 395, 406 (D.C. Cir. 1976). Generally, courts are reluctant to assume that a legislative body employed accidental or careless language. *Griffin v. United States*, 537 F.2d 1130, 1136 (Temp. Emer. Ct. App.), *cert. denied*, 429 U.S. 919 (1976); *United States v. Johnson*, 462 F.2d 423, 428 (3d Cir. 1972), *cert. denied*, 410 U.S. 937 (1973).

the statute and should be regarded as mere surplusage without substantive effect.<sup>278</sup>

#### a. Marijuana Offenses

A more significant ambiguity in the definition of "racketeering activity" involves the question whether Title IX applies to marijuana offenses. Although the government is prosecuting marijuana activities as RICO violations,<sup>279</sup> section 1961(1)(D) merely states that Title IX incorporates "any offense involving . . . the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs."<sup>280</sup> Narcotic and dangerous drugs are not defined. The absence of the word "marijuana," together with specific references to that drug at various stages of RICO's legislative history, strongly indicates that section 1961(1)(D) does not encompass marijuana offenses. For example, an early RICO proposal, S. 2049,<sup>281</sup> prohibited the acquisition of a business with income derived from "criminal activity" and the agent of a corporation from authorizing the corporation to engage in "criminal activity."<sup>282</sup> The term "criminal activity" included federal offenses specifically involving "narcotic drugs or marihuana, language that appeared in eleven subsequent RICO proposals."<sup>283</sup> Additionally,

278. Words that are unnecessary to express the intent of the act can be regarded as surplusage if the intent of the legislature is clear. *Young v. Brashears*, 560 F.2d 1337, 1345 (7th Cir. 1977). In the case of Title IX, the inclusion of the title and section numbers of the incorporated statutes would have been completely adequate to identify the offenses.

279. *See, e.g.*, *United States v. Rittenberg*, No. 80-0256S (S.D. Cal., indictment filed April 21, 1980); *United States v. Sneed*, No. 79-10-CR (E.D. Tex., indictment filed July 10, 1979).

280. 18 U.S.C. § 1961(1)(D) (1976).

281. S. 1623, 91st Cong., 1st Sess. (1969), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 37.

282. *Id.* §§ 2(a), (b), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 39-40.

283. *Id.* § 1(1), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 37. The eleven proposals were: S. 1623, 91st Cong., 1st Sess. § 2 (1969), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 37; H.R. 10077, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 919, 919-20; H.R. 9710, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 910, 910-11; H.R. 9327, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 872, 872-73; H.R. 7596, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 846, 846-47; H.R. 5216, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, 808, 808-09; H.R. 2774, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 774, 774-75; H.R. 2697, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 765, 765-66; H.R. 2154, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 745, 745-46; H.R. 760, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 731, 731-32; H.R. 326, 91st Cong., 1st Sess. § 2 (1969), reprinted in *House Hearings*, supra note 155, at 719, 719-20.

when a subsequent RICO proposal, S. 1861,<sup>284</sup> was introduced, the Justice Department suggested that the definition of "racketeering activity" include acts involving "narcotic drugs, marihuana or other dangerous drugs."<sup>285</sup>

Outside the legislative history, the only source of enlightenment as to the meaning of "narcotic or other dangerous drugs" are other definitions provided in the United States Code. The definition of "narcotic drug" in 21 U.S.C. § 802(16) does not include marijuana.<sup>286</sup> Moreover, many courts refuse to characterize marijuana as a "narcotic drug."<sup>287</sup> Although the term "dangerous drugs" is not used in any other federal statute, it is unlikely that marijuana is sufficiently hazardous to fall within the category of dangerous drugs.<sup>288</sup> Even Professor Blakey, a leading proponent of broad construction of Title IX and thought to be the principal draftsman of the statute, has conceded that marijuana violations are not punishable under RICO.<sup>289</sup>

284. S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9512 (1969).

285. Letter of Deputy Att'y Gen. Richard G. Kleindienst to Sen. John L. McClellan (Aug. 11, 1969), reprinted in *Measures Relating to Organized Crime*, supra note 36, at 405. The courts have held that Congress' rejection of specific language indicates that Congress did not intend to incorporate the proposal in the final statute. See, e.g., *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 460-61 (1974).

286. 21 U.S.C. § 802(16) (1976). The "narcotic drug" definition in § 802(16) is limited to "opium, coca leaves, or opiates" and their derivatives. Marijuana is separately defined in 21 U.S.C. § 802(15) (1976).

287. See *United States v. Kiffer*, 477 F.2d 349, 356 (2d Cir.), cert. denied, 441 U.S. 831 (1973); *United States v. Maiden*, 355 F. Supp. 743, 745 (D. Conn. 1973); *People v. McCabe*, 49 Ill. 2d 338, 275 N.E.2d 407 (1971); *People v. Sinclair*, 357 Mich. 91, 194 N.W.2d 878 (1972).

288. See generally *National Org. for Reform of Marijuana Laws v. Drug Enforcement Admin.*, 559 F.2d 735, 749, 751 n.70 (D.C. Cir. 1977); *United States v. Kiffer*, 477 F.2d 349, 356 (2d Cir.), cert. denied, 414 U.S. 831 (1973); *People v. Sinclair*, 387 Mich. 91, 104, 194 N.W.2d 878, 881 (1972). The phrase, "dangerous drugs," is commonly used to describe prescription drugs and hallucinogenics that are diverted from domestic supplies. Marijuana is not regarded as a dangerous drug because it is smuggled from abroad and has been historically subject to different forms of regulation. See *President's Advisory Comm'n on Narcotic and Drug Abuse, Final Report 35* (1963); *President's Comm'n on Law Enforcement and Admin. of Justice, The Challenge of Crime in a Free Society 214-16* (1967).

289. In a lecture delivered on August 9, 1979 to the Cornell Institute on Organized Crime Summer Program on Labor Racketeering, Professor Blakey asserted that the statute includes "narcotics and other dangerous drugs; it does not include marijuana. [The] language is such that you cannot infer that marijuana is a dangerous drug [under] RICO. There are no federal RICO marijuana prosecutions. There may be some state ones, but there's not going to be any federal ones, and that was a conscious policy choice by the Congressmen involved." Blakey, *Materials on RICO: Criminal Overview*, in *1 Cornell Institute on Organized Crime, Techniques in the Investigation and Prosecution of Organized Crime 24* (1980). The increasing number of marijuana related RICO prosecutions indicates that the prosecuting authorities are not overly concerned with Congress' policy decision.

### b. Conspiracy as a Predicate Offense

The Second Circuit's decision in *United States v. Weisman*<sup>290</sup> significantly expanded the scope of the term "racketeering activity" when it held that a conspiracy may be a predicate offense under section 1961(1)(D).<sup>291</sup> The court reasoned that conspiracy was included in the category of "any offense involving" securities fraud, bankruptcy fraud, or felonious dealing in narcotic and other dangerous drugs,<sup>292</sup> although the holding was expressly limited to the section 1961(1)(D) offenses. Conspiracy could not be alleged for the (B) and (C) offenses because those subsections apply to "any act which is indictable under" certain enumerated statutes.<sup>293</sup> Therefore, unless one of those statutes incorporated a conspiracy provision, the act of conspiracy would not be indictable under those statutes.

A more difficult question is whether conspiracy can be a predicate offense under section 1961(1)(A), which refers to "any act or threat involving" eight crimes under state law.<sup>294</sup> Certainly, a conspiracy can be regarded as "involving" these crimes. The issue, however, is whether it is significant that section 1961(1)(A) uses the term "act or threat" while section 1961(D) uses the term "offense." Arguably, while an agreement to commit a crime is an "offense involving" that crime, it is legally distinguishable from the act of committing the crime and is therefore not an "act or threat involving" the state crimes.

## 2. Incorporated State Offenses

Section 1962(1)(A) sets forth the state offenses that constitute "racketeering activity" and defines that activity to include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year."<sup>295</sup> This language establishes a three-pronged test requiring that the act or threat involve the crimes set forth, that the act be "chargeable" under state law, and that the act be punishable by imprisonment for more than one year.

### a. Generic Designation of State Offenses

A major difficulty is that a state may have both common law and statutory criminal offenses that resemble the enumerated crimes. If,

290. 624 F.2d 1118 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

291. 18 U.S.C. § 1961(1)(D) (1976).

292. 624 F.2d at 1123-24 (citing 18 U.S.C. § 1961(1)(D) (1976)).

293. 18 U.S.C. § 1961(1)(B), (C) (1976).

294. 18 U.S.C. § 1961(1)(A) (1976) (emphasis added).

295. *Id.*

for example, the state has a "bribery" statute that does not impose more than one year of imprisonment as required by section 1961(1)(A), the government will attempt to find a common law or other statutory offense that can be considered "bribery" and that imposes a prison term longer than one year.<sup>296</sup> Holding that "[s]tate offenses are included by generic designation," the courts have permitted the government to rely on those alternative offenses.<sup>297</sup> This approach is supported by the legislative history underlying Title IX which states that "[s]tate offenses are included by generic designation."<sup>298</sup>

The generic designation test to determine whether activity can be prosecuted under RICO focuses not on "the manner in which States classify their criminal prohibitions but whether the particular state involved prohibits the . . . activity charged."<sup>299</sup> Under this test, the court must determine "whether the indictment charges a type of activity generally known or characterized in the proscribed category."<sup>300</sup> Applying this test to the bribery example, the Third Circuit has held that common law bribery and the statutory offense of

296. The bribery hypothetical discussed in the text is derived from *United States v. Forsythe*, 560 F.2d 1127 (3d Cir.), *rev'g* 429 F. Supp. 715 (W.D. Pa. 1977), involving a bail bond agency making systematic payments to magistrates and other employees of a county court in return for the referral of defendants. The § 1962(c) charge was based on violations of a state bribery statute that did not impose more than one year of imprisonment and thus did not satisfy the § 1961(1)(A) test. The district court thus concluded that some defendants could not be prosecuted for racketeering activity under that state statute. 429 F. Supp. at 722-23. The appellate court reversed, however, noting that other state statutes, not termed "bribery" statutes, covered this conduct and proscribed more than one year of imprisonment. 560 F.2d at 1137-38.

297. *United States v. Forsythe*, 560 F.2d 1127, 1137-38 (3d Cir.), *rev'g* 429 F. Supp. 715, 722-23 (W.D. Pa. 1977) (quoting *House Report*, *supra* note 154, at 56, *reprinted in* U.S. Code Cong. & Ad. News at 4032); *accord*, *United States v. Salinas*, 564 F.2d 688, 689-91 (5th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Fineman*, 434 F. Supp. 189, 194 (E.D. Pa. 1977); *cf* *Perrin v. United States*, 444 U.S. 37, 49 (1979) (18 U.S.C. § 1952 (1976) includes all state crimes within generic designation).

298. *House Report*, *supra* note 154, at 56 *reprinted in* [1970] U.S. Code Cong. & Ad. News at 4032.

299. *United States v. Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977) (quoting *United States v. Nardello*, 393 U.S. 286, 295 (1969)).

300. *United States v. Forsythe*, 560 F.2d 1127, 1137 (3d Cir. 1977). This test is extremely vague. The "generally known or characterized" language fails to clarify which group of people have such knowledge or to make such a characterization. It seems unlikely that the general public would know what constitutes a category of offense or would be able to draw fine distinctions between offenses that fall within the category and those that do not. With no standards for determining when such constructions are too broad, the "generic designation" test seems to invite federal courts to construe a generic category as broadly as they wish. It is arguable, for example, that anyone contributing money to an election campaign in excess of the limits established by state election laws has committed an act within the generic category of bribery.

soliciting public officers to influence their actions are within the generic category of "bribery" for purposes of Title IX.<sup>301</sup>

### b. *Applicability of State Procedure*

The major issue arising from the incorporation of state offenses into Title IX is whether state procedural statutes govern RICO prosecutions. Frequently, this issue is raised by defendants who claim that the expiration of the state statute of limitations precludes the prosecution of state offenses under RICO.<sup>302</sup> Citing the requirement in section 1961(1)(A) that the act be "*chargeable* under State law and *punishable* by imprisonment for more than one year,"<sup>303</sup> they have contended that the act must be chargeable and punishable at the time of the indictment; therefore, after the expiration of the state statute of limitations period, the state offense is no longer chargeable or punishable.<sup>304</sup>

---

301. 560 F.2d at 1136-38; *see* United States v. Fineman, 434 F. Supp. 189, 194 (E.D. Pa. 1977). Neither *Forsythe* nor *Fineman* considered the problem arising from the inclusion of common law crimes within the generic designation of bribery. One difficulty stems from the lack of any common law offenses against the United States. United States v. Harold, 588 F.2d 1136, 1142 (5th Cir. 1979); *Dickey v. United States*, 404 F.2d 882, 883-84 (5th Cir. 1968). It could be argued by extension that a federal offense may not incorporate state common law offenses as predicate offenses. A second problem is determining whether the common law offense carries a prison term of more than one year. A statutorily prescribed prison term for the common law offense probably would not exist. Nevertheless, if the statutory offense is not within § 1961(1)(A) because it does not impose more than one year of imprisonment, it is difficult to understand why the term should be longer for the common law offense.

302. United States v. Davis, 576 F.2d 1065, 1066-67 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); United States v. Forsythe, 560 F.2d 1127, 1134-35 (3d Cir. 1977); United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); United States v. Fineman, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977). A similar argument has been advanced regarding a state speedy trial rule whose time period had expired. United States v. Malatesta, 583 F.2d 748, 757-58 (5th Cir.), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979). Defendants have requested instructions on state law matters such as lesser included offenses, United States v. Forsythe, 594 F.2d 947, 952 (3d Cir. 1979), and corroboration of an accomplice's testimony. United States v. Brown, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). They have also contended that an acquittal in state court precludes the use of the state offense as a racketeering activity in federal court. United States v. Malatesta, 583 F.2d 748, 757 (5th Cir.), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979); United States v. Frumento, 563 F.2d 1083, 1087 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *see* notes 548-57 *infra* and accompanying text. In each of these cases, the court rejected the defendant's arguments.

303. 18 U.S.C. § 1961(1)(A) (1976) (emphasis added).

304. *See* United States v. Davis, 576 F.2d 1065, 1068-69 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978); United States v. Fineman, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977). *See also* United States v. Frumento, 563 F.2d 1083, 1097 (3d Cir. 1977) (Aldisert, J., dissenting) (acquittal on state offense should preclude the charging or punishment of the conduct), *cert. denied*, 434 U.S. 1072 (1978).



The courts have uniformly rejected this contention, holding that the reference to state law in Title IX exists for the purpose of defining prohibited conduct and not for incorporating state statutes of limitations or other procedural rules.<sup>305</sup> The Third Circuit has reasoned that the Congressional intent expressed in RICO was not to punish state law offenses, but to punish the impact on commerce caused by conduct that meets the section 1961 definition of racketeering activity.<sup>306</sup> The courts have further responded that "chargeable" and "punishable" apply to the time when the offense was committed.<sup>307</sup> This construction effectively eliminates the impact of any state procedural rule that would bar a prosecution in state court.<sup>308</sup>

---

305. See *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir.), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979); *United States v. Frumento*, 563 F.2d 1083, 1087 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Forsythe*, 560 F.2d 1127, 1134-35 (3d Cir. 1977); *United States v. Brown*, 555 F.2d 407, 418 n.22 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). These courts rely by analogy on the holding in *United States v. Revel*, 493 F.2d 1, 3 (5th Cir. 1974), *cert. denied*, 421 U.S. 909 (1975). *Revel* determined that, in 18 U.S.C. § 1955 (1976), the reference to state law was to define the conduct prohibited and was not meant to incorporate the state statute of limitations or procedural rules. The court in *United States v. Forsythe*, 560 F.2d 1127, 1135 n.11 (3d Cir. 1977), applied the *Revel* holding, reasoning that, since Title IX and § 1955 were enacted together within the Organized Crime Control Act of 1970, they should be construed *in pari materia*.

306. *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977). This argument is seriously flawed. If RICO was intended to punish the impact on commerce, it is difficult to comprehend why so little evidence is needed to establish an impact. See pt. III(G) *infra*. Additionally, RICO cannot be viewed as focusing on the impact on interstate commerce, because conduct with an equal impact on commerce is punished differently due to variations in the laws of the states dealing with the offenses enumerated in § 1961. Atkinson, *supra* note 10, at 7. A similar objection can be made to the assertion that the application of a state statute of limitations would result in "unequal enforcement of a federal statute because of variations between the statutes of limitation in force in the various states." *Id.* at 8. The commentator fails to recognize that Title IX initially ensures unequal enforcement by incorporating state substantive laws that vary from one state to another.

307. *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States v. Fineman*, 434 F. Supp. 189, 194-95 (E.D. Pa. 1977).

308. Judge Aldisert's concurring opinion in *United States v. Davis*, 576 F.2d 1065, 1068-71 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978), sharply criticized the insertion of "at the time the offense was committed" into the statute as "a judicial, not legislative, definition of criminal activity, a genre of statutory interpretation outlawed by a host of Supreme Court decisions." *Id.* at 1069 (Aldisert, J., concurring) (emphasis deleted). Judge Aldisert found that "[t]his semantic excursion ignores the precise language Congress utilized in § 1961(1)(A), to-wit, 'any act or threat involving . . . bribery . . . which is chargeable under State law . . . .' The present tense of the copulative verb 'is' was used. The use of the present tense indicates that this provision is to apply only to those acts chargeable and punishable at the time of the indictment. Had Congress intended otherwise it just as easily could have added 'was or has been'; indeed, Congress could have used the words the majority has added to

The rationale of the cases rejecting state procedural rules is questionable because of the facile distinction between substantive and procedural laws.<sup>309</sup> The prevailing position assumes that substantive statutes can be appropriated and all statutes labeled as procedural can be ignored. The difficulty is that substantive statutes may incorporate elements that could be regarded as procedural. For example, the "pattern" component of section 1962, an element of the RICO substantive offense, could seemingly be characterized as procedural. If RICO were a state statute incorporated within a federal statute, a court could conceivably find that the rule requiring that the racketeering acts occur within ten years of one another and that one act occur after the effective date is a procedural rule analogous to a statute of limitations. Despite the problem of determining which rules are procedural, the structure of Title IX is inconsistent with the application of a state statute of limitations because the ten year requirement of the "pattern" definition would be undermined. If, for example, a RICO indictment alleging state offenses committed in 1979 and 1972 were returned in 1980, a five year statute of limitations would eliminate the 1972 offense, even though it occurred within the ten year period.<sup>310</sup>

*E. Relationship Between Illegal Activity and the  
Affairs of the Enterprise: The "Through"  
Element*

Ostensibly, section 1962(c) requires that an enterprise's affairs be conducted "through" a pattern of racketeering activity or the collection of an unlawful debt.<sup>311</sup> If a legitimate enterprise is alleged, the majority of courts have required a substantial nexus between the prohibited activity and the conduct of the enterprise's affairs.<sup>312</sup> In con-

---

the statute: 'is chargeable under State law at the time the offense was committed.' But Congress did not add these words, and we cannot." *Id.* at 1069 (Aldisert, J., concurring) (emphasis deleted).

309. In other contexts, federal courts have encountered considerable difficulty in distinguishing between substantive and procedural law. In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Supreme Court acknowledged this problem as it discussed *Eric R. R. v. Tompkins*, 304 U.S. 64 (1938).

310. This conflict may be the problem the court in *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977), referred to when it noted that application of a state statute of limitations would "render the definition of 'pattern' essentially meaningless." *Id.* at 194.

311. 18 U.S.C. § 1962(c) (1976).

312. *United States v. Scotto*, Nos. 1131-32, slip op. at 5374 (2d Cir. Sept. 2, 1980); *United States v. Mandel*, 591 F.2d 1347, 1374-76 (4th Cir.), *aff'd per curiam en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980); *United States v. Nerone*, 563 F.2d 836, 851-52 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Dennis*, 458 F. Supp. 197, 198-99 (E.D. Mo. 1978); *United States v. Ladmer*, 429 F. Supp. 1231, 1243-45 (E.D.N.Y. 1977); *see United States v. Rubin*, 559 F.2d 975, 990 (5th Cir. 1977) (assumed without deciding that such a

trast, this nexus is irrelevant when illegal enterprises are involved because the enterprise itself is the pattern or the collection.<sup>313</sup>

### 1. Private Business Enterprises

The failure to establish this nexus resulted in the reversal of a section 1962(c) conviction in *United States v. Nerone*.<sup>314</sup> The government had alleged that the defendant conducted the affairs of an enterprise, a corporation operating a mobile home park, through illegal gambling. However, the only proof of a connection between the gambling and the corporation was that the gambling occurred on property owned by the corporation. Holding that the prosecution failed to satisfy the "through" element,<sup>315</sup> the court adopted the position that the word "through" requires proof of a nexus between the

nexus exists), *vacated and remanded*, 439 U.S. 810 (1978). The Southern District of New York has repeatedly rejected a nexus requirement. *See United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979) (enterprise included broker who did not manage or operate enterprise); *United States v. Field*, 432 F. Supp. 55, 55 (S.D.N.Y. 1977) (no relationship required between defendant's acts and union activity), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) (RICO does not require that racketeering act play any role in the usual operation of the enterprise). The question of the existence and extent of the "nexus" requirement is significantly related to the "common scheme" interpretation of pattern. A decision rejecting the "common scheme" method of relating racketeering acts reasoned that the only requisite relationship was that of the predicate crimes to the affairs of the enterprise. *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). Under this rationale, courts rejecting the "common scheme" analysis should stringently apply the "nexus" element. *See notes 469-77 infra* and accompanying text.

313. *See United States v. Anderson*, 626 F.2d 1358, 1366 n.13 (8th Cir. 1980); *United States v. Nerone*, 563 F.2d 836, 852 (7th Cir. 1977) (if government had alleged illegal gambling operation as the enterprise, case would not have been reversed for failure to establish connection between racketeering and corporation allegedly used as "front"), *cert. denied*, 435 U.S. 951 (1978).

314. 563 F.2d 836, 851-52 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

315. *Id. But cf. United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (§ 1962(c) conviction upheld when defendant owned all stock of corporation operating restaurant and narcotic trafficking occurred in room of restaurant in which corporate records were kept), *cert. denied*, 441 U.S. 933 (1979). The performance of illegal activity on property owned by the enterprise was also held insufficient to support a § 1962(c) charge in *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978). In *Dennis*, the government alleged that the defendant, a non-managerial employee at a General Motors factory, collected unlawful debts from co-employees on the premises of the factory. The charged enterprise was General Motors Corporation. The court dismissed the RICO count, reasoning that although there was a nexus between the defendant's alleged activities and the enterprise itself, the allegations were insufficient to establish a relationship with the conduct of the enterprise. 458 F. Supp. at 199. *Dennis* drew an important distinction. Its nexus requirement focused on the conduct of the enterprise's affairs as it relates to the prohibited activity; it did not focus on the enterprise itself. *Id.*

prohibited acts and the operation of the enterprise.<sup>316</sup> It further suggested three ways in which this relationship could have been established: (1) investment of the gambling proceeds in the legitimate enterprise; (2) channeling of gambling revenues into the enterprise; or (3) use of gambling revenues to pay persons to perform services for the enterprise.<sup>317</sup>

Applying this nexus requirement, the Fourth Circuit concluded in *United States v. Mandel*<sup>318</sup> that the defendant's transfer of approximately half of his interest in the Security Investment Company to the Governor of Maryland<sup>319</sup> failed to satisfy this requirement.<sup>320</sup> The word "through" in section 1962(c) was cited as support for the requirement that the racketeering acts must involve some form of active operation or management of the enterprise.<sup>321</sup>

A more complex problem involving the relationship of illegal acts to the activities of the enterprise arose in *United States v. DePalma*.<sup>322</sup> The indictment alleged securities and bankruptcy fraud violations in the conduct of the affairs of the enterprise, the Westchester Premier Theatre Corporation. The defendant challenged the securities fraud

316. 563 F.2d at 851. The court adopted the definition of "through" found in Black's Law Dictionary 1652 (Rev. 4th ed. 1968): "[B]y means of, in consequence of, by reason of." The court held that this meaning required proof "that the affairs of the charged enterprise were conducted through a pattern of racketeering activity." 563 F.2d at 851.

317. *Id.* While *Nerone* correctly reversed the conviction for lack of proof of the "through" element, its standard is not sufficiently stringent. As required in the union cases, see pt. III(E)(2) *infra*, the "through" element should demand some performance of one's duties in the legitimate enterprise through racketeering. *Nerone* held that the use or investment of racketeering income in the legitimate enterprise is sufficient to satisfy the § 1962(c) "through" test. This standard is clearly erroneous because that type of conduct is covered by § 1962(a). Section 1962(c), however, is aimed at the operation of an enterprise through racketeering, not racketeering income. Consequently, the "through" element must require that the racketeering occur during the performance of one's duties as an employee or owner of the legitimate enterprise, a standard adopted in union cases. See notes 339-45 *infra* and accompanying text.

318. 591 F.2d 1347 (4th Cir.), *aff'd per curiam en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 100 S. Ct. 1647 (1980).

319. In return for this transfer, and a 15% interest in another corporation, Rays' Point, Inc., Governor Marvin Mandel allegedly used his influence in the Maryland legislature to help a race track obtain more racing dates. *Id.* at 1354-56.

320. *Id.* at 1375. To support its decision, the opinion adopted the district court's analysis: "[W]hile Congress specifically outlawed the acquisition of a business through a pattern of racketeering activity it did not specifically proscribe the transfer of an interest in an enterprise. Second, transfer of an interest in a business is the antithesis of operating it. Third, . . . Mandel's interest was purely passive, and that he was not entitled to any management role and did not have any. Finally, . . . the charged enterprise [was] merely a front for racketeering activity." *Id.* at 1376.

321. *Id.* at 1375. The court observed that this requirement was necessary in light of the mandatory forfeiture penalties. *Id.*

322. 461 F. Supp. 778 (S.D.N.Y. 1978), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

allegation by asserting that the sale in question did not occur in the conduct of the enterprise's affairs because it was completed before the formation of the corporation. The court disagreed, noting that the sale occurred after the business had been incorporated.<sup>323</sup> The court also dismissed as frivolous an argument that the commission of bankruptcy fraud did not occur in the conduct of the affairs of the enterprise, and noted that the racketeering acts need only involve the affairs of the enterprise, not the "day to day business operation" of the enterprise.<sup>324</sup>

In addition to *DePalma*, three other opinions from the same district have refused to apply the "nexus" requirement strictly.<sup>325</sup> *United States v. Chovanec*,<sup>326</sup> for example, rejected the restrictive view requiring that the illegal activities occur in the operation or management of the enterprise. The *Chovanec* court held instead that an independent broker's activities constituted indirect participation in the affairs of the enterprise.<sup>327</sup>

## 2. Union Enterprises

The remaining cases construing the "through" element of section 1962(c) have involved abuse of union<sup>328</sup> or government offices.<sup>329</sup> De-

323. *Id.* at 785. If the racketeering act occurred before incorporation, the defendant would undoubtedly contend that he could not have participated in an enterprise that did not exist. This position is somewhat analogous to the principle in conspiracy law that the acts and declarations of alleged co-conspirators are not admissible against a defendant if those acts and declarations occurred prior to the formation of the conspiratorial agreement. See *Minner v. United States*, 57 F.2d 506, 511 (10th Cir. 1932). A conceptual difficulty is inherent in this position, however. Because a pre-incorporation agreement is not binding on a corporation unless and until the corporation ratifies or adopts that agreement, *Air Traffic & Serv. Corp. v. Fay*, 196 F.2d 40, 42 (D.C. Cir. 1952), the government could claim that a sale of securities that occurred before incorporation is complete upon ratification or adoption and that, therefore, the fraudulent sale actually occurred while the corporation enterprise was in existence.

324. 461 F. Supp. at 786.

325. See *United States v. Chovanec*, 467 F. Supp. 41, 44 (S.D.N.Y. 1979); *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973).

326. 467 F. Supp. 41 (S.D.N.Y. 1979).

327. *Id.* at 44.

328. *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *United States v. Ladmer*, 429 F. Supp. 1231 (E.D.N.Y. 1977); *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973). The most complex "union enterprise" case involved Anthony Scotto, president of Local 1814 of the International Longshoremen's Association (ILA). Scotto was convicted of receiving numerous unlawful payments totalling over \$300,000 from employers of union members. These payments were made to reduce the number of fraudulent and exaggerated accident claims by ILA workers against

defendants have contended that Title IX is not directed at individuals who take advantage of these posts for their personal gain, but rather, the requirement of a nexus to the enterprise's affairs limits section 1962(c) to unions or government entities whose activities were actually conducted illegally.<sup>330</sup> One response to this argument has been the rejection of any "nexus" requirement. For example, two cases involving union enterprises have held that the government need not offer any proof "regarding the advancement of the union's affairs by the defendant's activities, or proof that the union itself is corrupt, or proof that the union authorized the defendant to do" the racketeering acts.<sup>331</sup> *United States v. Salvitti*,<sup>332</sup> which involved the alleged receipt of bribes by a government official,<sup>333</sup> recognized the nexus element but held that it was satisfied because the receipt of a bribe in connection with the official's duty was sufficiently related to the affairs of the governmental enterprise.<sup>334</sup>

Three cases involving alleged corruption by union officials indicate that the "nexus" requirement is not invariably satisfied when a defendant uses a position for gain. In *United States v. Rubin*,<sup>335</sup> the defendant claimed that section 1962(c) required the government to establish that he acquired or maintained his labor union position by the alleged acts of embezzlement, or that those acts furthered his ability to participate in or conduct the affairs of the union. The government contended that it was sufficient to establish the defendant's commission of two offenses during the course of his employment with the enterprise.<sup>336</sup> Although the court assumed, without definitely

---

their employers; to prevent employers from losing waterfront related business; and to secure additional business in exchange for payments to Scotto. *United States v. Scotto*, Nos. 1131-32 (2d Cir. Sept. 2, 1980); Welling, *On the Waterfront From Maine to Texas, a Crescent of Corruption*, Barron's, Jan. 21, 1980, at 4, col. 1; *id.* at 5, col. 1; *id.* at 8, col. 3.

329. *United States v. Salvitti*, 451 F. Supp. 195 (E.D. Pa.), *aff'd*, 588 F.2d 824 (3d Cir. 1978).

330. *See id.* at 199; *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978).

331. *United States v. Field*, 432 F. Supp. 55, 58 (S.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1371 (2d Cir.), *cert. dismissed*, 439 U.S. 801 (1978); *accord*, *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973). *See also* *United States v. Scalzitti*, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975), *appeal dismissed*, 556 F.2d 569 (3d Cir. 1977). *Stofsky* concluded that, although no particular degree of interrelationship is required in the statute, § 1962(c) is not unconstitutionally vague as to the requisite nexus.

332. 451 F. Supp. 195 (E.D. Pa.), *aff'd*, 588 F.2d 824 (3d Cir. 1978).

333. The official was the Executive Director of the Redevelopment Authority of Philadelphia, who allegedly received bribes in return for settlement of a legal dispute. *Id.* at 198-99.

334. *Id.* at 199.

335. 559 F.2d 975 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978).

336. *Id.* at 989-90.

deciding, that some relationship between the prohibited acts and the maintenance of a union position is required,<sup>337</sup> it found the evidence sufficient "to support a conclusion that appellant's embezzled funds served his position in the union organizations."<sup>338</sup>

The most stringent interpretation of the "nexus" requirement was applied in *United States v. Ladmer*,<sup>339</sup> in which the government alleged that the defendants used their union positions for private gain by charging the union for personal entertainment expenses at union conventions. The *Ladmer* court established a "relationship" standard that required a connection between the racketeering activity and the "essential functions that the union served in the regular conduct of union affairs."<sup>340</sup> "[I]rregularities committed in the course of the otherwise lawful conduct of an enterprise" were distinguished from the conduct of the enterprise in its essential functions.<sup>341</sup> Therefore, the junketeering was held to be "a very small and infrequent part of the conduct of union affairs" that did not satisfy this definition of the relationship element.<sup>342</sup>

A third union case, *United States v. Gibson*,<sup>343</sup> rejected *Ladmer's* "restrictive interpretation,"<sup>344</sup> but nonetheless dismissed the charges for failure to satisfy the "nexus" element. The court held that embezzlement of union funds, resulting from three joy rides in a union plane and a girl friend on the union payroll who may not have worked full time, showed that the defendant had conducted his per-

---

337. *Id.* at 990. The court cited the Congressional "Statement of Findings and Purpose" of the Organized Crime and Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, as well as the Ninth Circuit opinion in *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). A recent Second Circuit opinion, *United States v. Scotto*, Nos. 1131-32 (2d Cir. Sept. 2, 1980), seems to adopt the compromise view expressed in *Rubin*. It required proof that the predicate acts are related to the enterprise or to the defendant's position within it, but it rejected the defendant's instruction requiring that the acts be related to the operation or management of the enterprise. *Id.*, slip op. at 5373-75.

338. 559 F.2d at 990.

339. 429 F. Supp. 1231 (E.D.N.Y. 1977).

340. *Id.* at 1243-45.

341. *Id.* at 1244.

342. *Id.* Based on the face of the statute, *Ladmer* may not be correct in distinguishing between affairs of the enterprise that are part of its essential functions and those that are not as long as a racketeering act involved the conduct of the enterprise's affairs. From a policy standpoint, however, *Ladmer* may be regarded as an indirect method by which the courts can preclude imposing draconian RICO penalties for the commission of misdemeanors under 29 U.S.C. § 186 (1976). *Cf.* *United States v. Stofsky*, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (common scheme construction required because of severe punishment of § 186 misdemeanors).

343. 486 F. Supp. 1230 (S.D. Ohio 1980).

344. *Id.* at 1243-44.

sonal affairs, not the union's affairs, through a pattern of racketeering.<sup>345</sup>

The conflicting views on the "nexus" requirement stem from a dilemma not expressly recognized in cases involving allegedly corrupt government or union officials. The courts are understandably reluctant to accept the position that Title IX is not aimed at individuals who exploit their union or government posts for personal gain. This approach would leave no situation in which the receipt of bribes would be related to an enterprise, an absurd result in view of the inclusion of bribery and embezzlement as RICO predicate offenses in section 1961.<sup>346</sup> Yet, the courts that have adopted the "nexus" requirement have responded to an equally pressing concern that can be illustrated by adapting the facts in *United States v. Nerone*<sup>347</sup> to a union setting. Assume that a union official conducts illegal gambling activity in his off-hours on property owned by the union, and that no other connection exists between the gambling and the union. Unlike bribery and embezzlement, which involve some performance of the official's duty, the illegal gambling may be unrelated to his duties or work. To hold that the defendant conducted the union's affairs through gambling would distort the language of section 1962(c) by implying that the defendant was conducting the union's affairs rather than his own, and that the union's affairs were conducted through gambling even though those affairs were not involved.

This distortion can be resolved by requiring that the illegal activity occur while the defendant acts under color of authority as an employee of the business, union, or government agency.<sup>348</sup> The government would be required to prove, for example, that a union official was acting or purporting to act as a union official at the time he committed the racketeering acts.<sup>349</sup> If he was merely acting in his individual capacity, the "through" element would not be satisfied.<sup>350</sup>

345. *Id.* at 1244-45.

346. Bribery under state law is an underlying offense included in § 1961(1)(A), while bribery under federal law is included in § 1961(1)(B). Embezzlement of union funds is included in § 1961(1)(C). 18 U.S.C. § 1961(1)(A)-(C) (1976).

347. 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *see notes* 314-16 *supra* and accompanying text.

348. An analogous test is the "color of law" standard in 18 U.S.C. § 242 (1976), which punishes those who deprive others of their civil rights while acting under color of law. *See also* 18 U.S.C. § 1951(B)(2) (1976) (definition of extortion includes obtaining of property under "color of official right").

349. *Cf. Crews v. United States*, 160 F.2d 746, 750 (5th Cir. 1947) (A person acts under color of law when "he acts, or purports, or pretends, to act pursuant to his authority.").

350. This requirement would not unduly restrict RICO prosecutions because the government could eliminate the relationship problem by alleging that the defendant is an illegal enterprise. The "relationship" requirement merely prevents the applica-



F. *Mens Rea*

The most significant ambiguity in section 1962(c) is its failure to explicitly provide a scienter standard.<sup>351</sup> Surprisingly, few cases have directly considered whether an intent requirement exists.<sup>352</sup> In two cases, the Second Circuit, without discussion, held that "[t]he RICO count does not include a scienter element over and above that required by the predicate crimes."<sup>353</sup> One commentator has argued that courts should adopt an element of scienter because of the severe penalties imposed by Title IX.<sup>354</sup> Rather than focusing on the severity of the penalties, however, the commonly applied analysis of mens rea reads a mens rea element into the statute if it punishes conduct that is "wrong on principle," but not if it prohibits behavior to effect some social policy.<sup>355</sup>

If section 1962(c) were limited to the infiltration of legitimate business, it could plausibly be contended that it is a social policy

tion of remedies such as forfeiture, dissolution, and divestiture to situations in which the enterprise is only marginally involved in the illegal activity.

351. See pt. II(A)(1) *supra* (mens rea in § 1962(a)).

352. *United States v. Palmeri*, 630 F.2d 192, 203-04 (3d Cir. 1980); *United States v. Scotto*, Nos. 1131-32, slip op. at 5377-78 (2d Cir. Sept. 2, 1980); *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882). A few courts have noted in passing that there was sufficient evidence of intent, although they did not decide whether an intent element actually exists. See *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. McLaurin*, 557 F.2d 1064, 1078 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978). Another RICO case admitted evidence of similar uncharged crimes "to show [the defendant's] knowledge or intent concerning the crimes charged, especially in light of his defense that he had been drawn into these transactions." *United States v. Herring*, 602 F.2d 1220, 1225 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 734 (1980). A possible explanation for the judicial silence on the scienter issue is that the "common scheme" construction of pattern operates as a substitute for an intent requirement, albeit an inadequate one. See notes 256-58 *supra* and accompanying text.

353. *United States v. Scotto*, Nos. 1131-32, slip op. at 5377 (2d Cir. Sept. 2, 1980) (quoting *United States v. Boylan*, 620 F.2d 355, 361-62 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882)). *But see* *United States v. Palmeri*, 630 F.2d 192, 203-04 (3d Cir. 1980). The *Scotto* court stated that the district court had actually erred in the defendant's favor by implying in the charge to the jury that specific intent was required. Nos. 1131-32, slip op. at 5378.

354. Atkinson, *supra* note 10, at 4-5. He further asserted that charging individual enterprises would undermine a scienter requirement because "by redefining the enterprise involved, . . . the prosecutor can allege that the individual defendant constituted his own enterprise and engaged in a small-scale illegal activity, of which the defendant obviously was aware." *Id.* at 5 (footnote omitted). This fear is somewhat overstated. This tactic would be of limited practical utility in multi-defendant enterprise cases because the intent of all defendants other than the one alleged to be the enterprise must be established. The government could not merely allege that each is a separate enterprise because defendants can be joined at a single trial only if they are part of the same enterprise. See notes 582-600 *infra* and accompanying text.

355. See notes 72-78 *supra* and accompanying text.

crime.<sup>356</sup> One policy would be to prevent enterprises from using illegal activities to gain a competitive advantage over law-abiding businesses and drive them out of the market. This reasoning, however, is unsupportable in view of the courts' acceptance of the illegal enterprise concept. A consequence of these holdings is that section 1962(c) sweeps far too broadly to characterize it as a social policy crime. The application of section 1962(c) to purely illegal operations, therefore, establishes that it punishes conduct because it is wrong in principle. This conclusion requires that a mens rea element be read into section 1962(c).

If a scienter element exists, the standard could be either general knowledge that one is participating in an enterprise through illegal activity or specific intent to participate in an enterprise through illegal activity, although the distinction between the two standards is ordinarily not significant. *United States v. Bailey*<sup>357</sup> described two categories of crimes to which a specific intent standard applies, one composed of offenses, such as murder and treason, involving "heightened culpability" and the other including inchoate offenses such as attempt and conspiracy.<sup>358</sup> Neither category accurately describes section 1962(c). Although the RICO offense carries severe sanctions, murder and treason are obviously more serious. Nor is section 1962(c) an inchoate crime because it requires the actual commission of a pattern of racketeering activity.<sup>359</sup> In the absence of a compelling rationale for imposing a specific intent requirement, the statute would come within the broader category of general intent offenses involving knowledge of the elements of the crime.<sup>360</sup>

---

356. The Senate Report on RICO, *Senate Report, supra* note 48, indicates that Title IX was regarded as a social policy crime because it was limited to the illegal operation or acquisition of legitimate businesses. It states that "the courts have emphasized that the prohibition is not a penalty against any individual. It is instead a protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In the spirit of this background, title IX, it must be again emphasized, is remedial rather than penal. It is based upon the judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity." *Id.* at 82; see note 154 *supra*.

357. 444 U.S. 394 (1980).

358. *Id.* at 405.

359. Cf. *Investing Dirty Money, supra* note 29, at 1509 (discussing § 1962(a)).

360. This is the standard applied in criminal antitrust actions. See *United States v. United States Gypsum Co.*, 438 U.S. 422, 444-45 (1978). If the substantive provisions of Title IX are modeled on antitrust provisions, see pt. I(B) *supra*, the antitrust intent standard is applicable by analogy.

### G. Impact on Interstate Commerce

#### 1. Necessity of Proof of Interstate Commerce Effect

The final element of a section 1962(c) offense involves proof that the activities of the enterprise affected interstate commerce.<sup>361</sup> Relying on an analogy to cases holding that proof of that jurisdictional element is unnecessary in prosecutions under 18 U.S.C. § 1955,<sup>362</sup> which punishes certain illegal gambling businesses, the government has often argued, without success, that it is not obligated to establish an impact on interstate commerce.<sup>363</sup> The courts have distinguished section 1955 cases on the grounds that section 1955 is silent as to any interstate commerce element<sup>364</sup> while section 1962 includes that language,<sup>365</sup> and that unlike section 1962, section 1955 was accompanied by special findings of Congress that the prohibited activity involved the widespread use of, and impact on, interstate commerce.<sup>366</sup>

#### 2. Connection Between Illegal Activity and Interstate Commerce

Although the courts have required proof of the interstate element, they have been generally unreceptive to interpretations that place a substantial burden on the government. For example, they have rejected the contention that Title IX requires proof not only of a connection between the enterprise and interstate commerce, but also of

361. 18 U.S.C. § 1962(c) (1976).

362. 18 U.S.C. § 1955 (1976); *see* *United States v. Hunter*, 478 F.2d 1019, 1021 (7th Cir.) (construing *Perez v. United States*, 402 U.S. 146 (1971)), *cert. denied*, 414 U.S. 857 (1973); *United States v. Becker*, 461 F.2d 230, 233-34 (2d Cir. 1972), *vacated*, 417 U.S. 903 (1974).

363. *E.g.*, *United States v. Nerone*, 563 F.2d 836, 853 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

364. *See* *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Malatesta*, 583 F.2d 748, 754 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States v. Nerone*, 563 F.2d 836, 853-54 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Vignola*, 464 F. Supp. 1091, 1098 n.22 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

365. *United States v. Malatesta*, 583 F.2d 748, 754 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States v. Vignola*, 464 F. Supp. 1091, 1097 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

366. *United States v. Nerone*, 563 F.2d 836, 853-54 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978). In *United States v. Hunter*, 478 F.2d 1091 (7th Cir.), *cert. denied*, 414 U.S. 857 (1973), a § 1955 case, the court emphasized the § 1955 special legislative findings and concluded that they were "sufficient to support the statute even when applied to individual members of the class whose own activities may not have any demonstrable impact on interstate commerce." *Id.* at 1021.

an impact on the interstate commerce by the pattern of racketeering or collection of unlawful debts.<sup>367</sup> Consequently, the government has been required to establish only that the activities of the enterprise affect interstate commerce.<sup>368</sup> One case, *United States v. Vignola*,<sup>369</sup> focused on language in section 1962 referring only to the requirement that the *enterprise* be "engaged in, or [its] activities . . . affect, interstate or foreign commerce."<sup>370</sup> The court commented that this language, combined with the absence of any language concerning the impact of patterns of racketeering or collections on commerce, was a persuasive indication of legislative intent.<sup>371</sup> The court

---

367. See *Third Circuit*, *supra* note 29, at 275.

368. *United States v. Altomare*, 625 F.2d 5, 8 & n.8 (4th Cir. 1980); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Vignola*, 464 F. Supp. 1091, 1097-1100 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

369. 464 F. Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

370. 18 U.S.C. § 1962(c) (1976).

371. 464 F. Supp. at 1097. The *Vignola* court also observed that, if Congress had intended that the racketeering activity affect commerce, it would have been unnecessary to include extortion as a RICO predicate offense because extortion affecting commerce was already prohibited by 18 U.S.C. § 1951 (1976). 464 F. Supp. at 1097 n.19. The court engaged in a second stage of analysis to determine whether Congress could constitutionally punish racketeering activity that is purely local in effect. Using a "class of activities" test, the court determined what class of activities Congress regulated and whether that class was within reach of federal power. *Id.* at 1098. The analysis was limited to "determining whether Congress had a rational basis for finding that the regulated activity affects commerce, and, if it had such a basis, whether the means selected to regulate the activity are reasonable and appropriate." *Id.* The court described the class of activity regulated by Title IX as "that class of racketeering activity engaged in by persons associated with enterprises whose activities affect interstate commerce." *Id.* The court found that RICO was reasonable and appropriate to regulate that activity, and concluded that, because the defendant's racketeering activities were within the class regulated by RICO, it was irrelevant that the bribery was purely local. *Id.* at 1099. One commentator has sharply criticized *Vignola* on constitutional grounds. *Third Circuit*, *supra* note 29, at 275. Pointing out that statutes enacted pursuant to the commerce clause, U.S. Const. art. I, § 8, cl. 3, generally require some nexus between the defendant's activities and interstate commerce, he asserts that Congress would overreach its commerce power if there were no requirement that the racketeering activity have some effect on interstate commerce. *Third Circuit*, *supra* note 29, at 275. He further notes that *Vignola* cited only criminal statutes that actually require some nexus between the defendant and interstate commerce. *Id.* The incorporation of state offenses as predicate crimes raises the argument that Congress exceeded its authority under the commerce clause by usurping state law enforcement power. Atkinson, *supra* note 10, at 5-6. Although it is likely that this challenge would be rejected, *id.*, one court has expressed the perhaps unfounded expectation "that government prosecutorial policy will reserve use of this statute for racketeers, leaving local crimes to local authorities." *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

assumed a Congressional finding that all patterns affect commerce: therefore, the government need not prove that the pattern affected commerce. In contrast, the court determined that Congress made no such finding with respect to RICO enterprises.<sup>372</sup>

This distinction breaks down if, as is assumed by the majority of courts, Congress also intended to apply Title IX to illegal enterprises.<sup>373</sup> The practical effect of the illegal enterprise concept is that the enterprise is nothing more than the pattern of racketeering or collection of unlawful debts.<sup>374</sup> In illegal enterprise cases, therefore, the effect of the interstate commerce element of Title IX is to require that the pattern or collection affect commerce.<sup>375</sup> If Congress had intended both the illegal enterprise concept and the *Vignola*<sup>376</sup> conclusion, it would have had to find that patterns or collections always affect commerce when associated with a legitimate enterprise, so that the need for proof of impact is eliminated. In addition, it would have had to find that such patterns or collections do not always affect commerce when they are part of an illegal enterprise, so that proof that the acts affect commerce is necessary when alleging illegal enterprises. Therefore, the illegal enterprise theory limits the impact of the *Vignola* view because, in cases involving illegal enterprises, the government would nonetheless have to establish that the pattern of racketeering or collection of unlawful debts affected interstate commerce.<sup>377</sup>

A second restriction on *Vignola* arises from the elements of an underlying offense enumerated in section 1961, which may require that the racketeering activity affect or involve interstate commerce.<sup>378</sup> The impact of that offense on interstate commerce would have to be established in addition to the section 1962 interstate commerce element.

### 3. Standard of Proof

The effect of the interstate commerce element has been further undermined by special standards of proof adopted by the courts. When courts review the evidentiary sufficiency of a jury's finding of

---

372. 464 F. Supp. at 1100.

373. See pt. III(A) *supra*.

374. See *id.*

375. *Third Circuit, supra* note 29, at 275.

376. 464 F. Supp. 1091 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), *cert. denied*, 444 U.S. 1072 (1980).

377. See *United States v. Nerone*, 563 F.2d 836, 854-55 (7th Cir. 1977) (conviction reversed because government alleged an illegal gambling operation as enterprise but failed to offer proof that it affected interstate commerce), *cert. denied*, 435 U.S. 951 (1978).

378. See, e.g., 18 U.S.C. §§ 659, 1084, 1343, 1951 (1976).

an impact on commerce<sup>379</sup> or consider a pretrial motion to dismiss an indictment for insufficient allegation of this impact,<sup>380</sup> a minimal impact is sufficient to support the finding or indictment, or to support the denial of the motion.<sup>381</sup> The "minimal impact" test is illustrated in *United States v. Nerone*,<sup>382</sup> which held that the test was satisfied when the enterprise provided rental space for trailers manufactured out of state and the residents of the trailer park purchased mobile homes manufactured in other states.<sup>383</sup> Government enterprises in particular should always satisfy this standard because their activities tend to include at least one action affecting out-of-state residents. For example, in *United States v. Altomare*,<sup>384</sup> a county prosecutor's office regularly placed interstate telephone calls, purchased supplies from other states, and involved non-residents within the state in its investigations and litigation. The court found that these activities had a sufficient impact on commerce.<sup>385</sup>

The standard for appellate review must be distinguished from the government's burden of proof at trial. The effect on commerce is part of the definition of the RICO offense and, like all elements of a crime,<sup>386</sup> must be established beyond a reasonable doubt.<sup>387</sup> Courts,

---

379. See *United States v. DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979) (impact of arson and mail fraud established by payment of insurance claims by companies in other states), *cert. granted*, 444 U.S. 1070 (1980); *United States v. Gambino*, 566 F.2d 414, 419 (2d Cir. 1977) (New York garbage collection enterprise obtained equipment from Texas and arranged to dump garbage in New Jersey), *cert. denied*, 435 U.S. 952 (1978); *United States v. Nerone*, 563 F.2d 836, 851, 854-55 (7th Cir. 1977) (enterprise providing rental space for out of state trailers and for residents of trailer park who purchased mobile homes manufactured in other states found to have impact on interstate commerce), *cert. denied*, 435 U.S. 951 (1978); *United States v. Parness*, 503 F.2d 430, 439 n.11 (2d Cir. 1974) (requisite effect of foreign enterprise established where it was owned by American citizens, financed by American banks, had American creditors, and primarily served American tourists), *cert. denied*, 419 U.S. 1105 (1975).

380. See *United States v. Fineman*, 434 F. Supp. 189, 195 (E.D. Pa. 1977).

381. See cases cited notes 379, 380 *supra*. In *United States v. Fineman*, 434 F. Supp. 189 (E.D. Pa. 1977), the court applied the minimal impact test to a § 1962(c) case charging a scheme involving parents who bribed a state legislator to facilitate the admission of their children into graduate schools. *Id.* at 195. The requisite effect on interstate commerce was established because payments were made interstate; one individual traveled interstate in order to make a payment; the graduate schools were involved in interstate commerce; the admissions decisions affected persons in several states; and at least one student withdrew from a foreign medical school to enroll in a Pennsylvania medical school under the alleged payoff arrangement. *Id.*

382. 563 F.2d 836 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978).

383. *Id.* at 850-51.

384. 625 F.2d 5, 7-8 (4th Cir. 1980).

385. *Id.*

386. See *In re Winship*, 397 U.S. 358, 366-69 (1970).

387. *United States v. Malatesta*, 583 F.2d 748, 754 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *accord*,

however, have occasionally confused the appropriate jury instruction concerning burden of proof with the standard for appellate review of the sufficiency of the evidence.<sup>388</sup>

Several decisions have also questioned the proposition that impact on interstate commerce is an element of the offense to be determined by the jury and have assumed that the commerce effect is, to a considerable extent, a question of law to be decided by the judge.<sup>389</sup> This supposition is inherent in cases upholding instructions informing the jury that the requisite effect on interstate commerce is established if the jury finds certain facts to be true.<sup>390</sup> The result of this approach is a substantial intrusion on the jury's role, effectively reducing their determination on the issue to a special finding of fact and eliminating any discretion to determine whether the defendant's acts actually had an impact on commerce. Moreover, special findings or verdicts are generally disfavored in criminal cases<sup>391</sup> because they unduly interfere with the function of the jury as the conscience of the community to "look at more than logic."<sup>392</sup>

#### 4. Pleading of Interstate Commerce Element

A defense to the interstate commerce element is undermined by indictments alleging that element in the most general terms possible. This indictment format was approved in *United States v. Diecidue*,<sup>393</sup> in which the Fifth Circuit asserted that the indictment need only be sufficiently specific to satisfy the defendant's constitutional right to know what offenses have been charged.<sup>394</sup> The court concluded that the allegation of specific acts affecting commerce would contribute nothing to the defendant's understanding of the nature of those offenses.<sup>395</sup> It noted that the defendants were not "surprised or in any

2 H. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 56.25 (3d ed. Supp. 1979).

388. *E.g.*, *United States v. Malatesta*, 590 F.2d 1379, 1381-82 (5th Cir. 1979) (en banc) (condemning use of slight evidence standard of appellate review in a jury instruction on the defendant's connection with conspiracy), *cert. denied*, 444 U.S. 846 (1979).

389. *See* *United States v. DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), *cert. granted*, 444 U.S. 1070 (1980); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

390. *See* *United States v. DiFrancesco*, 604 F.2d 769, 775 (2d Cir. 1979), *cert. granted*, 444 U.S. 1070 (1980); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 444 U.S. 1070 (1980).

391. *United States v. O'Looney*, 544 F.2d 385, 392 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976); *United States v. Jackson*, 542 F.2d 403, 412 (7th Cir. 1976).

392. *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969).

393. 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

394. *Id.* at 546-58; *see* *United States v. Ostrer*, 481 F. Supp. 407, 412-13 (S.D.N.Y. 1979).

395. 603 F.2d at 547.

way prejudiced by the generality of the interstate commerce allegation or evidence subsequently introduced to establish it."<sup>396</sup> By alleging the interstate element in general terms, the government gains an important advantage because, in the absence of prejudice, it can prove acts not specifically mentioned in the indictment without risking a reversal on the grounds of variance.<sup>397</sup>

### 5. Federally Created Jurisdiction

An interstate commerce defense resembling entrapment may exist in the Second Circuit, although that court has not yet applied it in a RICO case. In *United States v. Archer*,<sup>398</sup> the government had intentionally made phone calls to create the interstate element of an 18 U.S.C. § 1952<sup>399</sup> bribery offense that would otherwise have been a local crime. These tactics were condemned by the court as having produced a "federally provoked incident of local corruption."<sup>400</sup>

The Second Circuit subsequently rejected a defense based on *Archer* in the context of a RICO case. In *United States v. Gambino*,<sup>401</sup> the defendants claimed that only the activities of a

396. *Id.* at 547-48. The defendant may be able to remedy this generality by seeking a bill of particulars under Fed. R. Crim. P. 7(f). The granting of a motion for a bill of particulars is within the discretion of the trial court. 603 F.2d at 563. However, courts have denied these motions on the grounds that the RICO indictment was sufficiently clear. *United States v. Nacrelli*, 468 F. Supp. 241, 250-51 (E.D. Pa. 1979), *aff'd mem.*, 614 F.2d 771 (1980); *United States v. Chovanec*, 467 F. Supp. 41, 46-47 (S.D.N.Y. 1979). In *United States v. Thevis*, 474 F. Supp. 117, 123-27 (N.D. Ga. 1979), the court granted requests for disclosure of all undisclosed and unindicted members of the enterprise, the connection between forfeitable property and the enterprise, and the interest of the defendant that was subject to forfeiture. *Thevis* adopted a two-part analysis of a motion for a bill of particulars. First, the court must determine from the face of the motion whether nondisclosure would result in prejudicial surprise or preclude meaningful defense preparation. If so, the motion for a bill of particulars must be granted. *Id.* at 123. If it cannot make such a finding on the face of the requested particular, "the Court must balance the competing interests of the defense and the government." *Id.* at 124. At this stage, the defendant has the burden of showing by motion, affidavit, or other means that the bill requests information necessary to investigate the charges. *Id.* The defendant is not required to offer "formal, legal proof," but only a logical probability of prejudicial surprise or preclusion of a meaningful defense, and in areas of doubt, the defendant's interest must prevail. *Id.*

397. *United States v. Malatesta*, 583 F.2d 748, 755-56 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979). In the absence of a showing of prejudice, the government is permitted to prove acts falling within the kind described by a general allegation; however, if the government specifically alleges the acts underlying an element of the offense, it is precluded from establishing other acts. *Id.*

398. 486 F.2d 670 (2d Cir. 1973).

399. 18 U.S.C. § 1952 (1976). This statute proscribes travel or transportation in aid of racketeering offenses.

400. 486 F.2d at 683.

401. 566 F.2d 414 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).



government-formed corporation created jurisdiction for purposes of a section 1962(b) charge that involved the use of extortion to acquire control of private sanitation districts in areas of New York City. Rejecting this argument, *Gambino* distinguished *Archer* on the ground that even if the federally created jurisdiction elements were excluded from consideration, the enterprise had a sufficient impact on interstate commerce.<sup>402</sup> The question remains whether this defense would be accepted if a court found no such impact by the enterprise.

#### H. Proposed Amendments

Both Senate and House versions of the most recent proposed federal criminal code create separate crimes resembling section 1962(c). Section 1801(a) of the Senate bill, S. 1722,<sup>403</sup> prohibits a person from organizing, controlling, financing, or participating in a supervisory capacity in a racketeering syndicate.<sup>404</sup> Section 1807(g) defines "racketeering syndicate" as a "group of five or more persons who, individually or collectively, engage on a continuing basis in conduct constituting racketeering activity."<sup>405</sup> H.R. 6915,<sup>406</sup> the House bill, establishes a similar crime in section 2701(a)(1),<sup>407</sup> although it differs from the Senate version in that it includes a scienter requirement of "knowingly."<sup>408</sup>

The Senate and House bills also incorporate provisions that combine the existing subsections 1962(b) and (c). Section 1802 of the Senate version provides that "[a] person is guilty of an offense if, through a pattern of racketeering activity, he acquires or maintains an interest in, or controls or conducts an enterprise."<sup>409</sup> The Senate bill, however, differs significantly from the present statute. Its proposed definition of "pattern" in section 1807(e) includes a common scheme requirement and resolves the "single transaction" pattern problem by requiring two or more "separate acts of racketeering ac-

402. *Id.* at 419.

403. S. 1722, 96th Cong., 1st Sess. (1979).

404. *Id.* § 1801(a).

405. *Id.* § 1807(g). Section 1801(b) states that prima facie evidence of culpable participation in a syndicate is established by "proof that a person has shared in the proceeds from a racketeering syndicate to the extent of \$5,000 or more in any thirty day period." *Id.* § 1801(b).

406. H.R. 6915, 96th Cong., 2d Sess. (1980).

407. *Id.* § 2701(a)(1). Under this section, an offender is one who knowingly "organizes, owns, controls, finances, or otherwise participates in a supervisory capacity in a racketeering syndicate." *Id.* § 2701(a)(1). The definition of syndicate in § 2707(8) is virtually identical to that contained in the Senate version. S. 1722, 96th Cong., 1st Sess. § 1807(g) (1979).

408. *Id.* The House bill also omits the prima facie case provision of S. 1722. See note 405 *supra*.

409. S. 1722, 96th Cong., 1st Sess. § 1802 (1979).

tivity."<sup>410</sup> In addition, this provision focuses only on patterns of racketeering; a separate crime for collection of an unlawful debt is established in section 1804.<sup>411</sup> Furthermore, S. 1722 expands the scope of RICO by incorporating new offenses such as aggravated battery, commercial bribery, and criminal copyright infringement within the definition of "racketeering activity" in section 1807(f).<sup>412</sup>

In all other respects, the Senate bill is either more ambiguous than the present statute or retains its flaws. Like section 1962, S. 1722 is silent on the scienter issue. Unlike the existing law, it omits any mention of effect on interstate commerce, fails to define the term "enterprise," and omits the requirement that racketeering activities occur within ten years of each other.<sup>413</sup> In contrast, the House provision improves present law by explicitly resolving issues rather than remaining silent. Although section 2701(2) of H.R. 6915 states an offense similar in form to the Senate's section 1802,<sup>414</sup> it incorporates a scienter requirement of "knowingly"<sup>415</sup> and, in section 2701(b), requires that the enterprise affect commerce.<sup>416</sup>

The most significant distinction between S. 1722 and H.R. 6915 is the latter's inclusion of a definition of "enterprise." That definition, contained in section 2707(3), describes an enterprise as "a business or other similar business-like undertaking by an association of persons, and includes a government or government agency."<sup>417</sup> This provision has three significant aspects: it includes government agencies as enterprises; it seems to exclude enterprises consisting of one person, as it refers only to groups and organizations; and its language of "business or other similar business-like undertaking" implies a more formal organizational structure than that of "individuals associated in fact."

410. *Id.* § 1807(e). Section 1807(e) defines "pattern of racketeering activity" as "two or more separate acts of racketeering activity, at least one of which occurred after the effective date of this subchapter, that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

411. *Id.* § 1804.

412. *Id.* § 1807(f).

413. The omission of the 10 year requirement compounds the due process problem of defending against charges that occurred several years before the indictment but that have not expired under any state or federal statute of limitations. *See* notes 302-10 *supra* and accompanying text; notes 492-95 *infra* and accompanying text.

414. H.R. 6915, 96th Cong., 1st Sess. § 2701(a)(2) (1980) (imposes criminal sanctions on one who "knowingly engages in a pattern of racketeering activity and thereby . . . (A) acquires or maintains an interest in, or control of an enterprise; or (B) conducts or participates in the conduct of an enterprise"). Like S. 1722, the House bill makes the collection of an unlawful debt a separate crime. *Id.* § 2703. The H.R. 6915 definition of "pattern of racketeering activity" in § 2707(6) closely resembles the Senate definition. *See* note 410 *supra*.

415. H.R. 6915, 96th Cong., 2d Sess. § 2701(a) (1980).

416. *Id.* § 2701(b).

417. *Id.* § 2707(3).

Although H.R. 6915 does not explicitly resolve the problem of alleged enterprises that are engaged only in illegal activities, section 2704, an offense entitled “[t]ravel or transportation in aid of racketeering,”<sup>418</sup> indicates that it probably contemplates that an illegal operation can be an enterprise. Moreover, section 2704(b) defines “unlawful activity” as “any enterprise involving conduct which violates section 2741 . . . or any of sections 2711 through 2714,” and as “an enterprise involving prostitution offenses, or narcotics or controlled substances.”<sup>419</sup>

#### IV. SECTION 1962(d)—RICO CONSPIRACY

Section 1962(d) proscribes conspiracies “to violate any of the provisions of subsections (a), (b), or (c).”<sup>420</sup> If the government alleges a conspiracy to violate subsection (c), for example, it must show that an individual agreed to participate, directly or indirectly, in the affairs of an enterprise through the commission of a pattern of racketeering activity.<sup>421</sup>

##### A. *The Elliott View of RICO Conspiracy*

###### 1. *United States v. Elliott*

The most controversial case interpreting section 1962(d) is *United States v. Elliott*,<sup>422</sup> in which the Fifth Circuit construed section 1962(d) as establishing an offense fundamentally different from the traditional form of conspiracy. In *Elliott*, six co-defendants participated in more than twenty diverse criminal acts, each of which involved an offense enumerated in section 1961. These acts included burning an unoccupied nursing home, stealing meat, attempting to influence the outcome of the stolen meat trial, selling stolen cars, stealing a truck, murdering an informer, and selling illegal drugs.<sup>423</sup> Many defendants participated in only a few of the criminal transactions, and only one defendant was implicated in all of them.<sup>424</sup>

The court acknowledged that the section 1962(d) charge could not have been successfully prosecuted as a single conspiracy under the general federal conspiracy statute, 18 U.S.C. § 371.<sup>425</sup> Although the

---

418. *Id.* § 2704.

419. *Id.* § 2704(b).

420. 18 U.S.C. § 1962(d) (1976).

421. See *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Campanale*, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

422. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

423. *Id.* at 884-95.

424. *Id.* at 884-96.

425. *Id.* at 902 (citing 18 U.S.C. § 371 (1976)).

Supreme Court's opinion in *Blumenthal v. United States*<sup>426</sup> permits the government to charge all defendants pursuing a common objective in a single conspiracy count under section 371, the *Elliott* court interpreted *Blumenthal* and another Supreme Court case, *Kotteakos v. United States*,<sup>427</sup> to mean that a single conspiracy does not exist if its members "are not truly interdependent or where the various activities sought to be tied together cannot reasonably be said to constitute a unified scheme."<sup>428</sup> The *Elliott* court conceded that the alleged section 1962(d) conspiracy would not satisfy the requirement of a common objective under *Kotteakos* and *Blumenthal* because some of the defendants had no contact with one another and the activities were too diverse to be tied together by one agreement.<sup>429</sup> Despite this apparent bar to prosecution, the *Elliott* court held that *Kotteakos* and *Blumenthal* were not controlling. It reasoned that RICO was intended to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the principles established in *Kotteakos* and *Blumenthal* with the concept of the enterprise.<sup>430</sup> Characterizing the substantive RICO offense as the means by which diverse parties

---

426. See, e.g., *Blumenthal v. United States*, 332 U.S. 539, 557-59 (1947). In this case, the evidence established the existence of a chain conspiracy involving illegal sales of liquor and consisting of the owner, wholesalers, and salesman. Although the owner concealed his activities so it appeared to the salesman that there was no further link beyond the wholesaler, the Court included all the participants within the conspiracy. It found knowledge of the owner's identity irrelevant to the basic plan because all the participants had attempted to further a common goal, overcharging for sales of whiskey. The activities were held to be sufficiently complex and continuing so that each member should have been aware that the knowing participation of the others was essential. *Id.*

427. 328 U.S. 750 (1946).

428. 571 F.2d 880, 901 (5th Cir.), cert. denied, 439 U.S. 953 (1978). In *Kotteakos*, the Court reversed convictions because the proof at trial disclosed multiple conspiracies at variance with the single conspiracy in the indictment. The evidence established a "wheel" conspiracy consisting of a central figure (the hub) who acted as a broker for at least eight separate fraudulent loans from the government. There was no connection between those procuring the loans (the spokes) other than that they transacted business with the hub. The Court analogized this situation to a wheel without the rim needed to enclose the spokes, and thus not sufficient to establish a single conspiracy. 328 U.S. 750, 754-55 (1946). See also *United States v. Bertolotti*, 529 F.2d 149, 155-57 (2d Cir. 1975); *United States v. Varelli*, 407 F.2d 735, 741-44 (7th Cir. 1969); *Rocha v. United States*, 288 F.2d 545, 552 (9th Cir.), cert. denied, 366 U.S. 948 (1961).

429. 571 F.2d at 902. Judge Simpson, the author of the *Elliott* opinion, omitted any reference of an earlier Fifth Circuit opinion in which he had joined, *United States v. Perez*, 489 F.2d 51, 64 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974), that criticized and discarded many of the pre-RICO conspiracy concepts established in *Kotteakos*. Although *Elliott* described traditional conspiracy law as adopting a "chain-wheel" dichotomy, 571 F.2d at 900-02, *Perez* had refused to apply that distinction, reasoning that "[i]t only confounds the law to try to characterize this in the figure of spokes, wheels, hubs, rims or chains." 489 F.2d at 64.

430. 571 F.2d at 902.

and crimes could be joined together, the court regarded the section 1962(d) conspiracy as relating to an agreement to participate in the enterprise's affairs, rather than an agreement to commit all of the predicate crimes constituting the enterprise.<sup>431</sup> This construction was based solely on a general expression of congressional intent that the Act was designed "to seek the eradication of organized crime . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."<sup>432</sup>

The *Elliott* interpretation of section 1962(d) emphasizes that the RICO conspiracy provision reaches even remote associates of an enterprise.<sup>433</sup> As the *Elliott* court metaphorically declared, "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise."<sup>434</sup> These remote associates are guilty, even though they do not know the full scope of the conspiracy, because *Elliott* requires knowledge only of the essential nature of the enterprise, described by the court as making money from repeated criminal activity.<sup>435</sup> For example, this knowledge requirement was satisfied because one defendant knew that the enterprise was ongoing and "bigger than his role in it."<sup>436</sup> It was immaterial that he was unaware of activities bearing little relationship to his own.<sup>437</sup>

431. *Id.* at 902-03. The court commented that "[t]he gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs." *Id.*

432. Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, 923 (Statement of Findings and Purpose) (cited at 571 F.2d at 902).

433. 571 F.2d at 903. Moreover, *Elliott* noted that, since direct evidence of a conspiratorial agreement is unnecessary, the remote associates could be convicted as conspirators on the basis of purely circumstantial evidence. *Id.*

434. *Id.*; *cf.* *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (acknowledged applicability of RICO to "small fry" may be overbroad in some cases, but found defendants not "small fry"), *cert. denied*, 441 U.S. 933 (1979); *Atkinson*, *supra* note 10, at 4 (RICO can be unconstitutionally vague as applied to some individuals). If the *Elliott* court correctly characterized the scope of RICO, Title IX should be closely scrutinized in view of the Supreme Court's cautionary note that "it would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1875); *see* note 138 *supra*.

435. 571 F.2d at 903-04. *Elliott* failed to reconcile this statement with its earlier assertion that, under traditional conspiracy law, a single conspiracy could not have been charged, "[e]ven viewing the 'common objective' of the conspiracy as the raising of revenue through criminal activity." *Id.* at 902.

436. *Id.* at 904.

437. *Id.* *But see* *United States v. Bright*, 630 F.2d 804, 834 n.52 (5th Cir. 1980).

## 2. Reaction to *Elliott*

Outside of the Fifth Circuit, only the Eighth Circuit has directly considered the validity of the *Elliott* construction of section 1962(d).<sup>438</sup> Sharply criticizing the rationale of the *Elliott* opinion, the Eighth Circuit, in *United States v. Anderson*,<sup>439</sup> noted that there is

nothing in the statutory scheme to suggest that Congress intended to discard the traditional legal precepts applied to concerted criminal activity, or that Congress intended to expand federal jurisdiction to this extent. The structure of RICO reveals a specific orientation that does not encompass radical expansion of federal conspiracy law.<sup>440</sup>

Even within the Fifth Circuit, however, the status of *Elliott* is unclear. One subsequent case analyzed section 1962(d) issues and mentioned *Elliott* only in passing.<sup>441</sup> Another case, *United States v. Clemones*,<sup>442</sup> rejected a defense based on *Kotteakos v. United States*,<sup>443</sup> but did not acknowledge that *Elliott* eliminated the *Kotteakos* argument.<sup>444</sup> *Clemones* also analyzed the intent or knowledge element of section 1962(d) in terms of more traditional conspiracy doctrines. Although *Elliott* merely required knowledge that others are engaged in repeated criminal activity for the purpose of making money,<sup>445</sup> *Clemones* focused on whether the defendants knew of the

438. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980). In *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979), the court may have indirectly criticized the remark in *Elliott* that RICO reaches even "the smallest fish." It commented that "RICO may impermissibly reach 'small fry' with only a tangential relationship with a criminal enterprise, but in this case neither McGowan nor Swiderski are small fry. Both had significant contacts with the broadly-defined enterprise." 593 F.2d at 1249; *see United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) (no indication that Congress intended to permit prosecutions of "relatively minor offenders, having no connection with organized crime, who simply associate to commit two of the predicate crimes").

439. 626 F.2d 1358 (8th Cir. 1980).

440. *Id.*, at 1369 (citations omitted).

441. *United States v. Malatesta*, 583 F.2d 748, 759-60 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979). *Malatesta* considered a challenge to an instruction requiring a finding that the "defendant wilfully participated in the unlawful plan with the intention of advancing its purpose." 583 F.2d at 759. The court rejected the defendant's claim that the instruction should have included the words "with knowledge of the plan" because this phrase might give the impression that "specific knowledge of the entire plan was required" rather than "full knowledge of the general scope and purpose of the conspiracy," the appropriate intent standard. *Id.* at 759-60.

442. 577 F.2d 1247 (5th Cir. 1978), *modified per curiam*, 582 F.2d 1373 (5th Cir.), *cert. denied*, 100 S. Ct. 1313 (1980).

443. 328 U.S. 750 (1946).

444. 577 F.2d at 1253.

445. *See* notes 433-37 *supra* and accompanying text.

actual prostitution activities that were the major objects of the conspiracy.<sup>446</sup>

A third Fifth Circuit decision, *United States v. Diecidue*,<sup>447</sup> purported to follow the *Elliott* mode of analysis, but expanded an element of the *Elliott* opinion that slightly mitigates the harsh impact of imposing conspiracy liability on remote associates. The *Diecidue* court emphasized *Elliott's* requirement that the defendant agree to commit two or more acts<sup>448</sup> and reversed the convictions of several defendants because the government failed to establish either that the defendants participated in more than one criminal transaction or that they knew of any other criminal activities constituting the enterprise.<sup>449</sup> For example, the court reversed the conviction of defendant Boni because the only evidence against him was that he supplied dynamite to certain members of the enterprise and bought cocaine from another member.<sup>450</sup> The sale of dynamite was not a predicate offense for RICO and was excluded as an object of the enterprise conspiracy, while the purchase of cocaine was also deemed insufficient to constitute an agreement to join the enterprise.<sup>451</sup> In the absence of other evidence that Boni "knew something about his codefendants' related activities which made the enterprise, he could not be convicted of conspiring to engage in a pattern of racketeering."<sup>452</sup>

Although *Diecidue* cited *Elliott* with approval, its discussion of the case against Boni may be difficult to reconcile with the *Elliott* analysis. If *Elliott* stands for the proposition that the defendant need not know of the enterprise's activities as long as he agrees to commit

---

446. 577 F.2d at 1255-56.

447. 603 F.2d 535 (5th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980).

448. *Id.* at 557.

449. *Id.* at 555-56, 558, 566.

450. *Id.*

451. *Id.* at 556.

452. *Id.* This language was quoted with approval in *United States v. Northrup*, 482 F. Supp. 1032, 1035 n.1 (D. Nev. 1980). In *Northrup*, the defendant supplied explosive and incendiary devices to Culinary Union Local 226 employees who sought to expand the union's jurisdiction by fire bombing restaurants not recognizing Local 226 as the bargaining agent for its employees. Judge Claiborne interpreted *Diecidue* as requiring the Government to "prove that the defendant in question had knowledge as to the enterprise's illicit activities," and applied this standard to deny the defendant's motion for judgment of acquittal under Fed. R. Crim. P. 29(c). 482 F. Supp. at 1035-36. The court held that the defendant had "knowledge of the nexus between the firebombings and the affairs of Culinary Union Local 226." *Id.* at 1036. The *Diecidue* holding does not conflict with *Elliott*, which also reversed a § 1962(d) conviction because the defendant was only marginally involved in the enterprise's activities. *Elliott* conducted amphetamine transactions with a codefendant and became peripherally involved in a stolen meat transaction, an involvement he later attempted to conceal. The court held these acts were insufficient to show that *Elliott* "knowingly and intentionally joined the broad conspiracy to violate RICO." 571 F.2d 850, 907 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

two predicate offenses,<sup>453</sup> Boni's knowledge of related activities should have been irrelevant because he was involved in only one racketeering offense. Consequently, the *Diecidue* holding may mean that a defendant is deemed to have agreed to commit two predicate offenses by actually committing them or by committing one offense and knowing of related activities. Alternatively, it may mean that a knowledge requirement applies to all RICO conspiracy defendants without regard to whether they commit one or two offenses.<sup>454</sup>

### 3. Analysis of *Elliott*

*Elliott's* radical departure from established conspiracy principles was not based on any specific legislative comment referring to changes in traditional conspiracy law. Instead, the court relied on comments in the legislative history pointing to the need for the innovative remedies that RICO created.<sup>455</sup> One commentator has suggested, however, that these comments probably referred to the incorporation of antitrust remedies, such as divestiture, and novel criminal forfeiture penalties.<sup>456</sup> Commentators have criticized the *Elliott* doctrine because it undermines the fundamental concepts of conspiratorial intent and agreement by permitting a finding that a defendant intended to join a section 1962(d) conspiracy, even though he did not know its purposes, activities, and scope.<sup>457</sup> Although *Elliott* does recognize the existence of a mens rea element to the extent that it requires knowledge of the essential nature of the plan, the

453. See notes 435-37 *supra* and accompanying text.

454. Compare *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) with *United States v. Northrop*, 482 F. Supp. 1032, 1035 n.1 (D. Nev. 1980).

455. See note 432 *supra* and accompanying text.

456. See *Conspiracy Law*, *supra* note 29, at 121-22. Another commentator has asserted that, in view of the lack of any specific reference in the legislative history regarding expansion of the scope of conspiracy law, it was "an extraordinary feat of creativity on the part of the Fifth Circuit to interpret a vague remark concerning unnecessarily limited [already existing] sanctions as concrete evidence of such intent." Bradley, *supra* note 84, at 878 & n.227.

457. See Marcus, *Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective*, 7 Am. J. Crim. L. 287, 319-21 (1979); Tarlow, *Defense of a Federal Conspiracy Prosecution*, 4 Nat'l J. Crim. Def. 183, 231-33 (1978); *Conspiracy Law*, *supra* note 29, at 124-25. Another commentator states that, because the enterprise alleged in *Elliott* was not a legitimate organization but merely a group of persons connected only by a series of criminal acts, the conspiracy to violate § 1962(c) became in effect "a conspiracy to commit a series of criminal acts by means of (the same) series of criminal acts." Bradley, *supra* note 84, at 879. He continues that the only agreement found was "the commission of the same series of criminal acts" or the simple participation in racketeering activity. As a result, "[t]he element of agreement, necessary to distinguish the conspiracy charge from the substantive offense, is missing," and the conspiracy becomes identical to the substantive offense. *Id.*; see *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980) (Congress intended two separate offenses).



characterization of "the essential nature" as the making of money from repeated criminal activity is so broad as to be meaningless. A defendant is seemingly culpable, for example, if he engages in two criminal acts and knows that other defendants are engaged in unrelated criminal activities for noncharitable purposes.<sup>458</sup>

The *Elliott* doctrine has also been criticized for permitting due process violations.<sup>459</sup> *Kotteakos* cautioned that joint trials may violate the due process requirement that a defendant's guilt be proven to be "individual and personal";<sup>460</sup> yet, *Elliott's* effect is to endorse mass conspiracy trials resulting in guilt by association because of the difficulties juries have in distinguishing the evidence against various defendants. The due process problems are compounded by the rule in *United States v. Pinkerton*, permitting each member of a conspiracy to be convicted of any substantive crime committed by a co-conspirator in furtherance of the conspiracy.<sup>461</sup> *Elliott* further expands the scope of this vicarious liability by freeing the *Pinkerton* rule from the limitations set by *Kotteakos*. The combined effect of *Elliott* and *Pinkerton* is that defendants may be liable for substantive offenses even if they did not know the type of offense or the scope of the enterprise including that offense.<sup>462</sup>

#### 4. *Elliott* and Legitimate Enterprises

The primary flaw in the *Elliott* view is the court's assumption that the scope of a RICO substantive offense or a RICO conspiracy is de-

---

458. Tarlow, *supra* note 457, at 232-33. The absurdly broad characterization of "the essential nature" of the conspiracy may have been compelled by *Elliott's* rejection of a requirement that a common objective underly the activities of the conspiracy. If the government is not required to show that the defendant knew of the common objective, the term "essential nature" must mean something broader than the common objective. The only conceivable "essential nature" standard broader than knowledge of a common goal is knowledge that other people are engaged in some unrelated criminal activity for the purpose of making money. The Fourth Circuit decision in *United States v. Karas*, 624 F.2d 500, 503 & n.3 (4th Cir. 1980), approved instructions requiring a more meaningful common purpose. The trial court instructed the jury that the prosecution must show that the predominant "purpose of the conspiracy was to violate the RICO Act." *Id.* See also *United States v. Bright*, 630 F.2d 804, 822, 834 (5th Cir. 1980). These instructions might enable defendants to argue that their activities were not for the purpose of forming or furthering an enterprise but were merely personal ventures conducted independently of the enterprise. See notes 347-48 *supra* and accompanying text.

459. *Conspiracy Law*, *supra* note 29, at 123-24.

460. *Kotteakos v. United States*, 328 U.S. 750, 772-77 (1946). *Elliott's* enterprise conspiracy theory does not, as *Elliott* contended, respond to due process problems by tying the defendants together in an association organized "for the purpose of making money from repeated criminal activity." 571 F.2d at 904. Rather, the "enterprise conspiracy" supplies no meaningful connection because the defendants could not know that they were participating in an enterprise and took no deliberate steps to create one.

461. *Pinkerton v. United States*, 328 U.S. 640, 647 (1946).

462. See *Conspiracy Law*, *supra* note 29, at 125.

fined by the enterprise. The court believed that, although the defendants must agree to commit a pattern of racketeering activity, they need not agree to commit the same pattern as long as the defendants' patterns involve the same enterprise.<sup>463</sup> Applying *Elliott* to a legitimate enterprise, however, it is apparent that the enterprise does not always supply a substantial connection between the activities of the defendants.

The following hypothetical illustrates this defect in *Elliott*. Assume that five police officers are charged with operating the same police department through the following patterns: (1) Officer A makes illegal payments in 1971 to a legislator to obtain a salary increase; (2) Officer B receives bribes in 1973 in exchange for protecting prostitution; (3) Officer C murders two minority citizens while arresting them in 1975; (4) Officer D removes cocaine from the evidence locker in 1977 and sells it with the aid of individuals he is supposedly investigating; and (5) Officer E embezzles money from the police pension benefit plan in 1979. All of the police officers know of, but are not involved in, the activities of the other officers.

Under a literal application of *Elliott*, these parties would be part of a single chargeable 1962(c) or 1962(d) RICO offense solely because their acts occurred in the conduct of the same enterprise. This produces the bizarre result that a single RICO offense may consist of every racketeering act committed by any employee or member of a large legitimate enterprise—such as the United States House of Representatives, General Motors, or the Department of Housing and Urban Development—during the many decades of the enterprise's existence. In *United States v. Cryan*,<sup>464</sup> the court rejected government arguments that would have led to this absurd result. Fearing that the scope of a RICO conspiracy to operate a large government agency would be "potentially enormous,"<sup>465</sup> the *Cryan* court required proof that each defendant either "committed or authorized the acts" constituting the RICO offense.<sup>466</sup>

The decision in *Cryan* implies that the enterprise alone cannot define the scope of a RICO offense. A relationship is required between

---

463. *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir.), cert. denied, 439 U.S. 953 (1978); accord, *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir. 1980), cert. denied, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62). The *Elliott* court stated that "the two or more predicate crimes must be related to the affairs of the enterprise but need not otherwise be related to each other." 571 F.2d at 899 n.23; accord, 624 F.2d at 1122; see notes 430-37 *supra* and accompanying text.

464. 490 F. Supp. 1234 (D.N.J. 1980).

465. *Id.* at 1243. The court distinguished *Elliott* on the ground that *Cryan* involved a legitimate enterprise while *Elliott* involved an illegal enterprise. *Id.* at 1242 n.14. This distinction is not valid, however, because RICO employs a uniform definition of "enterprise." See notes 170-72 *supra* and accompanying text. A different law cannot be formulated for each type of enterprise.

466. 490 F. Supp. at 1243.

the patterns of the defendants because the mere fact that the defendants operate the same enterprise does not supply a sufficient connection between them. Conspiracy principles<sup>467</sup> and rules of joinder<sup>468</sup> require that defendants agree to commit a common pattern of racketeering activity rather than merely agree to operate a common enterprise through a variety of otherwise unrelated patterns.

### 5. *Elliott* and Common Scheme

*Elliott's* construction of section 1962(d) may be related to its rejection of the "common scheme" interpretation of "pattern."<sup>469</sup> The court assumed that the RICO substantive offense itself can connect diverse parties and crimes without a common objective.<sup>470</sup> This assumption would be invalid in a jurisdiction that requires racketeering acts to be connected by a common scheme or plan to establish the "pattern" element of the substantive RICO offense.<sup>471</sup> Reconciling *Elliott* with a common scheme analysis, however, presents problems, even in those jurisdictions that do not adopt it, because that analysis

---

467. See pt. IV(B) *infra*.

468. See pt. V(E) *infra*.

469. 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

470. *Id.* at 902.

471. The common scheme element of the substantive offense would affect a § 1962(d) offense because of the specific intent requirement of conspiracy law. See generally Harno, *Intent in Criminal Conspiracy*, 89 U. Pa. L. Rev. 624 (1941). To sustain a conviction for conspiracy to commit a particular offense, the specific intent element requires that the defendant intended to commit each of the elements of the substantive offense. See *United States v. Conroy*, 589 F.2d 1258, 1270 (5th Cir.), *cert. denied*, 444 U.S. 831 (1979). With a § 1962(d) charge, the defendant would have to intend to participate in the common scheme because that scheme is an element of the underlying offense. Assuming that § 1962(d) offenses must involve a common scheme, the defendant need not know of the specific acts; indeed, under *pre-Elliott* law, a defendant unaware of the existence of other conspirators or their activities could be convicted of conspiracy. See *Blumenthal v. United States*, 332 U.S. 539, 556-57 (1947); *Chavez v. United States*, 275 F.2d 813, 817 (9th Cir. 1960). The common scheme limitation, however, would restrict the scope of the conspiracy to agreed upon activities and to those activities that are reasonably foreseeable and committed in furtherance of the common objective. See *Pinkerton v. United States*, 328 U.S. 640, 647 (1946); *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938). This analysis may be modified by a broad reading of the "common scheme" element that is satisfied by finding "similar purposes, results, participants, victims, or methods of commission" among the racketeering acts. 18 U.S.C. § 3575(e) (1976); see note 248 *supra* and accompanying text. If these relationships are the only bases for commonality, no actual scheme or plan is involved. Consequently, the defendant's liability for acts in furtherance of a common scheme cannot be assessed. On the other hand, if the § 1962(d) offense is based on the defendant's agreement to commit offenses connected by "similar results" types of relationships, the scope of the agreement would be limited to acts that share those relationships. See *United States v. Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (defendants liable only for the "fair import of the concerted purpose or agreement as he understands it").

may be inherent in the Federal Rules of Criminal Procedure. Although *Elliott* assumed that RICO modifies the rules governing joint trials of defendants,<sup>472</sup> rule 8(b) nonetheless governs the joinder of defendants in a single trial.<sup>473</sup> If rule 8(b) bars joinder, Title IX cannot authorize joinder without repealing or amending the rule.<sup>474</sup> Commentators interpreting the "series of acts or transactions" language of rule 8(b) have suggested that it is similar in meaning to the phrase, "two or more acts or transactions connected together or constituting parts of a common scheme or plan," contained in rule 8(a),<sup>475</sup> which governs joinder of offenses against a single defendant.<sup>476</sup> A court reading the rule 8(a) language into rule 8(b) must require that a relationship between the defendants' transactions be established. This result is difficult to reconcile with the *Elliott* holding permitting joinder of defendants who have participated in unrelated transactions.<sup>477</sup>

### B. Application of Conspiracy Doctrines to Section 1962(d)

If *Elliott* correctly concluded that RICO creates a new form of conspiracy, the applicability of the individual principles of traditional conspiracy law must be determined. For example, conspiracy doctrines imputing the acts and declarations of a person to conspirators may be inapplicable to an *Elliott* conspiracy.<sup>478</sup> Because vicarious liability doctrines were developed when conspiracy law required that the agreeing parties share a common objective,<sup>479</sup> *Elliott's* rejection of that requirement undermines the basis for vicarious liability.

---

472. 571 F.2d 880, 902 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

473. Fed. R. Crim. P. 8(b) permits joinder of defendants "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." See pt. III(C)(3) *supra*.

474. Rule 8(b) has not been explicitly repealed or amended. An implied repeal is unlikely without a strong showing of legislative intent to repeal. See note 630 *infra*. The absence of substantial support in the legislative record for the *Elliott* view effectively eliminates the implied repeal argument.

475. Fed. R. Crim. P. 8(a).

476. *United States v. Jackson*, 562 F.2d 789, 796 (D.C. Cir. 1977); 8 J. Moore, *Federal Practice* ¶ 8.06[2], at 8-37 (2d ed. 1976); 1 C. Wright, *Federal Practice and Procedure* § 144, at 322 (1969).

477. See pt. III(C)(3) *supra*; pt. V(E) *infra*.

478. Fed. R. Evid. 801(d)(2)(E). The rule provides that such declarations are not hearsay.

479. See *Pinkerton v. United States*, 328 U.S. 640, 644 (1946). These doctrines were based on the theory that the conspiratorial agreement created an agency relationship among the parties to that agreement. *Id.* Although *Pinkerton* involved vicarious liability for the substantive offenses of a conspirator, the agency rationale also underlies the concept in Fed. R. Evid. 801(d)(2)(E) that statements of co-conspirators that are imputed to one another are not hearsay. See *United States v. Harris*, 546 F.2d 234, 237 n.4 (8th Cir. 1976).

*United States v. Cryan*,<sup>480</sup> however, indicates that RICO does not expand conspiracy law to permit the admission of all illegal acts occurring in the operation of a legitimate enterprise. In *Cryan*, three employees of a sheriff's office, the enterprise, were charged with participation in annual illegal payments to a political "slush fund." The government alleged that, before these defendants joined the office, other employees made a special payment in 1971 to a Democratic Party Chairman in return for his attempts to influence a local legislative body to grant salary increases. The government contended that the special payment and the subsequent acts of the three defendant employees could be charged together in both section 1962(c) and section 1962(d) counts, and that the evidence of the special payment was admissible against the three defendants who were not members of the sheriff's office at the time of the 1971 payment. Under the government's view, a sheriff making illegal payments in 1975 would be liable as a conspirator for the acts of every employee who ever made or collected an illegal payment.<sup>481</sup>

Holding that the special payment and the subsequent payments were not part of the same offense or the same section 1962(d) conspiracy, *Cryan* rejected the use of the vicarious liability doctrine on these facts and dismissed the indictment.<sup>482</sup> The court reasoned that, if the government could allege all illegal acts in the operation of a common enterprise as part of a single conspiracy, the scope of the conspiracy would be "potentially enormous."<sup>483</sup>

Despite *Elliott's* elimination of the *Kotteakos* principles, section 1962(d) cases have been analyzed in virtually the same manner as other conspiracies.<sup>484</sup> One exception has been the treatment of the

---

480. 490 F. Supp. 1234 (D.N.J. 1980).

481. *Id.*

482. *Id.* at 1243-45; see note 271 *supra*; notes 464-66 *supra* and accompanying text.

483. *Id.* at 1243; see notes 464-66 *supra* and accompanying text. In a different factual context, the Third Circuit also confronted the problem of admitting prior acts of bribery at a RICO trial. In *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913 (1979), the defendants were state court magistrates charged with participating in the affairs of the enterprise, the Levitt Agency, through a common scheme involving the receipt of bribes from that agency. The court held that, under Fed. R. Evid. 404(b), the government could not show a common scheme by offering evidence that the defendants had received bribes from another bail bonding agency because the indictment charged a common scheme that involved only the Levitt Agency. *Id.* at 1197-98. *Herman* is a simpler case than *Cryan* because the prior acts in *Herman* did not involve the affairs of the alleged enterprise. If the prior payments in *Herman* had been received from the same enterprise as that alleged, allegation and proof of those payments would be permitted under *Cryan* because the defendants in *Herman* had actually committed those acts.

484. See, e.g., *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Malatesta*, 583 F.2d 748

requirement in the general federal conspiracy statute that the government prove an overt act in furtherance of the conspiracy.<sup>485</sup> A district court has concluded, by analogy to Sherman Act conspiracies,<sup>486</sup> that section 1962(d) does not require an overt act.<sup>487</sup> In contrast, the Fourth Circuit seemingly replaces the overt act element with a requirement that two racketeering acts be committed.<sup>488</sup>

### C. Proposed Federal Criminal Codes

Neither of the recently proposed criminal codes includes provisions corresponding to section 1962(d) because both codes eliminate the practice of attaching conspiracy provisions to substantive statutes. By requiring that a conspiracy to violate the racketeering statutes be prosecuted under the general conspiracy statutes in S. 1722<sup>489</sup> and H.R. 6915,<sup>490</sup> these bills indicate a legislative intent to create a uniform body of conspiracy law.<sup>491</sup> This restructuring is likely to undermine

(5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979); *United States v. Clemones*, 577 F.2d 1247 (5th Cir. 1978), *modified per curiam*, 582 F.2d 1373 (5th Cir.), *cert. denied*, 100 S. Ct. 1313 (1980). One doctrine that has survived *Elliott* excludes acts of concealment as independent evidence of a conspiracy. *See United States v. Elliott*, 571 F.2d 880, 907 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *United States v. Campanale*, 518 F.2d 352, 358 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *see note 264 supra*. Another conspiracy doctrine that has been applied to § 1962(d) is the rule established in *Braverman v. United States*, 317 U.S. 49 (1942). *Braverman* held that one agreement with multiple objects, each of which is a separate crime, is only one conspiracy and can only be punished once. *Id.* at 53. This doctrine precludes the government from charging one agreement as two or more separate conspiracy counts. The Ninth Circuit examined the *Braverman* rule in the context of § 1962(d) in *United States v. Campanale*, 518 F.2d 352, 357-58 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976), and indicated that the government cannot allege two separate § 1962(d) counts based on one agreement. *Id.* at 357; *see notes 498-507 infra* and accompanying text.

485. 18 U.S.C. § 371 (1976).

486. 15 U.S.C. § 1 (1976). This statute does not require proof of an overt act. *Fiswick v. United States*, 329 U.S. 211, 216 n.4 (1946).

487. *United States v. Forsythe*, 429 F. Supp. 715, 720 n.2 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977). The court observed that to require an overt act would be "merely repetitious of the general conspiracy statute, 18 U.S.C. 371." *Id.*

488. *United States v. Karas*, 624 F.2d 500, 503 (4th Cir. 1980). This holding seems to conflict with the basic principle of conspiracy law that one can be guilty of an agreement to commit an offense even if he did not attempt to commit the offense. *See United States v. Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974). *Karas* fails to explain why a group of people cannot agree to commit two racketeering acts without attempting to commit the offenses.

489. S. 1722, 96th Cong., 1st Sess. § 1002 (1979).

490. H.R. 6915, 96th Cong., 2d Sess. § 1102 (1980).

491. Additionally, the code versions undermine a fundamental assumption of *Elliott*. Both define "pattern" to require a relationship between the racketeering activities, a relationship that *Elliott* had rejected. S. 1722, 96th Cong., 1st Sess. § 1807(e) (1979); H.R. 6915, 96th Cong., 2d Sess. § 2707(6) (1980); *see notes 469-70 supra* and accompanying text.

*Elliott* because it would be difficult to carve out a unique RICO conspiracy doctrine from a single conspiracy statute.

## V. DEFENSES AND PRETRIAL OBJECTIONS TO RICO INDICTMENT FORMAT

### A. *Statute of Limitations*

The statute of limitations applicable to RICO prosecutions is the five year statute for noncapital offenses, 18 U.S.C. § 3282,<sup>492</sup> which runs from the date of the last alleged act of racketeering activity.<sup>493</sup> To some extent, Title IX undermines the operation of the statute of limitations by permitting prosecutions of predicate offenses committed beyond the existing limitations period.<sup>494</sup> The rationale for this undesirable result is that the predicate offenses alone are not the subject of the prosecution, but are merely part of a continuing RICO offense that extends into the limitations period.<sup>495</sup>

### B. *Double Jeopardy*

#### 1. Multiple RICO Indictments

Double jeopardy problems arise when the government alleges two or more separate section 1962(c) offenses or multiple section 1962(d) offenses based on the same illegal conduct. Traditionally, the courts have applied a "same evidence" test in cases involving multiple offenses arising out of the same transaction.<sup>496</sup> That test permits separate prosecutions if each offense charged "requires proof of an addi-

492. 18 U.S.C. § 3282 (1976); see *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir.), cert. denied, 439 U.S. 836 (1978); *United States v. Forsythe*, 560 F.2d 1127, 1134 & n.10 (3d Cir. 1977); *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1371 (2d Cir.), cert. dismissed, 439 U.S. 801 (1978). The courts have held that state statutes of limitations are inapplicable when state offenses are the predicate offenses for a RICO charge. See notes 302-10 *supra* and accompanying text.

493. *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1371 (2d Cir.), cert. dismissed, 439 U.S. 801 (1978).

494. See notes 302-10 *supra* and accompanying text.

495. *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977), aff'd mem., 578 F.2d 1371 (2d Cir.), cert. dismissed, 439 U.S. 801 (1978); see *United States v. Cohen*, 444 F. Supp. 1314, 1320-21 (E.D. Pa. 1978) (in rejecting duplicity argument, court found violations of predicate offenses within limitations period when RICO offense continued into period). It has been suggested that due process should prevent a prosecution of predicate offenses committed too far in the past to permit the defendant to properly prepare a defense. Atkinson, *supra* note 10, at 7-8.

496. E.g., *United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), cert. denied, 429 U.S. 961 (1976); *United States v. McCall*, 489 F.2d 359, 362-63, (2d Cir. 1973), cert. denied, 419 U.S. 849 (1974); see *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

tional fact which the other does not."<sup>497</sup> Based on the Supreme Court opinion in *Braverman v. United States*,<sup>498</sup> certain non-RICO cases have not strictly applied the "same evidence" test in situations involving two or more conspiracy charges under the same conspiracy statute.<sup>499</sup> *Braverman* proscribed the practice of charging multiple conspiracies merely because one agreement contemplated the violation of several statutes. The Court established the principle that one agreement with multiple objects involving separate substantive offenses is only one conspiracy that cannot be punished more than once under a single conspiracy statute.<sup>500</sup> Although *Braverman* precludes the tactic of charging multiple conspiracies based solely on multiple statutory violations, a more troublesome problem remains because the "same evidence" test may permit the government to charge a single conspiracy as separate conspiracies by alleging different named conspirators and different overt acts. Recognizing this problem, recent cases have sharply criticized this test<sup>501</sup> and have engaged in painstaking analyses of the similarities among the charged conspiracies to determine whether they actually constitute a single agreement.<sup>502</sup>

This practical approach to multiple conspiracy indictments should affect cases involving separate section 1962(c) indictments.<sup>503</sup> Although no case has yet directly analyzed the issue, the extension of this conspiracy double jeopardy approach to separate section 1962(c) counts may also be a source of potential conflict.<sup>504</sup> As in the multi-

---

497. See *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Papa*, 533 F.2d 815, 820 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976); *United States v. McCall*, 489 F.2d 359, 362-63 (2d Cir. 1973), *cert. denied*, 419 U.S. 849 (1974).

498. 317 U.S. 49 (1942); see note 484 *supra*.

499. See *United States v. Tercero*, 580 F.2d 312, 314-15 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978).

500. 317 U.S. at 53.

501. *United States v. Tercero*, 580 F.2d 312, 314-15 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978).

502. See, e.g., *United States v. Marable*, 578 F.2d 151, 153-54 (5th Cir. 1978). The first indictment alleged conspiracy to possess and distribute heroin from July 14 to August 20, 1976, while the second alleged conspiracy to possess and distribute cocaine between July 12 and July 29, 1976. The similar time periods, identical personnel, and the alleged violation of identical statutes established a single agreement. *Id.* at 154.

503. See *United States v. Campanale*, 518 F.2d 352, 357-58 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (indictment on two counts of conspiracy criticized because based upon same agreement).

504. In *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), the court refused to resolve a double jeopardy challenge to multiple § 1962(c) indictments involving different racketeering activities in the conduct of the affairs of the same enterprise, a union representing workers in New York's fur garment manufacturing industry. The first indictment alleged that the defendants unlawfully accepted money



ple conspiracy situation, the government can easily create two or more section 1962(c) charges from the same conduct by charging different enterprises or different patterns of racketeering activity.<sup>505</sup> However, there is no viable policy distinction between a situation involving multiple conspiracy indictments and one involving multiple section 1962(c) indictments. If the courts will not permit prosecutorial pleading discretion to undermine double jeopardy arguments in conspiracy cases,<sup>506</sup> they should not permit this result in situations under section 1962(c). Applying the conspiracy double jeopardy analysis to section 1962(c) cases, a double jeopardy violation should be presumed if the racketeering activities occur in the same general location, at the same general time, and involve the same central figure.<sup>507</sup> Furthermore, jurisdictions adopting the common scheme approach should bar separate prosecutions of section 1962(c) offenses when those offenses arise out of the same scheme or plan.

---

from manufacturers in return for permitting the manufacturers to subcontract work to non-union labor in violation of a collective bargaining agreement. The second indictment alleged that the defendants threatened non-union shop manufacturers with injury to person and property if these manufacturers would not stop soliciting subcontract work from union shop manufacturers. Responding to the defendant's assertion that multiple § 1962(c) offenses could not arise from the conduct of the affairs of the same enterprise, *id.* at 618, the court found this issue to turn on an interpretation of congressional intent with respect to § 1962(c), but refused to decide the question because it was prematurely raised. *Id.*

505. Under existing § 1962(c) case law, the government has virtually unfettered discretion to charge any one of the numerous enterprises existing in a particular situation. See notes 196-200 *supra* and accompanying text. The hypothetical discussed in the text accompanying notes 198-99 *supra* illustrates the manner in which at least seven separate enterprises can be created from one fact pattern. In the absence of the double jeopardy approach used with conspiracy, this hypothetical could produce at least seven § 1962(c) indictments. The number of conceivable § 1962(c) indictments also increases because of new charges produced by differing patterns of racketeering activity. Assume, for example, that although only a single enterprise exists, three related acts of racketeering activity, arson, bribery, and robbery, have occurred. Three separate § 1962(c) indictments could be drafted, an enterprise operated through a pattern composed of arson and bribery, the same enterprise operated through a pattern composed of bribery and robbery, and that enterprise operated through a pattern composed of arson and robbery.

506. In *United States v. Papa*, 533 F.2d 815 (2d Cir.), *cert. denied*, 429 U.S. 961 (1976), the court rejected a literal application of the "same evidence" test, reasoning that "[b]ecause the government can tailor the overt acts charged in each indictment, prosecutorial discretion may account for a single conspiracy's being capable of proof in several prosecutions requiring different evidence for conviction." *Id.* at 820; *cf.* *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.").

507. *United States v. Mallah*, 503 F.2d 971, 985-86 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *accord*, *United States v. Inmon*, 568 F.2d 326, 328-33 (3d Cir. 1977); see *United States v. Tercero*, 580 F.2d 312 (8th Cir. 1978); *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149 (5th Cir. 1978).

## 2. Separate Indictments of Section 1962(d) Conspiracy and Conspiracy Charged Under Another Statute

In cases in which a single agreement results in one indictment containing multiple conspiracy counts charged under *different* conspiracy statutes, the existing law regarding double jeopardy analysis and the "same evidence" test is in a state of confusion. The First<sup>508</sup> and Sixth<sup>509</sup> Circuits have prohibited separate punishment for multiple conspiracies based on the same agreement and charged under separate conspiracy statutes. In contrast, Fifth and Ninth Circuit opinions reach conflicting conclusions.<sup>510</sup> The decisions permitting separate punishment conclude that separate charges are permissible if, as is invariably the case, the conspiracies are not the same under the "same evidence" test.<sup>511</sup>

The confusion is reflected in three cases<sup>512</sup> rejecting double jeopardy challenges to a section 1962(d) indictment that was based on

508. *United States v. Honneus*, 508 F.2d 566, 569-70 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). The defendant in *Honneus* was indicted on three counts alleging identical overt acts: conspiracy to import drugs under 21 U.S.C. § 963 (1970); conspiracy to distribute and possess drugs under 21 U.S.C. § 846 (1970); and conspiracy to smuggle under the general federal conspiracy statute, 18 U.S.C. § 371 (1970). The court held that the evidence established only one agreement and that the defendant could not be separately punished merely because different conspiracy statutes were allegedly violated.

509. *United States v. Adcock*, 487 F.2d 637, 639-40 (6th Cir. 1973) (defendant could not be sentenced for two conspiracies under 21 U.S.C. § 846 (1970) and 21 U.S.C. § 963 (1970) based on one agreement).

510. In the Fifth Circuit, compare *United States v. Rodriguez*, 612 F.2d 906, 921-24 (5th Cir. 1980) and *United States v. Houlton*, 525 F.2d 943, 950-51 (5th Cir. 1976) (barring separate sentences for two conspiracies charged under 21 U.S.C. §§ 846 and 963 (1970)), *vacated on other grounds and remanded sub nom. Croucher v. United States*, 429 U.S. 1034 (1977) and *United States v. Mori*, 444 F.2d 240, 244 (5th Cir.) (defendant could not be sentenced for two conspiracies under both the Narcotic Drug Import and Export Act, ch. 100, § 2(c)(f), 35 Stat. 614 (1909) and 18 U.S.C. § 371 (1970) on the basis of one agreement), *cert. denied*, 404 U.S. 913 (1971) with *United States v. Marable*, 578 F.2d 151, 154 n.1 (5th Cir. 1978) (implying that double jeopardy does not bar separate prosecutions under separate conspiracy statutes) and *United States v. Smith*, 574 F.2d 308, 309-11 (5th Cir.) (separate sentences permitted for multiple conspiracies charged under different statutes), *cert. denied*, 439 U.S. 931 (1978). In the Ninth Circuit, compare *United States v. Noah*, 475 F.2d 688, 693 (9th Cir.) (one agreement could result in only one conspiracy conviction), *cert. denied*, 414 U.S. 1095 (1973) with *United States v. Marotta*, 518 F.2d 681, 684-85 (9th Cir. 1975) (upholding separate punishment for two conspiracies charged under 21 U.S.C. §§ 846 and 963 (1970) even though only one agreement was involved).

511. *United States v. Marable*, 578 F.2d 151, 154 n.1 (5th Cir. 1978); *United States v. Smith*, 574 F.2d 308, 309-11 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); *United States v. Marotta*, 518 F.2d 681, 684-85 (9th Cir. 1975).

512. *United States v. Solano*, 605 F.2d 1141, 1143-45 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980); *United States v. Smith*, 574 F.2d 308, 309-11 (5th Cir. 1978), *cert. denied*, 439 U.S. 931 (1978); *United States v. Meinster*, 475 F. Supp. 1093, 1095 (S.D. Fla. 1979).

factual allegations similar to those that were the basis for a prior, separate indictment and conviction for conspiracy to distribute drugs under 21 U.S.C. § 846.<sup>513</sup> The reasoning differs sharply. In *United States v. Smith*,<sup>514</sup> the Court of Appeals for the Fifth Circuit considered whether separate conspiracy indictments under the two statutes were permissible, and disposed of the double jeopardy argument by rigidly applying the "same evidence" test.<sup>515</sup> Not surprisingly, it found differences in the elements of each conspiracy statute and permitted separate sentences.<sup>516</sup>

*Smith* is not entirely consistent with *United States v. Meinster*,<sup>517</sup> a subsequent opinion by a Fifth Circuit district court. Although *Meinster* also involved section 1962(d) indictments following section 846 convictions, its analysis differed in a significant aspect. In *Meinster*, the court observed and the government conceded that double jeopardy would preclude a section 1962(d) indictment following the section 846 conspiracy conviction.<sup>518</sup> The *Meinster* holding is in line with two non-RICO Fifth Circuit decisions involving separate indictments under different conspiracy statutes.<sup>519</sup> In these cases, the court declined to apply a strict "same evidence" test on the grounds that to do so would "permit the government arbitrarily to split unitary . . . conspiracies and to initiate as many prosecutions."<sup>520</sup> These results cannot be reconciled with the *Smith* holding permitting multiple conspiracy prosecutions of a single agreement.<sup>521</sup>

The third section 1962(d) case, *United States v. Solano*,<sup>522</sup> established a bifurcated analysis of the double jeopardy issue. In considering a pretrial challenge to the indictment, the court adopted an orthodox "same evidence" test and rejected the double jeopardy

513. 21 U.S.C. § 846 (1976).

514. 574 F.2d 308 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978).

515. *Id.* at 310-11.

516. *Id.*

517. 475 F. Supp. 1093, 1095-96 (S.D. Fla. 1979).

518. *Id.* at 1096.

519. *United States v. Marable*, 578 F.2d 151 (5th Cir. 1978); *United States v. Ruigomez*, 576 F.2d 1149 (5th Cir. 1978).

520. *United States v. Ruigomez*, 576 F.2d 1149, 1151 (5th Cir. 1978); *accord*, *United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978).

521. 574 F.2d at 310-11. *Meinster* also implied that, while a conspiracy conviction under 21 U.S.C. § 846 (1976) bars an indictment under § 1962(d) and 21 U.S.C. § 848 (1976) (continuing criminal enterprise), it does not bar a § 1962(c) indictment. 475 F. Supp. at 1095. The distinction between application of the double jeopardy principles to § 848 and § 1962(c) is persuasive. Section 848, though not labeled a conspiracy statute, requires an agreement among five people. *See Jeffers v. United States*, 432 U.S. 137, 149-50 (1977). A § 846 conspiracy prosecution bars a § 848 trial because § 848 is in essence a conspiracy statute. Section 1962(c) is not a conspiracy statute unless it is transformed into one by the common scheme interpretation of "pattern."

522. 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980).

argument because section 846 and section 1962(c) involve different elements.<sup>523</sup> Nevertheless, the court concluded that the defendant could raise the double jeopardy issue at a later date "if it [became] clear from the trial that [the defendant was] being prosecuted twice for the same conspiracy."<sup>524</sup> This conclusion implies that the "same evidence" test would not be applied on direct appeal.

### 3. Separate Punishment of Section 1962(c) and Predicate Offenses

Because certain federal and state crimes constitute racketeering activities under Title IX, double jeopardy problems may arise when acquittals or convictions on the predicate crimes occur before or simultaneously with the RICO litigation. Under the prevailing law, the government may charge a defendant with both a RICO offense and the underlying offenses in the same indictment.<sup>525</sup> An appropriate double jeopardy analysis, however, must recognize that the law pertaining to the allegation of separate charges may not be controlling on the issue of separate punishment.<sup>526</sup>

The case law governing separate punishment of section 1962(c) and its predicate offenses has failed to recognize this critical distinction. For example, the issue of separate punishment was subjected to a muddled analysis by both the Second and Ninth Circuits.<sup>527</sup> In *United States v. Rone*,<sup>528</sup> the defendant received consecutive sentences for a section 1962(c) violation and two extortion offenses that were among the predicate offenses. Applying the "same evidence" test, the Ninth Circuit held that double jeopardy principles were not violated because the RICO count charged predicate offenses other than the two extortion offenses.<sup>529</sup> The *Rone* court also noted that the RICO statutory scheme did not suggest that Congress intended to preclude separate convictions or consecutive sentences.<sup>530</sup> The court

523. *Id.* at 1144.

524. *Id.* at 1145.

525. See Atkinson, *supra* note 10, at 8.

526. The government may allege the same offense in different counts of a single indictment if separate sentences are not imposed. *United States v. Honneus*, 508 F.2d 566, 570 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975).

527. *United States v. Boylan*, 620 F.2d 359 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882); *United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980); *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

528. 598 F.2d 564, 571-72 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980).

529. 598 F.2d at 571; *accord*, *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980).

530. 598 F.2d at 571, *accord*, *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882); *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980). The court in *Boylan* stated that the RICO statute and the predicate offense

indicated that precluding separate punishment would impermissibly require the government to elect between prosecuting a RICO offense and prosecuting only the predicate offenses.<sup>531</sup> This reasoning was also adopted by the Second Circuit in *United States v. Boylan*,<sup>532</sup> which involved a fact pattern similar to that in *Rone*. *Rone*, however, should not be regarded as persuasive authority because it failed to recognize that the significant issue is not whether the offenses are identical so that they cannot be prosecuted separately, but whether the predicate offenses are lesser included offenses within a RICO offense.<sup>533</sup>

The Supreme Court has concluded that the double jeopardy clause requires, at a minimum, that separate punishment of a greater and lesser included offense be imposed only when clearly authorized by Congress.<sup>534</sup> In *Whalen v. United States*,<sup>535</sup> the defendant received consecutive sentences for rape and first-degree murder. The murder was committed during the commission of a rape, and the murder charge was based on a felony-murder theory. Under the District of Columbia felony-murder statute,<sup>536</sup> the rape was a lesser included offense within the felony murder charge because proof of the rape

---

statute, 29 U.S.C. § 186(b)(1) (1976), proscribed two different acts or transactions and implemented different congressional purposes. Therefore, it was clear that "Congress intended to create separate crimes, separately punishable." 620 F.2d at 361; *see Whalen v. United States*, 100 S. Ct. 1432 (1980).

531. 598 F.2d at 571; *accord*, *United States v. Boylan*, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882). Oddly enough, this statement is contradicted by the court's earlier comment that, had the § 1962(c) allegation charged only the two extortion offenses for which separate sentences had been imposed, there might be problems under the same evidence test. 598 F.2d at 571.

532. 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882).

533. Both lesser included offenses and the greater offense may be alleged separately. *See Gaunt v. United States*, 184 F.2d 284, 290 (1st Cir. 1950), *cert. denied*, 340 U.S. 917 (1951); *United States v. Isaacs*, 347 F. Supp. 743, 757 (N.D. Ill. 1972).

534. *Whalen v. United States*, 100 S. Ct. 1432, 1436-37 (1980). The Supreme Court is sharply divided on the issue whether double jeopardy bars cumulative punishment of the same offense at a single trial even if Congress clearly intends to permit such punishment. Many cases indicate that double jeopardy would bar multiple punishment at a single trial. *See Simpson v. United States*, 435 U.S. 6, 11-12 (1978); *Jeffers v. United States*, 432 U.S. 137, 155-56 (1977); *American Tobacco Co. v. United States*, 328 U.S. 781, 788 (1946). Another case states in dicta that the double jeopardy clause forbids only cumulative punishment imposed at two trials and does not preclude such punishment if it is imposed at a single trial. *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Other cases have barred multiple punishment after analyzing only legislative intent. *See United States v. Basic*, 100 S. Ct. 1747 (1980); *Prince v. United States*, 352 U.S. 322, 325-28 (1957).

535. 100 S. Ct. 1432 (1980).

536. D.C. Code Encycl. § 22-2401, ¶ 11 (West 1967).

was a necessary element of the offense.<sup>537</sup> The Court held that under the general rule of statutory construction, absent clear legislative intent to the contrary, Congress does not authorize consecutive sentences if the offenses are the same under the *Blockburger* test.<sup>538</sup> Because a lesser included offense and the greater are the same under that test, separate punishment was barred.<sup>539</sup> Obviously, the predicate offenses are lesser included offenses within section 1962(c) because the elements of these crimes must be established to prove the commission of a racketeering activity.<sup>540</sup> Therefore, separate punishment of the predicate offenses and the RICO offense is not permissible because of the absence of a clear congressional authorization of consecutive sentences.<sup>541</sup>

#### 4. Trial on State Charges Prior to RICO Prosecutions

A different analysis is adopted when a defendant claims that a prior state court prosecution of the predicate offenses precludes a subsequent RICO indictment. Two issues distinguishing this situation from other double jeopardy fact patterns emerge—the role of the dual sovereignty doctrine and a question of statutory construction concerning the meaning of the “chargeable under state law” language in section 1961(1)(A). The dual sovereignty doctrine, affirmed by the Supreme Court in *Abbate v. United States*,<sup>542</sup> authorizes state and federal prosecutions of the same acts on the rationale that each

537. 100 S. Ct. at 1439.

538. *Id.* at 1438.

539. *Id.* at 1439; see *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

540. See Atkinson, *supra* note 10, at 9 n.65. The courts have noted that proof beyond a reasonable doubt of each element of the predicate offense is necessary to establish a RICO violation. *E.g.*, *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Forsythe*, 594 F.2d 947, 952 (3d Cir. 1979); *cf.* *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.) (RICO count includes any scienter element required by predicate crimes), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882); *United States v. Campanale*, 518 F.2d 352, 364 n.34, 365 n.36 (9th Cir. 1975) (each racketeering act in pattern must violate independent statute), *cert. denied*, 423 U.S. 1050 (1976). The instructions in *E. Devitt & C. Blackmar*, 2 Federal Jury Practice and Instructions §§ 56.18 to -34 (1977 & Supp. 1979), however, do not expressly incorporate a requirement that the government prove each element of the predicate offense.

541. The argument that separate punishment was precluded because the predicate offenses are lesser included within the RICO offense was rejected in *United States v. Scotto*, Nos. 1131-32, slip op. at 5379 (2d Cir. Sept. 2, 1980). The court cited its holding in *United States v. Boylan*, 620 F.2d 359, 360-61 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3246 (U.S. Oct. 7, 1980) (No. 79-1882), that violations of RICO and the predicate crimes were “separate crimes, separately punishable.” See notes 528-32 *supra* and accompanying text.

542. 359 U.S. 187 (1959).

sovereign has the inherent power to punish violations of its law.<sup>543</sup> In RICO cases involving prior state convictions, courts have rejected double jeopardy arguments on this basis.<sup>544</sup> At least one authority has criticized this application of *Abbate* to RICO cases as a violation of the double jeopardy clause.<sup>545</sup> Regardless of the abstract merits of the dual sovereignty view, its application to RICO is particularly ironic. The *Abbate* Court upheld the doctrine because of its fear that a contrary result "would bring about a marked change in the distribution of powers to administer criminal justice, for the States under our federal system have the principal responsibility for defining and prosecuting crimes."<sup>546</sup> When the dual sovereignty doctrine is applied to Title IX, RICO's broad reach has precisely the impact of changing the distribution of powers by substantially extending federal jurisdiction to define and prosecute crimes.<sup>547</sup>

The dual sovereignty principle does not conclusively resolve problems arising when the defendant faces a RICO prosecution after an acquittal on the predicate state offenses. In these situations, the meaning of the requirement in section 1961(1)(A) that state offenses be "chargeable under State law and punishable by imprisonment for more than one year"<sup>548</sup> may be at issue. Judge Aldisert's dissent in *United States v. Frumento*<sup>549</sup> reasoned that, after acquittal in state court, the offense is "neither 'chargeable' nor 'punishable.'"<sup>550</sup> However, the *Frumento* majority rejected this interpretation and charac-

543. *Id.* at 194-95; *United States v. Lanza*, 260 U.S. 377, 382 (1922). In *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980), the court considered the applicability of an exception to the dual sovereignty doctrine. That exception, implicitly acknowledged in *Bartkus v. Illinois*, 359 U.S. 121 (1959), prohibits a federal prosecution when the prior state prosecution is "a sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." 359 U.S. at 124. In *Aleman*, the defendant contended that the state prosecution was a sham and cited the testimony of an FBI agent at the state trial and the listing of a federal prosecutor as a possible state witness. 609 F.2d at 309. The court found that these facts did not evidence "federal 'orchestration' of state authorities," but merely demonstrated cooperation between state and federal authorities, and were thus insufficient to come within the *Bartkus* exception. *Id.*

544. *United States v. Aleman*, 609 F.2d 298, 309 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Solano*, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 677 (1980); *United States v. Malatesta*, 553 F.2d 745, 757 (5th Cir. 1978), *aff'd on rehearing en banc*, 590 F.2d 1379 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979).

545. *United States v. Frumento*, 563 F.2d 1083, 1092-95 (3d Cir. 1977) (Aldisert, J., dissenting), *cert. denied*, 434 U.S. 1072 (1978).

546. *Abbate v. United States*, 359 U.S. 187, 195 (1959).

547. See note 162 *supra* and accompanying text.

548. 18 U.S.C. § 1961(1)(A) (1976).

549. 563 F.2d 1083 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

550. *Id.* at 1097.

terized section 1961 as requiring only that the "conduct on which the federal charge is based be typical of the serious crime dealt with by the state statute."<sup>551</sup> The court observed that the list of state offenses was merely definitional and necessary only to identify the proscribed unlawful activity.<sup>552</sup>

The *Frumento* majority's construction of section 1961 is suspect because it inadequately distinguished the Supreme Court decision in *United States v. Mason*.<sup>553</sup> In *Mason*, the defendant was first acquitted in state court of the murder of a federal officer and then charged in federal court with conspiracy to obstruct federal officers and with murder of a federal officer as part of the conspiracy. The conspiracy statute in force at the time prescribed additional punishment attached to certain felonies or misdemeanors "by the laws of the State" committed by a defendant during the course of the conspiracy.<sup>554</sup> The court held that acquittal in state court barred the use of the state offense to increase the punishment for conspiracy.<sup>555</sup> *Frumento* characterized *Mason* as limited to the construction of a particular statute rather than a double jeopardy or a collateral estoppel decision.<sup>556</sup> Even if *Mason* was based upon statutory construction, however, the *Frumento* court did not explain its peculiar construction of Title IX and failed to cite any support in the legislative history or on the face of the statute that would dictate a deviation from *Mason*.<sup>557</sup>

### C. Collateral Estoppel

Collateral estoppel, a principle embodied in the double jeopardy clause,<sup>558</sup> bars an issue that has been determined by a valid and final

---

551. *Id.* at 1087 n.8A.

552. *Id.* This reasoning is similar to the cases holding that state procedural rules are inapplicable even if they would bar prosecution in state courts. In those cases the Third Circuit has held that "chargeable" and "punishable" refer to the time at which the offense was committed. See notes 307-08 *supra* and accompanying text.

553. 213 U.S. 115 (1909).

554. Act of May 31, 1870, ch. 114, § 7, 16 Stat. 140, 141.

555. 213 U.S. at 123-26.

556. 563 F.2d 1083, 1087 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

557. Distinguishing *Mason* is particularly difficult because of the Supreme Court's definitive statement in *Mason*: "As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should the Federal court accept the judgment of a state court based upon a verdict of acquittal of a crime *against the State*, whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the State was committed by the defendants on trial in the Federal court for an offense against the United States." 213 U.S. at 125.

558. U.S. Const. amend. V, cl. 2.



judgment from being relitigated by the same parties.<sup>559</sup> This doctrine was considered in a section 1962(c) case, *United States v. Meinster*,<sup>560</sup> which acknowledged that an acquittal on a prior *federal* aiding and abetting charge precluded the government from introducing "into evidence any fact which was necessarily resolved against the government at the previous trial."<sup>561</sup> In contrast, acquittals in state court on a *state* predicate offense have been held to have no collateral estoppel impact in a RICO case because the United States was not a party in the state prosecution.<sup>562</sup>

A variation on the collateral estoppel problem occurs when the defendant obtains an acquittal on or reversal of a predicate offense but is convicted on a section 1962(c) or (d) charge in the *same* trial. For example, *United States v. Brown*<sup>563</sup> reversed convictions on two of the four predicate offenses alleged in counts separate from the section 1962(c) and (d) charges. The court held that a reversal of any of the predicate offense convictions would require the reversal of both section 1962(c) and (d) convictions because the appellate court could not determine which predicate offenses the jury used as a basis for the RICO conviction.<sup>564</sup> The Ninth Circuit has construed *Brown* to imply strongly "that conviction on the substantive counts which form the basis of the RICO charge is necessary to uphold a RICO conviction."<sup>565</sup>

559. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979), 1B J. Moore, *Federal Practice* ¶ 0.405[1], at 22-24 (2d ed. 1974). Collateral estoppel may estop the government solely on issues resolved in the first trial. *See, e.g., United States v. Mespouledé*, 597 F.2d 329 (2d Cir. 1979) (government precluded from introducing evidence of a defendant's possession of cocaine in a conspiracy trial held subsequent to an acquittal on a substantive possession charge).

560. 475 F. Supp. 1093, 1096-97 (S.D. Fla. 1979).

561. *Id.* at 1097.

562. *United States v. Malatesta*, 583 F.2d 748, 757 (5th Cir. 1978) (dismissing a collateral estoppel argument because United States not bound by results of state proceeding to which it was not a party), *aff'd on rehearing en banc*, 590 F.2d 1329 (5th Cir.), *cert. denied*, 444 U.S. 846 (1979). *But cf. United States v. Mason*, 213 U.S. 115 (1909) (federal court should be bound by acquittal of state charges in state court).

563. 583 F.2d 659 (3d Cir. 1978), *cert. denied*, 440 U.S. 909 (1979).

564. *Id.* at 669-70.

565. *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980). This point was made to support *Rone's* holding that separate punishment of predicate offenses and of a RICO charge was permissible. *Id.* at 572. *Brown* was distinguished in *United States v. Huber*, 603 F.2d 387, 399 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), on the ground that the evidence in *Huber* was sufficient to sustain all the predicate offenses. *Huber*, however, indicated that it was not deciding whether it agreed with *Brown's* analysis. *Huber's* reluctance to endorse *Brown* may have been based on *Brown's* departure from the general rule of conspiracy law that if an indictment charges a conspiracy to engage in two or more offenses and only one is established, the conspiracy conviction can nonetheless stand. *See United States v. Dixon*, 536 F.2d 1388, 1401-02 (2d Cir. 1976).

D. *Duplicity and Multiplicity*I. *Duplicity*

An indictment is duplicitous when the government charges two or more distinct offenses in a single count.<sup>566</sup> Duplicitous indictments are considered prejudicial because they prevent jurors from acquitting on one charge if they would convict on the other. Consequently, on appellate review or in litigating double jeopardy arguments, a court cannot determine whether the jury found the defendant guilty of only one crime, or whether all twelve jurors believed the defendant committed the same crime.<sup>567</sup>

Duplicity objections have rarely been successful in RICO prosecutions.<sup>568</sup> Two cases rejected arguments that RICO counts were duplicitous because they alleged a series of predicate offenses.<sup>569</sup> The courts held that the mere fact that a RICO count incorporates separate predicate offenses does not sustain a duplicity argument because the predicate offenses and section 1962(c) and (d) constitute a single continuing offense.<sup>570</sup>

Another case, however, has indicated that a RICO count may violate the prohibition on duplicitous indictments in the absence of sufficient procedural protections against prejudice. In *United States v. Huber*,<sup>571</sup> the defendant claimed that a section 1962(c) count was duplicitous because it charged a series of acts through a number of entities. He asserted that the jury could convict even if it did not agree on the particular predicate offenses committed.<sup>572</sup> Although the court recognized the potential validity of the claim, it found that

---

566. *United States v. Orzechowski*, 547 F.2d 978, 936 (7th Cir. 1977), *cert. denied*, 431 U.S. 906 (1977); *United States v. Bartemio*, 547 F.2d 341, 345 (7th Cir. 1974); *Gerberding v. United States*, 471 F.2d 55, 59 (8th Cir. 1973).

567. *See United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States v. Starks*, 515 F.2d 112, 116 (3d Cir. 1975); *United States v. Tanner*, 471 F.2d 128, 139 (7th Cir.), *cert. denied*, 409 U.S. 949 (1972).

568. *See United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Cohen*, 444 F. Supp. 1314, 1320-21 (E.D. Pa. 1978) *United States v. Amato*, 367 F. Supp. 547, 549 (S.D.N.Y. 1973).

569. *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979) (rejecting claim that § 1962(d) count alleged two conspiracies when count alleged a wide variety of substantive offenses), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Cohen*, 444 F. Supp. 1314, 1320-21 (E.D. Pa. 1978) (rejecting duplicity argument when RICO counts charged multiple incidents of receiving extortionate payments).

570. *United States v. Diecidue*, 603 F.2d 535, 546 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. Cohen*, 444 F. Supp. 1314, 1320-21 (E.D. Pa. 1978).

571. 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

572. *Id.* at 394.

the claim was waived because it was not raised prior to trial, and the problem was resolved, in any event, by use of special verdicts and convictions for all separate counts alleging the predicate offenses.<sup>573</sup>

## 2. Multiplicity

A multiplicitous indictment charges a single offense in several counts.<sup>574</sup> Multiplicity can prejudice the defendant by imposing multiple sentences for the same offense.<sup>575</sup> Multiplicity and double jeopardy issues are ostensibly similar, the only difference being that multiplicity involves multiple sentences for a crime charged in one indictment while double jeopardy involves two or more separate indictments for the same offense.

Despite the similarities, recent Supreme Court cases indicate that, while it is clear double jeopardy precludes separate punishment imposed at separate trials of the same offense, the Court is divided on whether, in the multiplicity situation, double jeopardy also precludes separate sentences for the same offense at a single trial.<sup>576</sup> The primary multiplicity issue in RICO cases involves charging the RICO offense and its predicate offenses in separate counts, an indictment format the courts have consistently upheld.<sup>577</sup> These decisions are correct within their limited scope. Permitting the government to charge the RICO offense and its predicate crimes in separate counts is not prejudicial unless the court also imposes separate sentences on each count. Separate punishment, however, should be barred by the

---

573. *Id.*; see *United States v. Amato*, 367 F. Supp. 547, 549 (S.D.N.Y. 1973). In *Amato* the defendant contended that the count alleging violations of two conspiracy statutes, § 371 and § 1962(d), was duplicious. The court acknowledged that a guilty verdict would not indicate under which statute the defendant had been convicted, but resolved this problem by imposing a sentence under the statute providing the lesser punishment.

574. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *Gerberding v. United States*, 471 F.2d 55, 58 (8th Cir. 1973).

575. *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

576. See note 534 *supra*. At a minimum, multiple punishment at a single trial can only be imposed upon a showing of clear legislative authorization. See notes 534-41 *supra* and accompanying text.

577. See *United States v. Aleman*, 609 F.2d 298, 306-07 (7th Cir. 1979), *cert. denied*, 100 S. Ct. 1345 (1980); *United States v. DePalma*, 461 F. Supp. 778, 786-87 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62); *United States v. Pray*, 452 F. Supp. 788, 800 (M.D. Pa. 1978); *United States v. Salvitti*, 451 F. Supp. 195, 199-200 (E.D. Pa.), *aff'd mem.*, 588 F.2d 824 (3d Cir. 1978); *United States v. Hansen*, 422 F. Supp. 430, 433-34 (E.D. Wis. 1976); *United States v. Stofsky*, 409 F. Supp. 609, 617-18 (S.D.N.Y. 1973); *United States v. White*, 386 F. Supp. 852, 854 (E.D. Wis. 1974). These courts have pointed to the "pattern" element of RICO, not present in the underlying offenses.

double jeopardy clause because of the lesser included offense status of the predicate offenses.<sup>578</sup>

### E. Joinder and Severance

Joinder and severance of defendants and offenses in RICO cases are frequently litigated issues that often require consideration of the merits of both the common scheme construction of "pattern" and the *Elliott* conspiracy doctrine. For purposes of this analysis, some commonly used terms must be understood. Joinder is the inclusion of multiple offenses and/or multiple defendants in the same indictment.<sup>579</sup> Misjoinder is joinder that is not proper under rule 8 of the Federal Rules of Criminal Procedure.<sup>580</sup> Finally, prejudicial joinder is joinder of offenses that is proper under rule 8 but improper under rule 14 because of prejudice to the defendant.<sup>581</sup>

#### 1. Joinder of Offenses

##### a. Joinder of Predicate Offenses

Joinder of offenses is governed by Federal Rule of Criminal Procedure 8(a).<sup>582</sup> Because rule 8(a) controls joinder only if a single defendant is tried,<sup>583</sup> it is of little practical significance in multi-defendant RICO cases.<sup>584</sup> Nevertheless, its language can aid in the interpretation of rule 8(b), the more frequently litigated rule that governs joinder of offenses and/or defendants in a trial of two or more defendants.<sup>585</sup> Rule 8(b) is more restrictive than rule 8(a) because

---

578. See notes 534-41 *supra* and accompanying text.

579. Fed. R. Crim. P. 8(a), (b).

580. See *id.*

581. Fed. R. Crim. P. 8, 14. See generally *United States v. Jackson*, 562 F.2d 789, 796-97 & n.10 (D.C. Cir. 1977); *Haggard v. United States*, 369 F.2d 968 (8th Cir. 1966), *cert. denied*, 386 U.S. 1023 (1967); 1 C. Wright, *Federal Practice and Procedure* § 144, at 223 (1969).

582. Rule 8(a) provides that "[t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions, connected together or constituting parts of a common scheme or plan." Fed. R. Crim. P. 8(a).

583. *Id.*; see *United States v. Jackson*, 562 F.2d 789, 796 (D.C. Cir. 1977).

584. The only reported rule 8(a) decision in a RICO prosecution is *United States v. Fineman*, 434 F. Supp. 197 (E.D. Pa. 1977). In *Fineman*, the defendant contended that an obstruction of justice count, not alleged to have been part of the conspiracy or racketeering enterprise, could not be joined with the RICO or conspiracy counts. Nevertheless, speculating that the obstruction of justice may have been intended to conceal the enterprise, the court found no misjoinder. *Id.* at 203.

585. Fed. R. Crim. P. 8(b). Rule 8(b) provides that "[t]wo or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions

instead of permitting joinder solely on the grounds that two defendants committed the same or similar type of offense,<sup>586</sup> it permits joinder of two defendants as long as they participated in the "same series of acts or transactions constituting an offense or offenses."<sup>587</sup> If the "series of acts or transactions" language requires any substantial relationship among those transactions, a court rejecting the requirement of a relationship among acts constituting a "pattern" under section 1962(c) would find it difficult to apply rule 8(b) joinder to the section 1962(c) offense.<sup>588</sup>

This difficulty has surfaced when defendants charged in a RICO count have been joined with those alleged to have committed the predicate offenses. The courts in *United States v. Thevis*<sup>589</sup> and *United States v. DePalma*<sup>590</sup> upheld joinder based on the assumption that if the predicate offenses are part of the same RICO "pattern of racketeering activity," they are also part of the "same series of acts or transactions" for purposes of rule 8(b).<sup>591</sup> These courts dismissed as incongruous any construction of the rule 8(b) "series of acts or transactions" language that would require a closer interrelationship between the predicate offenses than does "pattern."<sup>592</sup> Significantly, both courts also rejected any construction of "pattern" that requires a relationship between the racketeering acts.<sup>593</sup>

constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

586. *United States v. Jackson*, 562 F.2d 789, 796 (D.C. Cir. 1977); *United States v. Whitehead*, 539 F.2d 1023, 1025 (4th Cir. 1976); *United States v. Marionneaux*, 514 F.2d 1244, 1248 (5th Cir. 1975).

587. Fed. R. Crim. P. 8(b).

588. See pt. III(c)(3) *supra*.

589. 474 F. Supp. 117 (N.D. Ga. 1979).

590. 461 F. Supp. 778 (S.D.N.Y. 1978), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

591. *United States v. Thevis*, 474 F. Supp. 117, 131 (N.D. Ga. 1979) (joinder of RICO predicate offenses involving mail fraud, possession of a destructive device, murder, obstruction of justice); *United States v. DePalma*, 461 F. Supp. 778, 787-88 (S.D.N.Y. 1978) (joinder of predicate offenses involving securities fraud, bankruptcy fraud and obstruction of justice), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62); *cf.* *United States v. Campanale*, 518 F.2d 352, 359 (9th Cir. 1975) (participation in the same pattern of racketeering activity permits rule 8(b) joinder), *cert. denied*, 423 U.S. 1050 (1976).

592. *United States v. Thevis*, 474 F. Supp. 117, 131 (N.D. Ga. 1979) (quoting *United States v. DePalma*, 461 F. Supp. 778, 789 (S.D.N.Y. 1978), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62)).

593. *United States v. Thevis*, 474 F. Supp. 134, 139 n.7 (N.D. Ga. 1979); *United States v. DePalma*, 461 F. Supp. 778, 782-85 (S.D.N.Y. 1978), *aff'd sub nom.* *United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

The implication of the two holdings is that the word "series" does not connote a relationship between the acts because the word "pattern" does not. Consequently, the cases reveal a dilemma. It would seem logical to permit joinder of the RICO offense with its lesser included predicate offenses. Yet, the phrase "same series of transactions" clearly connotes some form of relationship between the offenses to be joined.<sup>594</sup> Moreover, prior to *DePalma* and *Thevis*, knowledgeable authorities theorized that the rule 8(b) "series of acts or transactions" language should be construed to be equivalent to the language "two or more acts or transactions *connected together or constituting parts of a common scheme or plan*" in rule 8(a).<sup>595</sup> Permitting joinder when no common scheme or other relationship underlies the predicate offenses undermines the fundamental requirement of rule 8 that some relationship exist between the joined offenses.<sup>596</sup>

The "series of transactions" restriction of rule 8(b) can retain its meaning in one of two ways. A "common scheme" construction of "pattern" would prevent the allegation of a section 1962(c) offense composed of unrelated racketeering activities and thereby preclude joinder of defendants involved in unrelated racketeering activities.<sup>597</sup>

---

594. *United States v. Isaacs*, 493 F.2d 1124, 1158 (7th Cir.) (interpreting "transaction" in rule 8 as contemplating a series of acts depending "upon their logical relationship" (quoting *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610 (1926))), *cert. denied*, 417 U.S. 976 (1974).

595. 1 C. Wright, *Federal Practice and Procedure* § 144, at 322 (1969) (emphasis added); *accord*, 8 J. Moore, *Federal Practice* ¶ 8.06[2], at 8-36 to -37 (2d ed. 1979).

596. Two unpersuasive objections to this reasoning exist. The first turns on the language in rule 8(b) permitting joinder based on participation in the "same series of transactions constituting an offense or offenses," and asserts that if the acts constitute the offense, they are part of the same series of transactions. The difficulty with this approach is that rule 8(a) does not include any language stating that the transactions "constitute" an offense or offenses. Rather, it states that the transactions must constitute a common scheme. If rule 8(a) and (b) are to be read *in pari materia*, *see* note 593 *supra* and accompanying text, the "constituting" language in rule 8(b) should not be decisive. The second contention is that, if rule 8(b) requires a relationship between the offenses, it is supplied by the relationship of the racketeering acts to the enterprise. *See United States v. Thevis*, 474 F. Supp. 134, 139 n.7 (N.D. Ga. 1979); *United States v. DePalma*, 461 F. Supp. 778, 782 (S.D.N.Y. 1978), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62). If an illegal enterprise is alleged, however, this relationship requirement is meaningless because proof of the illegal enterprise consists of no more than proof of the racketeering acts themselves. *See* note 311 *supra* and accompanying text. *DePalma* involved a legitimate enterprise and did not confront this problem. *See* 461 F. Supp. at 781.

597. *See* notes 269-70 *supra* and accompanying text; *cf. United States v. Turkette*, Nos. 79-1545, 79-1546, slip op. at 27 (1st Cir. Sept. 23, 1980) (rejecting illegal enterprise allegation because government's theory "avoids the strictures of Rule 8(b)" by consolidating "in one indictment acts and transactions which otherwise could not have been joined").

A second solution is to permit the allegation of a section 1962(c) offense consisting of unrelated racketeering acts, but preclude rule 8(b) joinder of defendants involved in those acts.<sup>598</sup>

Even if any offenses may be joined as long as they are part of the same pattern, joinder might still be precluded if the government prosecutes two or more defendants who operated the same enterprise but were involved in different patterns. Assume, for example, that four employees operate Hooker Chemical through a pattern of otherwise unrelated racketeering. Employee A commits fraud in the sale of stock in 1971; Employee B steals products being shipped to out-of-state dealers in 1973; Employee C threatens potential witnesses to a grand jury that is investigating corporate antitrust violations in 1975; and Employee D bribes state legislators in 1977. Whether or not, under *United States v. Cryan*,<sup>599</sup> the defendants may be characterized as having participated in the same RICO offense,<sup>600</sup> a literal application of *DePalma* and *Thevis* would bar joinder of these employees in a single trial because they did not participate in the same pattern.

#### b. Joinder of a RICO Offense and Non-Predicate Offense

In fact patterns involving the joinder of a RICO offense and a crime that is *not* an alleged racketeering activity, the courts have emphasized the relationship between the offenses. In *United States v. Cohen*,<sup>601</sup> the defendant, an attorney for a school board, objected to joinder of perjury and income tax violations with a RICO offense charging a pattern of extortion in the selection of architects for school district work. The tax violations involved the proceeds received from

---

598. If neither of these solutions is adopted, the absence of any required relationship between the joined offenses in *DePalma* and *Thevis* will vastly expand the government's ability to join defendants. In a single trial, key members of an enterprise could be joined with individuals only marginally related to the enterprise. A participant in only one offense who is not alleged to be a member of the enterprise could be joined with enterprise members even though his offense was not related to other racketeering acts. Both *DePalma* and *Thevis* permitted joinder of a defendant charged with a single RICO predicate offense even though that person was not charged in the RICO count. *United States v. Thevis*, 474 F. Supp. 117, 130 (N.D. Ga. 1979) (defendant involved in one predicate offense, conspiracy to deprive citizens of constitutional rights, joined with RICO defendants charged with murder, obstruction of justice, and mail fraud); *United States v. DePalma*, 461 F. Supp. 778, 789 (S.D.N.Y. 1978) (in RICO case involving securities fraud, bankruptcy fraud, and obstruction of justice, defendants involved in only one of those offenses joined with RICO defendants), *aff'd sub nom. United States v. Weisman*, 624 F.2d 1118 (2d Cir.), *cert. denied*, 49 U.S.L.W. 3249 (U.S. Oct. 7, 1980) (No. 80-62).

599. *United States v. Cryan*, 490 F. Supp. 1234 (D.N.J. 1980).

600. See notes 478-83 *supra* and accompanying text.

601. 444 F. Supp. 1314, 1317 (E.D. Pa. 1978).

the RICO violation while the perjury related to concealment of that violation.<sup>602</sup> Joinder was sustained because the offenses arose out of a "common scheme of racketeering activity"<sup>603</sup> and satisfied the "same series of acts or transactions" requirement.

## 2. Retroactive Misjoinder

If the RICO count provides the only joinder relationship between the various predicate offenses, reversal of the RICO count may appear to create a misjoinder problem. The Supreme Court, however, has held that if a conspiracy count supplied the joinder element, a dismissal or acquittal of the conspiracy count during or after the trial does not result in misjoinder.<sup>604</sup> Rather, if defendants are properly joined before the trial, courts will continue to find the joinder proper.<sup>605</sup> Nevertheless, in some instances misjoinder is found at trial. One such situation occurred in *United States v. Sutton*,<sup>606</sup> in which a Sixth Circuit panel eliminated both a section 1962(c) count and a section 1962(d) count. The panel was then compelled to determine whether the elimination of these counts resulted in misjoinder of the predicate offenses, fencing of stolen property and various drug offenses. The panel held that misjoinder had occurred because the predicate offenses were not part of the same series of transactions in the absence of the RICO counts.<sup>607</sup> It limited the rule against retroactive misjoinder to cases in which insufficient proof of the conspiracy or the section 1962(c) count was offered.<sup>608</sup> The rule was not controlling in *Sutton* because the panel had eliminated the RICO counts on the grounds that they were legally insufficient;<sup>609</sup> therefore, the panel concluded that the elimination of the RICO count created reversible misjoinder of the predicate offenses.<sup>610</sup>

## 3. Prejudicial Joinder

If dismissal or acquittal of a count occurs during or after trial, a severance or mistrial motion will often be considered as an issue of

---

602. *Id.* at 1317.

603. *Id.* A second case holds that, when an offense is not a predicate crime, it may be joined with the RICO offense if it was intended to conceal the RICO violation. *United States v. Fineman*, 434 F. Supp. 197, 203 (E.D. Pa. 1977) (obstruction of justice charge could be joined with RICO charge if the offense may have been intended to conceal enterprise), *aff'd mem.*, 571 F.2d 572 (3d Cir.), *cert. denied*, 436 U.S. 945 (1978); see pt III(C) *supra*.

604. *Schaffer v. United States*, 362 U.S. 511, 516 (1960).

605. *United States v. Miley*, 513 F.2d 1191, 1209-10 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975).

606. 605 F.2d 260 (6th Cir. 1979), *rev'd on rehearing en banc*, Nos. 78-5134 to -5139, 78-5141 to -5143 (6th Cir. Dec. 3, 1980).

607. *Id.* at 271.

608. *Id.* at 272.

609. *Id.*

610. *Id.* at 271-72.



prejudicial joinder, a problem governed by rule 14.<sup>611</sup> The problems commonly arising in multi-defendant RICO cases, such as conflicting defenses<sup>612</sup> or the disparate quanta of evidence against various defendants,<sup>613</sup> have invariably been held insufficient to justify rule 14 severance.<sup>614</sup> Acknowledging that the spirit of rule 14 is to discourage mass trials, the court in *United States v. Thevis*<sup>615</sup> established a bifurcated approach to the rule 14 issue. It held that, when consider-

---

611. Fed. R. Crim. P. 14; see *United States v. Scott*, 511 F.2d 15, 18-19 (8th Cir.), cert. denied, 421 U.S. 1002 (1975); *United States v. Donaway*, 447 F.2d 940, 943 (9th Cir. 1971). Although misjoinder and prejudicial joinder are both raised by a motion to sever, the standards for granting severance are different for each. A rule 8(b) motion is, in theory, a determination of law based on the facts alleged in the indictment. See *United States v. Levine*, 546 F.2d 658, 663 (5th Cir. 1977). But see Tarlow, *supra* note 457, at 288-89. A prejudicial joinder claim, a decision within the discretion of the trial court, is governed by Fed. R. Crim. P. 14. The court must examine whether joinder unduly prejudiced the defendant's right to a fair trial. See *United States v. Wright*, 564 F.2d 785, 787 (8th Cir. 1977); *United States v. Moten*, 564 F.2d 620, 628 (2d Cir.), cert. denied, 434 U.S. 959 (1977). Reversals of rule 14 determinations occur only when an abuse of discretion is established. See *United States v. Herring*, 602 F.2d 1220, 1224-25 (5th Cir. 1979), cert. denied, 100 S. Ct. 734 (1980).

612. See *United States v. Herring*, 602 F.2d 1220, 1224-25 (5th Cir. 1979) (defendants joined in a single trial each blamed the other for fraud in obtaining loans), cert. denied, 100 S. Ct. 734 (1980).

613. See *United States v. Frumento*, 426 F. Supp. 797, 809-10 & n.11 (E.D. Pa. 1976) (one defendant claimed that jury improperly used against him evidence admitted only against other two defendants), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978).

614. See *United States v. Herring*, 602 F.2d 1220, 1224-25 (5th Cir. 1979) (defendant claimed trial atmosphere prejudicial because each defendant blamed the other), cert. denied, 100 S. Ct. 734 (1980); *United States v. McLaurin*, 557 F.2d 1064, 1073-75 (5th Cir. 1977) (defendants unsuccessfully sought severance because of crowded courtroom conditions, race, plethora of nicknames, and similarity of given names among 15 defendants), cert. denied, 434 U.S. 1020 (1978); *United States v. Thevis*, 474 F. Supp. 117, 132-33 (N.D. Ga. 1979) (court rejected arguments of disparate evidence, pre-trial publicity, economic burden of joint trial); *United States v. Vignola*, 464 F. Supp. 1091, 1103 (E.D. Pa.) (defendant unsuccessfully opposed joinder of tax counts and RICO count because of fear that evidence introduced to prove one crime would establish defendant's criminal propensity and lead to his conviction on other crime), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979), cert. denied, 444 U.S. 1072 (1980); *United States v. Fineman*, 434 F. Supp. 189, 196-97 (E.D. Pa. 1977) (court rejected contention that joinder of offenses would deprive defendant of right to testify on certain counts and remain silent on others); *United States v. Frumento*, 426 F. Supp. 797, 809-10 (E.D. Pa. 1976) (court rejected contention that disparate proof against each defendant requires severance), *aff'd*, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); *United States v. Hansen*, 422 F. Supp. 430, 434 (E.D. Wis. 1976) (denial of severance motion based on jury's inability to distinguish the evidence and charges against each defendant, conflicting defenses of joined defendants and desire to call as witnesses, and codefendants who would not testify at joint trial). The courts have appeared to be more preoccupied with saving court time and taxpayers' money than with the significant problems resulting from joinder.

615. 474 F. Supp. 117, 133 & n.9 (N.D. Ga. 1979).

ing pretrial motions, a court should balance the interest of judicial and governmental convenience against the defendant's allegations of prejudice.<sup>616</sup> *Thevis* cautioned against using this balancing approach, however, when rule 14 motions based on prejudice appearing in the record are made during the trial. Instead, in these situations the court should analyze the weight of the evidence to determine whether a reasonable jury with appropriate instructions could distinguish defendants, offenses, and the evidence.<sup>617</sup>

## VI. CRIMINAL FORFEITURES

### A. *General Structure and Scope of RICO Forfeiture*

The criminal penalties attaching to a RICO violation are delineated in section 1963(a), which provides for forfeiture of a defendant's interest in an enterprise in addition to a fine and/or imprisonment.<sup>618</sup> Although the language of the two forfeiture clauses of section 1963(a) indicates that they are generally applicable to all violations of section 1962, the clauses have been construed to apply to separate categories of interests. Section 1963(a)(1) has thus been held to mandate forfeiture of interests in enterprises acquired or maintained in violation of section 1962(a) or (b),<sup>619</sup> while section 1963(a)(2) has been held to govern forfeiture of interests in violation of section 1962(c).<sup>620</sup> This construction of section 1963(a) fails to specify any relationship between forfeiture and violations of section 1962(d); indeed, no case has discussed whether section 1963(a) forfeiture is an appropriate penalty for a RICO conspiracy conviction. Obviously, for purposes of section 1963(a), the defendant's actions must proceed beyond the point of mere agreement<sup>621</sup> because if no interest is actually acquired there is nothing to forfeit.

616. *Id.* at 133.

617. *Id.*

618. 18 U.S.C. § 1963(a) (1976). This section provides that "[w]hoever 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."

619. *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga. 1979). *Thevis* hypothesized "that § 1963(a)(1) is directed toward the forfeiture of a minority interest in an enterprise controlled by others." *Id.* at 143 n.14.

620. *Id.* at 143. Under this interpretation, § 1963(a)(2) reaches an interest in the enterprise if the defendant is in control, either alone or jointly with other co-defendants. *Id.* at 143 n.14.

621. It may be incorrect to conclude that § 1963(a) applies only to § 1962(a), (b), and (c). The point made in the text is simply that a mere agreement is insufficient to

Section 1963(a) is a radical innovation in forfeiture law. Before the passage of section 1963 and 21 U.S.C. § 848,<sup>622</sup> federal forfeiture statutes authorized *in rem* actions against articles or contraband put to illegal use.<sup>623</sup> In contrast, section 1963(a) authorizes *in personam* forfeitures that automatically attach upon conviction.<sup>624</sup> The *in personam* forfeiture itself is not a new concept. At English common law, "[t]he convicted felon forfeited his chattels to the Crown and his lands escheated to his lord; the convicted traitor forfeited all his

support a § 1963(a) forfeiture. The analysis, however, becomes much more complex when a defendant acts in furtherance of a § 1962(d) charge but does not violate subsections (a), (b), or (c). For example, assume that two defendants agree to acquire stock in a corporation through a pattern of racketeering involving two acts of mail fraud (the sending of two letters containing misrepresentations), but the victim sells the stock to the defendants after receiving only one letter, thus preventing the defendants from completing the pattern. Ostensibly, this situation might appear to trigger the operation of § 1963(a)(1) as it applies to acquisition or maintenance in violation of § 1962, which includes § 1962(d) conspiracies. The crucial issue of statutory construction is whether the word "in" contained in the phrase "in violation of section 1962" means "during the violation" or whether it signifies that the acquisition or maintenance "is the violation." If "in" means "is the violation," the § 1962(d) could not result in forfeiture because (d) punishes only agreement, not acquisition or maintenance. If, on the other hand, it means "during the violation," § 1962(d) could result in forfeiture because that acquisition or maintenance occurred during the conspiracy. The "during" construction is flawed, however, because the more appropriate equivalent of the term "during" would be "in the violation of." A similar problem arises in the context of § 1963(a)(2). Assume that, in violation of § 1962(c), two defendants agree to commit two acts of embezzlement from the union that employs them. After the defendants have committed one such act they are arrested and thus prevented from completing the pattern of racketeering. The government then seeks forfeiture of their union offices under § 1963(a)(2), which applies to an interest in an enterprise that the defendant "established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." 18 U.S.C. § 1963(a)(2) (1976). An enterprise, however, has not been established or operated in violation of § 1962(d) because § 1962(d) punishes agreement and not establishment or operation.

622. 21 U.S.C. § 848 (1976).

623. See, e.g., 15 U.S.C. § 1265 (1976) (forfeiture of banned hazardous substances sold in interstate commerce); 18 U.S.C. § 492 (1976) (forfeiture of counterfeit money and devices used to produce that money); 21 U.S.C. § 881 (1976) (forfeiture of property used in violation of controlled substance laws); 26 U.S.C. § 7302 (1976) (forfeiture of property used in violation of internal revenue laws); 31 U.S.C. § 1102(a) (1976) (forfeiture of currency transported in violation of currency-reporting law); 49 U.S.C. § 781-89 (1976) (forfeiture of vehicles used to transport contraband).

624. *United States v. L'Hoste*, 609 F.2d 796, 813 n.15 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 104 (1980); *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Thevis*, 474 F. Supp. 134, 141 n.10 (N.D. Ga. 1979); *United States v. Brigance*, 472 F. Supp. 1177, 1181 (S.D. Tex. 1979). The purpose of the forfeiture remedy is "to remove the leaders of organized crime from their sources of economic power [so that] [i]nstead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence." *Senate Report, supra* note 48, at 80. This statement is a further indication that, in promulgating the new RICO remedies, Congress intended to direct them at the infiltration of legitimate businesses, not at illegal racketeering enterprises. See pt. III(A) *supra*.

property, real and personal, to the Crown."<sup>625</sup> Believing *in personam* forfeitures were repugnant, the founding fathers included Article III, section 3 in the Constitution. This section prohibits all forfeitures of estates resulting from a conviction for treason, except forfeitures of estates for the lifetime of a traitor.<sup>626</sup> In addition, the First Congress adopted a statute prohibiting forfeitures of estates resulting from federal criminal convictions.<sup>627</sup> That statute remains in the federal code at 18 U.S.C. § 3563,<sup>628</sup> which provides that "[n]o conviction or judgment shall work corruption of blood or any forfeiture of estate."<sup>629</sup> Inasmuch as RICO revives common law *in personam* forfeitures, it probably repeals section 3563 by implication.<sup>630</sup>

## B. RICO Forfeiture Procedure

### 1. Pleading Requirements

The Federal Rules of Criminal Procedure require the government to give notice in the indictment that it is seeking forfeiture.<sup>631</sup> This

625. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (citations omitted). "The basis for these forfeitures was that a breach of the criminal law was an offense to the King's peace, which was felt to justify denial of the right to own property." *Id.* at 682.

626. U.S. Const. art. III, § 3. This section provides that "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." *Id.*

627. Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117.

628. 18 U.S.C. § 3563 (1976).

629. *Id.*

630. *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978). This implied repeal seems likely despite the Supreme Court's repeated admonition that repeals by implication are not favored. *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976); *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Repeals by implication do not occur absent a "manifest inconsistency or positive repugnance between the two statutes." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565 (1963). "Legislative history and congressional intent are important factors in determining whether there has been a repeal by implication." *Plains Elec. Generation & Transmission Coop., Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1376 (10th Cir. 1976). Accordingly, the legislative history of RICO and the manifest inconsistency supports repeal by implication. See *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Brigance*, 472 F. Supp. 1177, 1180-81 (S.D. Tex. 1979). In conflict with the Fifth Circuit holding in *Rubin*, the Fourth Circuit has held that § 3563 was not repealed by RICO because RICO forfeiture does not constitute a forfeiture of estate. *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3289 (U.S. Oct. 21, 1980) (No. 80-132). Neither RICO nor any other legislative enactment could repeal art. III, § 3 of the Constitution. This result has the anomalous impact of granting convicted traitors more protection from forfeiture than is accorded to the small-time gambler convicted under RICO.

631. Fed. R. Crim. P. 7(c)(2). The enactment of the forfeiture provisions of § 1963(a) resulted in modifications of the Federal Rules of Criminal Procedure. Fed. R. Crim. P. 7(c)(2), 31(c), 32(b)(2), Advisory Committee Notes.

pleading requirement is easily satisfied. Rule 7(c)(2) does not require a specific description of the defendant's interest in the property; it is sufficient to claim any and all interest in a particular piece of property.<sup>632</sup> Failure to satisfy this requirement, however, is a ground for striking that portion of the indictment.<sup>633</sup>

## 2. Forfeiture Verdict

The imposition of a forfeiture penalty is part of the judgment of conviction.<sup>634</sup> The court orders forfeiture after the jury determines whether forfeiture is permitted<sup>635</sup> by means of a special verdict describing the extent of the interest or property subject to forfeiture.<sup>636</sup> To eliminate any impact on the issue of guilt, the request for a special verdict should be submitted to the jury only after it has returned guilty verdicts on the RICO counts.<sup>637</sup>

---

632. See *United States v. Smaldone*, 583 F.2d 1129, 1133 (10th Cir. 1978) (indictment sufficient when it sought forfeiture of defendant's "interest in the business and property known as Gaetano's Restaurant, located at 3760 Tejon Street, Denver, Colorado"), *cert. denied*, 439 U.S. 1073 (1979).

633. *United States v. Hall*, 521 F.2d 406, 407-08 (9th Cir. 1975). Rule 7 applies only if a § 1962 conviction "may" result in forfeiture. Fed. R. Crim. P. 7(c)(2). In *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977), for example, the court held that forfeiture could not result when the Government contended that defendant no longer had any forfeitable interest on the date of the indictment. *Meyers*, however, includes a puzzling caveat that rule 7 applies if the offense charged "may result in a criminal forfeiture," not merely when the Government in fact claims such a forfeiture." *Id.* at 461 (footnote omitted) (quoting *United States v. Hall*, 521 F.2d 406, 407-08 (9th Cir. 1975)). It is difficult to discern how rule 7 can require the government to describe forfeitable property if it does not claim a forfeiture. This statement is logical only if the jury has the power to impose forfeiture regardless of whether the government requests it.

634. Fed. R. Crim. P. 32(b)(2). A forfeiture under § 1963(a) could not be imposed absent a RICO conviction. *United States v. Scharf*, 551 F.2d 1124, 1127 (8th Cir.) (dismissal of all RICO criminal counts automatically eliminates possibility of forfeiture), *cert. denied*, 434 U.S. 824 (1977).

635. *United States v. L'Hoste*, 609 F.2d 796, 813-14 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

636. Fed. R. Crim. P. 31(e). The language of rule 31(e) seems to limit the special verdict to the issue of the extent of the defendant's interest in an enterprise. In *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980), however, the court approved the submission of an inquiry requiring the jury to specify which corporations were part of the enterprise and the percentage of the defendant's interest in each. The defendant argued that this verdict was not authorized by rule 31(e) and should be reversed under the general rule that special verdicts are disfavored. *Id.* at 396. Emphasizing the complex multi-corporation nature of the enterprise, the court found that the jury could not determine the extent of the forfeitable property without first determining the answers to the submitted questions. *Id.*

637. See *United States v. L'Hoste*, 609 F.2d 796, 813 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

### 3. Mandatory v. Discretionary Forfeitures

The most significant procedural issue is the role of the trial judge in deciding the extent of forfeitures. The Fifth Circuit has explicitly held that trial courts have no discretion to grant remission or mitigation of forfeiture.<sup>638</sup> In conflict with this view, the Second Circuit has concluded that trial courts have discretion to avoid "draconian (and perhaps potentially unconstitutional) applications of the forfeiture provision."<sup>639</sup> The court viewed the availability of this discretion as a factor alleviating eighth amendment problems inherent in criminal forfeiture.<sup>640</sup> In support of its conclusion that discretion exists, the court cited language in section 1963(c) authorizing "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.*"<sup>641</sup> Notably, the Fifth Circuit construed this same language narrowly to support its holding that a trial court has no discretion to remit or mitigate forfeitures. *United States v. L'Hoste*<sup>642</sup> characterized the quoted passage as encompassing "the determination of such administrative details as the time and place that the property declared forfeited is to be seized by the Attorney General."<sup>643</sup> *L'Hoste* failed to explain why section 1963(c) would authorize the courts to decide mere administrative details. Under a rational statutory scheme, "administrative details" are decided by administrative bodies, not by courts.<sup>644</sup>

---

638. *Id.* at 809-14.

639. *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980).

640. The *Huber* court observed: "We do not say that no forfeiture sanction may ever be so harsh as to violate the Eighth Amendment. But at least where the provision for forfeiture is keyed to the magnitude of a defendant's criminal enterprise, as it is in RICO, the punishment is at least in some rough way proportional to the crime." *Id.*

641. 18 U.S.C. § 1963(c) (1976) (emphasis added). The quoted language can also be found in Fed. R. Crim. P. 32 (b)(2), which governs criminal forfeitures generally.

642. 609 F.2d 796 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

643. *Id.* at 811. *L'Hoste* relied on *in rem* cases construing similar provisions of the customs laws.

644. *Cf. Association of Mass. Consumers, Inc. v. SEC*, 516 F.2d 711, 714 (D.C. Cir.) (practical problems of calendaring proceedings "are housekeeping details addressed to the discretion of the agency and, due process or statutory considerations aside, are no concern of the courts" (quoting *City of San Antonio v. Civil Aeronautics Bd.*, 374 F.2d 326, 329 (D.C. Cir. 1967)), *cert. denied*, 423 U.S. 1052 (1975). A second criticism of *L'Hoste* is that its construction of "terms and conditions" is not in accord with the common legal definition of "condition," which ordinarily indicates that the forfeiture can depend on the occurrence of an uncertain event. *See In re Las Colinas, Inc.*, 294 F. Supp. 582, 601-02 (D.P.R. 1968) ("It is a well known rule of law that in conditional obligations, the acquisition of rights, as well as the extinction or loss of those already acquired, shall depend upon the event constituting the condi-

The Fifth Circuit's analysis also focused on the following language in section 1963(a): "Whoever violates any provision of section 1962 of this chapter shall be fined . . . or imprisoned . . . and shall forfeit to the United States . . ." <sup>645</sup> Conceding that the mere use of the word "shall" was not controlling, <sup>646</sup> the court commented that "shall" generally indicates mandatory congressional intent. <sup>647</sup> *L'Hoste* also distinguished fines and imprisonment, which are discretionary, from the criminal forfeiture penalty. It noted that the "criminal penalties of fine and imprisonment are presented in the disjunctive, allowing either fine *or* imprisonment *or* both." <sup>648</sup> In contrast, *L'Hoste* observed that "criminal forfeiture is mentioned in the conjunctive with the other formats of penalties, leaving the implication that forfeiture is required." <sup>649</sup>

By limiting its forfeiture analysis to the question of statutory construction, *L'Hoste* failed to deal with the Second Circuit contention that judicial discretion is needed to prevent eighth amendment violations resulting from mandatory forfeitures. <sup>650</sup> Although mandatory sentences are not unconstitutional *per se*, the lack of sentencing flexibility may be a factor in an eighth amendment analysis. <sup>651</sup>

tion."). The use of the word "conditions" in § 1963(c) and Fed. R. Crim. P. 32 (b)(2) implies that the trial judge has the power to impose restrictions on governmental seizure of forfeited property. If, as *L'Hoste* holds, the trial judge does not have the power to remit or mitigate forfeitures, it is unlikely that the court could enforce any condition, even one relating to an "administrative detail," that might so restrict the government.

645. 18 U.S.C. § 1963(a) (1976).

646. *United States v. L'Hoste*, 609 F.2d 796, 810 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980). This concession may have been compelled by the use of the word "shall" in connection with fines and imprisonment, said by *L'Hoste* to be matters of discretion. *Id.* In addition, § 1963(b), which *L'Hoste* characterized as granting discretion to the trial court, also contains the word "shall." *Id.*

647. *Id.* at 812. The court compared § 1963(a) to 18 U.S.C. § 1955(d) (1976). Section 1955(d) uses the term "may," and thus indicates permissive rather than mandatory forfeiture. The use of both words in the Organized Crime Control Act was considered an indication that if Congress had intended nonmandatory forfeitures under § 1963(a) it would have used the word "may." 609 F.2d at 812.

648. *Id.* at 810.

649. *Id.* *L'Hoste* rejected a second argument that the trial court has discretion under the Federal Probation Act, 18 U.S.C. §§ 3651-3656 (1976). Under § 3651, a district court has the power to suspend the imposition or execution of jail sentences and fines. The court held that § 3651 does not grant the power to suspend the imposition or execution of a forfeiture; rather § 3651 is silent on forfeitures. 609 F.2d at 814. A forfeiture, however, is not similar to a fine or imprisonment as it was designed for more than punitive purposes. *Id.* Forfeiture was intended to implement a policy of depriving those engaged in racketeering activity of their economic base so that they cannot easily continue illegal activities. *Id.*

650. See note 640 *supra*.

651. See notes 724-29 *infra* and accompanying text. *L'Hoste* also omits any discussion of the constitutional problem inherent in depriving innocent persons of judicial

### C. Forfeitable Interests

Although RICO revives common law *in personam* forfeitures, the scope of a forfeitable interest under RICO is significantly different. At common law, the convicted felon or traitor forfeited all property.<sup>652</sup> Section 1963(a), on the other hand, reaches only the defendant's interest in the enterprise.<sup>653</sup> In this respect RICO resembles the traditional *in rem* action because it is limited to illegally acquired interests or property rights put to an illegal use under section 1962.<sup>654</sup> In section 1962(c) cases, for example, the government may not seek forfeiture of an entity owned by a defendant if the entity's affairs are not conducted through a pattern of racketeering activity.<sup>655</sup>

---

access prior to the criminal judgment authorizing forfeiture. The lesson of recent Supreme Court decisions is that due process requires a hearing before an individual can be deprived of property. See notes 763-74 *infra* and accompanying text. If no judicial discretion exists to protect innocent parties, the jury's issuance of a forfeiture judgment aggravates the due process problem in a RICO context. See notes 679-95 *infra* and accompanying text.

652. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-83 (1974).

653. *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979). The enterprise itself is protected from over-extensive forfeiture in that the government cannot forfeit all the assets of a corporation unless the defendant owned all those assets. See *United States v. Weatherspoon*, 581 F.2d 595, 602 (7th Cir. 1978) ("the Government had not offered any evidence to show that Weatherspoon owned all the assets of the beauty college, which therefore would have subjected the assets to forfeiture under 18 U.S.C. § 1963").

654. *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga. 1979). The Justice Department emphasized the limited type of *in personam* forfeiture authorized by § 1963. See Letter of Deputy Att'y Gen. Richard G. Kleindienst to Sen. John L. McClellan (Aug. 11, 1969), reprinted in *Measures Relating to Organized Crime*, *supra* note 36, at 406.

655. For example, in *United States v. Huber*, 603 F.2d 387, 394-95 (2d Cir. 1977), *cert. denied*, 445 U.S. 927 (1980), the government sought forfeiture of the defendant's interest in several corporations selling hospital supplies. The defendant used those corporations to defraud hospitals and government medical health programs through a series of cost-plus contracts, the prices for which he obtained by falsifying invoices and misrepresenting costs. The defendant argued that the instructions erroneously "permitted the jury to find that the various entities were part of the enterprise if it found that defendant owned them all even if he conducted the affairs of only one of them through the pattern of racketeering activity." *Id.* at 394. The government conceded, and the court held "that such a connection alone would not support application of RICO's forfeiture sanction to enterprises whose affairs were not conducted through the pattern of racketeering activity. [The instructions adequately informed the jury that] it could not include a particular entity in the enterprise unless its affairs were found to have been conducted through the pattern of racketeering activity." *Id.* at 394-95; see *United States v. Thevis*, 474 F. Supp. 134, 145 (N.D. Ga. 1979) ("If the government carries its burden and shows that each of Fidelity's assets were contributed to or utilized by the association to forward its goals, then forfeiture under 18 U.S.C. § 1963(a)(2) would be proper.").



The "interest" forfeited under section 1963(a)(2) is broadly defined<sup>656</sup> as "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise."<sup>657</sup> An interest need not be a formal contribution of capital evidenced by a stock certificate or a security agreement; informal contributions to an association that is not a legal entity are also forfeitable.<sup>658</sup> Moreover, one court has described section 1963(a)(2) as reaching only a continuing source of control over the enterprise, not one that influenced the enterprise on a single occasion.<sup>659</sup>

A limitation on the scope of section 1963(a) is that the interest must exist on the date of the indictment; forfeiture extends neither to an interest terminating before the indictment,<sup>660</sup> nor to an interest obtained after the indictment.<sup>661</sup> The latter type of interest was involved in *United States v. Rubin*,<sup>662</sup> in which the government attempted to prohibit the defendant from seeking a union office in the future and sought section 1963 forfeiture in perpetuity of his right to hold a union office.<sup>663</sup> The court refused to permit this forfeiture and restricted the ambit of section 1963 to presently-held interests.<sup>664</sup>

656. Objections to the terms "interest" and "property or contractual right of any kind" on vagueness grounds were considered in *United States v. Thevis*, 474 F. Supp. 134, 141-44 (N.D. Ga. 1979). The court found that the terms were not vague, ambiguous or overbroad, and held that "interest" referred to capital interests rather than income acquired in violation of § 1962(a) or (b) and that "property or contractual right" referred to property acquired in violation of § 1962(c) affording a continuing source of power within the enterprise. *Id.*

657. 18 U.S.C. § 1963(a)(2) (1976).

658. *United States v. Thevis*, 474 F. Supp. 134, 143 (N.D. Ga. 1979).

659. *Id.* at 143, 144 n.16. *Thevis* applied this broad construction of § 1963(a) to contract rights held by defendants over other members of the enterprise. *Id.* at 145. It observed that these contracts were forfeitable because they afforded "one defendant a source of influence over another defendant" and in turn afforded "a source of influence over the association-enterprise of which they are both members." *Id.* The "source of influence" language could limit forfeiture in some circumstances. For example, a defendant may use an automobile to transport stolen goods in a fencing enterprise. The auto could be regarded as a forfeitable informal contribution. The auto, however, might not be regarded as a source of power or influence although it is, in a broad sense, a contribution to the enterprise. See Taylor, *Forfeiture under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 Am. Crim. L. Rev. 379, 392 (1980) (criticizing application of RICO to forfeit instrumentalities of crime).

660. *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

661. *United States v. Rubin*, 559 F.2d 975, 990-93 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978).

662. *Id.*

663. *Id.* at 992-93.

664. *Id.*

## 1. Forfeiture of Third Party Interests

## a. Complete Transfer of Defendant's Interest

A significant and rarely discussed issue of RICO forfeiture law is whether a conviction can result in the forfeiture of an interest owned by parties not charged with that crime. If, for example, prior to the indictment, a defendant assigns or transfers a potentially forfeitable interest to a person not involved with the enterprise, the government may attempt to forfeit the interests held by the defendant's heirs, successors, and assigns. *United States v. Thevis*,<sup>665</sup> however, held that the interest of uncharged heirs, successors, and assigns could not be forfeited because mandatory forfeiture can occur only upon conviction and unindicted parties cannot be convicted.<sup>666</sup>

If *Thevis* is correct, an important distinction exists between RICO criminal forfeiture law and the doctrines established by *in rem* cases. Under many *in rem* statutes, the government can obtain forfeiture of property used for criminal purposes even though the owner was not criminally culpable.<sup>667</sup> Furthermore, it is irrelevant that the innocent party purchased the property before forfeiture proceedings were instituted.<sup>668</sup> In *Simons v. United States*,<sup>669</sup> the Ninth Circuit held that

[t]he forfeiture statute takes effect immediately upon the commission of the illegal act. At that moment the right to the property vests in the United States, and when forfeiture is sought, the condemnation when obtained relates back to that time and avoids all intermediate sales and alienations, even as to purchasers in good faith.<sup>670</sup>

---

665. 474 F. Supp. 134 (N.D. Ga. 1979).

666. *Id.* at 145. Permitting forfeiture of an uncharged party's interest violates the fundamental principle that *in personam* forfeiture of a person's property is dependent upon conviction. *United States v. Scharf*, 551 F.2d 1124, 1127 (8th Cir.) (dismissal of all RICO counts automatically eliminates the possibility of forfeiture), *cert. denied*, 434 U.S. 824 (1977); *see* notes 624, 672 *infra* and accompanying text. In the context of *in rem* forfeiture statutes, the Supreme Court has noted that forfeiture statutes are not directed at innocent parties. *United States v. United States Coin & Currency*, 401 U.S. 715, 712-22 (1971) ("When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise." (footnote omitted)).

667. *Van Oster v. Kansas*, 272 U.S. 465, 468 (1926).

668. *See, e.g., United States v. One 6.5 mm Mannlicher Carcano Military Rifle*, 250 F. Supp. 410 (N.D. Tex. 1966). This case involved forfeiture of the gun allegedly used to assassinate President Kennedy and which had been purchased by a speculator before the forfeiture proceeding. Even though the government made no allegation that the speculator was not a bona fide purchaser, the rifle was forfeited to the government. *Id.* at 415.

669. 541 F.2d 1351 (9th Cir. 1976).

670. *Id.* at 1352 (citation omitted).

This "relation back" principle is inapplicable to RICO *in personam* forfeitures because the doctrine is grounded in the essential nature of *in rem* forfeiture actions. In those actions, the innocence of the owner is irrelevant because the thing to be forfeited is considered the offender.<sup>671</sup> Thus, the "relation back" doctrine cannot be employed in an *in personam* action in which forfeiture is dependent on the guilt of the former owner. Accordingly, because RICO established an *in personam* forfeiture procedure, the innocence of the present owner must control if the defendant does not retain an interest in the property.<sup>672</sup>

Although the "relation back" doctrine should not affect the rights of third parties, the government may nonetheless contest the validity of any sales, conveyances, gifts, or assignments to third parties.<sup>673</sup> For

671. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). The Supreme Court explained that the innocence of the property owner is irrelevant under *in rem* law because the property is treated as the offender in these actions. *Id.* at 685. On this point, the Court extensively quoted, with approval, Justice Story's opinion in *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827), distinguishing *in rem* actions, in which the innocence of the owner is irrelevant, from *in personam* forfeitures. 416 U.S. at 683-84. In *The Palmyra*, Justice Story noted that "at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem*; but it was a part, or at least a consequence, of the judgment of conviction. . . . [T]he [Crown's right to the goods and chattels] attached only by the conviction of the offender. . . . But this doctrine never was applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing; and this, whether the offence be *malum prohibitum*, or *malum in se*. . . . [T]he practice has been, and so this Court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*." 416 U.S. at 684 (quoting *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827)).

672. The § 1963(b) procedure permitting the government to obtain a court order to prevent the defendant from transferring forfeitable property and therefore rendering the forfeiture illusory also discourages the adoption of a "relation back" doctrine in RICO prosecutions. *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 104 (1980); see notes 671-72 *supra* and accompanying text; 730-32 *infra* and accompanying text. Apparently, a temporary restraining order may be issued against these transfers upon a showing that the defendant is attempting to transfer the property. *United States v. Bello*, 470 F. Supp. 723, 724 (S.D. Cal. 1979). If the "relation back" principle is applied to RICO, § 1963(b) would be superfluous. If potentially forfeitable property could be recovered from innocent purchasers, the government's interest in that property would never be threatened by pre-conviction transfers, and a court order would never be necessary.

673. *United States v. Currency Totalling \$48,318.08*, 609 F.2d 210, 213-15 (5th Cir. 1980). The court held that "relation back" did not apply to an *in rem* forfeiture statute, 31 U.S.C. § 1102(a) (1976). The prior assignment was invalid, however, because it did not satisfy state assignment law requiring that the assignment be perfected by giving notice to the United States before the institution of forfeiture proceedings. 609 F.2d at 213-14. The court provided no guidance as to how this notice could be given and to whom it should be given.

example, an assignment to an attorney may be a security interest under certain circumstances.<sup>674</sup> If it is, failure to perfect by filing may result in the subordination of the assignment to the forfeiture claim of the government.<sup>675</sup> If the government is considered a subsequent creditor, it may also attack a conveyance or assignment on the ground that the transfer was made to defraud.<sup>676</sup> If, however, the property is conveyed prior to conviction by a valid, non-refundable assignment for attorneys fees, the *Thevis* holding precludes forfeiture.<sup>677</sup>

---

674. Tarlow, *Criminal Defendants and Abuse of Jeopardy Tax Procedures*, 22 U.C.L.A. L. Rev. 1191, 1207 (1975). Under the Uniform Commercial Code, the assignment must be collateral guaranteeing the client's promise to pay, not an absolute transfer in payment of services. U.C.C. §§ 1-201(3); 9-105(1)(c),-203(1). If the property is conveyed for attorney's fees prior to conviction by a valid, nonrefundable assignment, *Thevis* precludes forfeiture. *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979).

675. Tarlow, *supra* note 674, at 1207 & n.121.

676. The law of the state in which the conveyance occurred is controlling when federal taxing agencies attempt to set aside a taxpayer's transfer of property before the assessment. *Hall v. United States*, 403 F.2d 344, 346 (5th Cir. 1968), *cert. denied*, 394 U.S. 958 (1969); *United States v. Hickox*, 356 F.2d 969, 973 (5th Cir. 1966). Although I.R.C. § 6901 permits the government to directly assess the property of the transferee, the applicable state law determines the liability of the transferee. *Commissioner v. Stern*, 357 U.S. 39 (1958); *Tooley v. Commissioner*, 121 F.2d 350 (9th Cir. 1941); *Nutter v. Commissioner*, 54 T.C. 290 (1970). The government must establish by clear and convincing evidence that the transfer was made with fraudulent intent. *United States v. De Martini*, 53 F. Supp. 162, 163 (N.D. Cal. 1943). The burden of proof would shift to the transferee when the property is conveyed to relatives. *United States v. West*, 299 F. Supp. 661, 664-65 (D. Del. 1969). The government may attempt to employ the "constructive fraud" provision of the Uniform Fraudulent Conveyance Act § 4 under which actual fraudulent intent is irrelevant. This provision provides that "every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Uniform Fraudulent Conveyance Act § 4. In addition to the difficulties in establishing inadequacy of consideration and the existing or potential insolvency of the transferor, the major obstacle to employment of this provision is that the complaining party must have been an existing creditor at the time of the conveyance. *See Hartman v. Lauchli*, 238 F.2d 881, 889 (8th Cir. 1956), *cert. denied*, 353 U.S. 965 (1957); *Kentucky-Tennessee Light & Power Co. v. Fitch*, 63 F. Supp. 989, 991 (W.D. Ky. 1946); *Dubia v. Ebeling*, 30 F. Supp. 992, 993 (N.D. Ill. 1939). If the assignment occurs before a RICO indictment, however, the government cannot claim that it was an existing creditor at the time of the transfer, as it becomes a creditor only on indictment of the defendant. *Tcherepnin v. Franz*, 457 F. Supp. 832, 838-39 (N.D. Ill. 1978) (tort claimant became creditor within Fraudulent Conveyance Act when suit was filed). Therefore, the government can set aside the conveyance only if it can show actual fraudulent intent. *Hartman v. Lauchli*, 238 F.2d 881, 889 (8th Cir. 1956), *cert. denied*, 353 U.S. 965 (1957); *Fish v. East*, 114 F.2d 177, 182-83 (10th Cir. 1940). *But see Taylor, supra* note 659, at 388 (if transfer is *bona fide*, it cannot be set aside even if defendant intended to avoid forfeiture by means of the transfer).

677. *See* notes 665-66 *supra* and accompanying text.

b. *Forfeiture of Property in Which Defendant Owns Only Part Interest*

A more complex problem arises when both the defendant and the innocent party have interests in forfeitable property. The applicable statute, section 1963(c), provides that "the United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons."<sup>678</sup> A simple, but potentially unfair, interpretation of this language was adopted by the court in *United States v. L'Hoste*,<sup>679</sup> which concluded that a trial judge has no discretion to remit or mitigate forfeitures to protect innocent parties holding an interest in the forfeited property.<sup>680</sup> Construing section 1963(c) as placing sole responsibility for protecting innocent parties on the United States, the court concluded that the only remedy of innocent parties was to petition the Attorney General.<sup>681</sup> The manner in which the Attorney General is to discharge this duty, however, is not clear. Section 1963(c) does not require the Justice Department to promulgate regulations governing procedures for the recovery of forfeited property. Furthermore, although some courts have reviewed abuses of discretion,<sup>682</sup> many *in rem* cases have held that the courts have no power to review the Attorney General's actual decision on remission and mitigation of forfeiture.<sup>683</sup> These holdings indicate that an innocent party affected by a RICO forfeiture may be entitled only to a limited appellate review.

A major flaw in the *L'Hoste* view is that it permits the government to acquire an interest in the forfeited property greater than that owned by the defendant. This flaw becomes apparent in situations such as *L'Hoste*, in which the defendant's wife had a community property or other marital interest in the forfeited property. The defendant could not transfer the entire property without his wife's consent but could convey only his own interest in the property.<sup>685</sup> Yet, *L'Hoste* permitted forfeiture of the entire property.<sup>686</sup> If the wife's

---

678. 18 U.S.C. § 1963(c) (1976).

679. 609 F.2d 796 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

680. *Id.* at 812; *see* notes 642-49 *supra* and accompanying text.

681. 609 F.2d at 812.

682. *E.g.*, *United States v. One 1974 Mercury Cougar*, 397 F. Supp. 1325, 1329-32 (C.D. Cal. 1975).

683. *See, e.g.*, *United States v. One 1961 Cadillac*, 337 F.2d 730, 733 (6th Cir. 1964); *Bramble v. Kleindienst*, 357 F. Supp. 1028, 1033 (D. Colo. 1973), *aff'd*, 498 F.2d 968 (10th Cir.), *cert. denied*, 419 U.S. 1069 (1974).

684. A recipient of property cannot take an interest greater than that owned by the transferor. *Sauget v. Villagomez*, 228 F.2d 374, 376 (9th Cir. 1955).

685. *See Gantner v. Johnson*, 274 Cal. App. 2d 869, 876-77, 79 Cal. Rptr. 381, 386 (1969).

686. *United States v. L'Hoste*, 609 F.2d 796, 812 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

petition to the Attorney General is denied and the decision is not reviewable, the United States may obtain a greater interest than the defendant had.<sup>687</sup>

Even if the *L'Hoste* court correctly denied the district court any power to remit or mitigate a lawful forfeiture, it failed to distinguish the issue of discretion from the question whether a forfeiture is invalid as to innocent parties. This distinction was recognized in *Wiren v. Eide*,<sup>688</sup> in which the court noted that, "[w]hile the remission or mitigation of lawful seizures and forfeitures is a matter committed to agency discretion, . . . the determination of the propriety of the seizures and forfeitures themselves is not."<sup>689</sup> Under this view, the recognition of a wife's property rights does not pose an issue of remission or mitigation of a lawful seizure. Rather, the issue is one of the propriety of the forfeiture itself, and is not a matter within the discretion of the Attorney General.<sup>690</sup> The *L'Hoste* view also renders RICO forfeiture procedures unconstitutional on due process grounds. Because there are no statutory procedures permitting an innocent person to plead his case,<sup>691</sup> the holding that a court issuing a forfeiture order has no power to protect such a person deprives him of his right to some form of hearing prior to a forfeiture.<sup>692</sup> Consequently,

---

687. A similar problem arises when the defendant acquires title to the innocent party's interest or property through extortion or fraud in violation of § 1962(b). Forfeiture of this property may violate the due process rights of the victim. In *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), the court characterized prior Supreme Court cases as implying "that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent." *Id.* at 689. See also *Peisch v. Ware*, 8 U.S. (4 Cranch.) 347, 363-64 (1808); *United States v. Almeida*, 9 F.2d 15, 16 (1st Cir. 1925); *United States v. One Saxon Auto.*, 257 F. 251, 252 (4th Cir. 1919). Certainly, the fraud or extortion causing the uncharged party to transfer property vitiates any consent to the transfer. Moreover, the government should not be permitted to forfeit property that a defendant does not own because it was acquired through fraud or extortion; a defendant who commits the tort of conversion has no title in the property until the victim receives a judgment or settlement against the defendant that is satisfied in full. See, e.g., *Lovejoy v. Murray*, 70 U.S. (3 Wall.) 1 (1865); *Atwater v. Tupper*, 45 Conn. 144, 147-48 (1877); cf. *United States v. One Saxon Auto.*, 257 F.2d 251, 252 (4th Cir. 1919) (no *in rem* forfeiture attaches to property taken by trespasser or thief because owner retains title). A RICO forfeiture would, therefore, unlawfully deprive the victim of converted property to which he still holds title.

688. 542 F.2d 757 (9th Cir. 1976).

689. *Id.* at 761 (footnote omitted).

690. The forfeiture of an uncharged party's property is improper. See note 666 *supra* and accompanying text.

691. In addition to the silence of Title IX on the matter, the traditional rule prohibits intervention in criminal cases by persons who are not parties to the action. See *Bankers' Mortgage Co. v. McComb*, 60 F.2d 218, 222 (10th Cir. 1932); *United States v. Widen*, 38 F.2d 517, 518-19 (N.D. Ill. 1930).

692. In *in rem* forfeiture cases, the courts have interpreted the due process clause to require a hearing for the owner of property that is subject to an *in rem* forfeiture action. See *United States v. One 1972 Chevrolet Blazer Vehicle*, 563 F.2d 1386 (9th

a situation in which an innocent party's rights are affected demands either that the district court have the power to restrict forfeiture to the defendant's interest in the property, or that the third party have a right to challenge the forfeiture before a jury<sup>693</sup> in an ancillary proceeding to the criminal case<sup>694</sup> or in a civil action.<sup>695</sup>

---

Cir. 1977); *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976); *United States v. One 1951 Douglas DC-6 Aircraft*, 475 F. Supp. 1056 (W.D. Tenn. 1979); cf. *Commissioner v. Shapiro*, 424 U.S. 614, 630-33 (1976) (due process violation found when jeopardy assessment and subsequent levy on taxpayer's assets occurred without prompt hearing to establish tax liability). In *Chevrolet*, the government brought a forfeiture action against a vehicle used to transport contraband firearms. The legal title to the automobile was in the name of Charles Brandon. However, Steven Brandon asserted that he was the actual or equitable owner of the property and filed an answer to the complaint as a third party claimant. The district court granted summary judgment for the government without giving Steven Brandon an opportunity to show that he was the owner of the automobile and that he had done everything he reasonably could to avoid having the automobile put to unlawful use. The Ninth Circuit reversed, holding that it was error to deny appellant a hearing on his ownership claims. 563 F.2d at 1391. Moreover, there is no RICO procedure by which the innocent owner of the property is notified of a pending forfeiture proceeding against the property. Therefore, the due process requirement of notice prior to forfeiture is violated. *Robinson v. Hanrahan*, 409 U.S. 38, 39-40 (1972) (per curiam).

693. See *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980). In this case the court held that, in an *in rem* forfeiture action against his property, an owner is entitled to a jury trial. The court reasoned that the seventh amendment guarantee of jury trials except in equity or admiralty cases applies to all cases in which legal rights are to be ascertained, embracing "all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." *Id.* at 457 (quoting *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 446-47 (1830)). Rejecting the contention that a statutory forfeiture resembles a suit in equity, and asserting that an admiralty action would apply only to a seizure of property taking place on water, the court held that an *in rem* forfeiture of property seized on land does not fall within either of the two seventh amendment exceptions. *Id.* at 458-59. This holding should be extended to permit a jury trial for an innocent party who wishes to contest a RICO forfeiture of his property. A RICO forfeiture action does not resemble an equity suit to any greater extent than does an *in rem* action. Additionally, the admiralty exception to the seventh amendment is probably inapplicable because the location of the seizure is irrelevant for purposes of Title IX.

694. The first alternative may not be wholly satisfactory because the third party could present its case only by intervening in the criminal case. This procedure would contravene the general rule prohibiting intervention in criminal cases by persons who are not parties to the action. See note 691 *supra*. This problem, however, may be avoided by considering the interests of third parties at a post-trial hearing. *Taylor, supra* note 659, at 396. At such a hearing, the jury's forfeiture verdict would not be binding on third parties as they were not parties to the criminal trial giving rise to the verdict. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969) ("It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process."). A more difficult question is whether the government has the burden of proving that the defendant had title to the property or whether the third party must prove his own title. A general rule of property law is that the burden of proving title is on the party alleging it. *Goodwin v. Home Buying*

## 2. Forfeiture of Profits

Whether income derived from violations of section 1962(c) is a forfeitable interest is the only issue of RICO forfeiture law in which the government's position has been repeatedly rejected. Cases holding that income obtained from a pattern of racketeering activity is not forfeitable unless it is invested in violation of section 1962(a) have sharply restricted the scope of forfeiture.<sup>696</sup> These cases have ruled that profits derived from racketeering are not forfeitable unless they are invested in an enterprise. Profits invested in consumer goods or within the one percent stock exception of section 1962(a) can never be forfeited.<sup>697</sup> The courts have interpreted the term "interest" in section 1962(a)(2) as connoting a capital contribution similar to corporate stock.<sup>698</sup>

In the seminal case, *United States v. Marubeni America Corp.*,<sup>699</sup> the rejection of forfeiture of section 1962(c) profits was primarily

---

Inv. Co., 352 F. Supp. 413, 415 (D.D.C. 1973). Because the government's allegation in the indictment that the property is forfeitable implicitly alleges that the indicted defendant owned the property, the government should have the burden of proof in the subsequent hearing. Moreover, unless a third party is required to file a pleading alleging ownership before receiving a post-trial hearing, he will never have an opportunity to allege title. Consequently, the third party should not have the burden of proof.

695. If the forfeiture is unlawfully applied to the property of an uncharged party, he may file an action under the Tucker Act, 28 U.S.C. § 1346(a)(2) (1976). *See* *Simons v. United States*, 497 F.2d 1046 (9th Cir. 1974), *aff'd*, 541 F.2d 1351 (9th Cir. 1976). This remedy often would be inadequate because the claim may not exceed \$10,000 in this type of action. 28 U.S.C. § 1346(a)(2) (1976).

696. *See* *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 766-70 (9th Cir. 1980); *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979); *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977). In *Thevis*, the government was rebuffed in its attempt to forfeit property allegedly obtained from or purchased with racketeering profits. 474 F. Supp. at 144. The principle that profits are not forfeitable has been criticized in *Blakey & Goldstock*, *supra* note 4, at 349 n.64. The commentators remarked that "*Marubeni* appears to be wrongly decided [because] [t]he statute states that 'all property or other interest' is to be forfeited." *Id.* (quoting 18 U.S.C. § 1963 (1976)). Notably, however, the quoted language the authors relied upon to justify their assertion refers only to the authority of the Attorney General to seize "all property or other interest *declared forfeited*." 18 U.S.C. § 1963(c) (1976) (emphasis added).

697. *See* cases cited note 696 *supra*.

698. *United States v. Thevis*, 474 F. Supp. 134, 141-42 (N.D. Ga. 1979); *United States v. Meyers*, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

699. 611 F.2d 763 (9th Cir. 1980). In *Marubeni* the government attempted to forfeit profits from the defendant corporations' alleged acts of racketeering. The defendant manufactured and sold electrical cable and was bidding on contracts to supply Anchorage Telephone Utility with telephone cable. The government contended that the defendants bribed a utility official to obtain confidential bidding information and artificially lowered their bids by offering some types of cable at depressed prices. The bribed official then used his position to ensure that the utility would purchase higher priced cable rather than the underpriced cable. *Id.* at 763-64.



grounded in the court's analysis of the relationship between sections 1962(a) and 1963(a). The court noted that the forfeiture of income derived from a pattern of racketeering in violation of section 1962(c) cannot be reconciled with the legislative intent underlying section 1962(a) expressly governing the investment of income derived from a pattern of racketeering activity.<sup>700</sup> If Congress had intended to permit forfeiture of all racketeering income, it would not have permitted investments of such income in corporate stock.<sup>701</sup> Therefore, *Marubeni* concluded that forfeiture of capital interests, rather than of profits, would fulfill the congressional design of separating racketeers from the enterprises they own.<sup>702</sup>

The Congressional intent can also be determined by comparing section 1963(a) with another section of the Organized Crime Control Act, 21 U.S.C. § 848(a)(2)(A).<sup>703</sup> Section 848 explicitly provides for forfeiture of profits obtained from a continuing criminal enterprise.<sup>704</sup> The omission of similar explicit language in section 1963(a) indicates that Congress did not intend to permit forfeitures of income from illegal activity except as permitted by section 1962(a).<sup>705</sup>

### 3. Forfeiture of Government or Union Offices

Forfeiture of government or union offices raises serious questions concerning the scope of the term "interest" and the power of the federal government. One objection to such forfeiture is that a defendant does not seem to have a property interest in an office.<sup>706</sup> Nevertheless, this type of forfeiture has been permitted, the forfeited interest being the defendant's "entitlement under the organic docu-

700. *Id.* at 766-67.

701. *Id.* (citing 18 U.S.C. § 1962(a) (1976)). *Marubeni* does not discuss the effective elimination of § 1962(a) prosecutions resulting from the existing broad construction of § 1962(c). See notes 134-35 *supra* and accompanying text.

702. 611 F.2d 763, 768-69 (9th Cir. 1980). *Marubeni* found further support for its conclusion in statements in the legislative history. *Id.* at 767-68. An earlier version of RICO, S. 1861, plainly called for forfeiture of any interest in an enterprise by providing that "[w]hoever violates any provision of section 1962 of this Chapter . . . shall forfeit to the United States all interest in the enterprise engaged in, or the activities of which affect, interstate or foreign commerce." S. 1861, 91st Cong., 1st Sess. § 1963(a), 115 Cong. Rec. 9569 (1969). Remarks in the legislative history also indicate that forfeitures were intended to be limited to forfeiture of interest "in the enterprise." *House Report, supra* note 154, at 35, *reprinted in* [1970] U.S. Code Cong. & Ad. News at 4010; *Senate Report, supra* note 48, at 160. *Marubeni* characterized the modifying word "in an enterprise" in S. 1861 as evidencing Congress' intent to exclude forfeiture of income. 611 F.2d at 769.

703. 21 U.S.C. § 848(a)(2)(A) (1976).

704. *Id.*

705. *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 766 n.7 (9th Cir. 1980); *United States v. Meyers*, 432 F. Supp. 456, 461 n.18 (W.D. Pa. 1977).

706. *United States v. Grzywacz*, 603 F.2d 682, 691 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 100 S. Ct. 2152 (1980).

ments of the various entities to serve the remainder of his terms of office."<sup>707</sup> Constitutional provisions, however, may bar the courts from issuing orders stripping the defendant of a government office. For example, forfeiture of a congressional seat would conflict with Congress' exclusive power under article 1 of the Constitution to impeach its members.<sup>708</sup> Moreover, forfeiture of state offices would violate the Supreme Court's holding in *National League of Cities v. Usery*<sup>709</sup> that Congress has no authority under the commerce clause to regulate integral state government functions.<sup>710</sup>

#### D. Eighth Amendment Problems of Section 1963(a)

In addition to constitutional problems of substantive<sup>711</sup> and procedural<sup>712</sup> due process, the forfeiture provisions of Title IX are vul-

707. *United States v. Rubin*, 559 F.2d 975, 992 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978). The court reasoned that the congressional intent to separate racketeers from their enterprises applied to defendants operating a union through racketeering. *Id.* The government forfeited the defendants' offices including those of the trustee of labor trust funds, the President of Concrete Products and Material Yard Workers Local No. 666, the Business Manager of Local No. 478, and the President of Southwest Florida Laborers' District Council.

708. U.S. Const. art. 1, §§ 2, 3. Section 2, cl. 5 of article 1 refers to the "sole Power of Impeachment" residing in the House, while § 3, cl. 6 contains similar language pertaining to the Senate.

709. 426 U.S. 833 (1976).

710. *Id.* at 852-53. Depriving a person of a state office under Title IX would impermissibly infringe on state sovereignty by depriving it of "the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest." *Id.* at 851. *See also* Atkinson, *supra* note 10, at 13 n.108 (observing that issue would be moot in most instances since convicted felons are usually automatically removed from office).

711. *United States v. Thevis*, 474 F. Supp. 134, 141-44 (N.D. Ga. 1979), for example, considered objections to the term "interest" in § 1963(a)(1) and the language "property or contractual right of any kind" in § 1963(a)(2) and found that these terms were not vague, ambiguous, or overbroad. It held that the term "interest" in § 1963(a)(1) is limited to capital interests (rather than income) acquired in violation of § 1962(a) or (b), *id.* at 141-42, and that the § 1963(a)(2) language is limited to property acquired in violation of § 1962(c) that is a continuing source of power within the enterprise. *Id.* at 143 n.14, 144. One commentator has criticized the vagueness of § 1963(a), concerning forfeiture of property acquired in violation of § 1962(a) with both racketeering income and legitimate money. Atkinson, *supra* note 10, at 5. He raises the following questions: "[H]ow far should the term 'acquired' and 'maintained' be stretched? If a person takes the cash proceeds of racketeering activity and mixes them with money derived from legitimate sources and then that common fund is used to operate a legitimate business, should all, or any part of, the legitimate business be subject to forfeiture? What if the money acquired in violation of section 1962 changes form several times before forfeiture proceedings begin? Should the court order forfeiture of assets only in such proportions as the assets were derived from racketeering activity?" *Id.* Atkinson suggests that there "be a reasonably foreseeable or intentional link between the racketeering activity and the interest subject to forfeiture," and that the court prohibit "forfeiture if the interest is too remote from the racketeering activity." *Id.* Although these concerns are valid, the criticisms are more

nerable to an eighth amendment challenge when imposed concurrently with the already severe penalties of imprisonment and fines.<sup>713</sup> While the Fourth Circuit<sup>714</sup> and a district court in the Fifth Circuit<sup>715</sup> have rejected eighth amendment arguments, the Second and Ninth Circuits have acknowledged that in some circumstances the forfeiture sanction may be unconstitutionally harsh.<sup>716</sup> The court in *United States v. Marubeni America Corp.*, for example, refused to decide the issue explicitly, but noted that section 1963(a) might impose "shockingly disproportionate" penalties.<sup>717</sup> To illustrate, it de-

---

appropriately directed at the substantive statute, § 1962(a), which fails to clarify the requisite relationship between the investment and the pattern of racketeering activity. See notes 91-93 *supra* and accompanying text. The forfeiture provisions merely incorporate flaws inherent in § 1962(a). The vagueness problems inherent in the application of the Title IX liberal construction clause, see notes 55-64, 138 *supra* and accompanying text, have not appeared in RICO forfeiture decisions. Paradoxically, two courts have held that § 1963 must be strictly construed even though the substantive criminal statute is not. See *United States v. Rubin*, 559 F.2d 975, 991 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978); *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979). This view is inexplicable because § 1963(a) is a remedial provision and as such should be subject to the liberal construction clause. See note 57 *supra* and accompanying text.

712. See notes 691-92 *supra* and accompanying text; 763-74 *infra* and accompanying text.

713. See note 44 *supra* and accompanying text. Although the Supreme Court *in dicta* recently questioned whether the eighth amendment prohibits prison sentences that are grossly disproportionate to the severity of the crime, the court was discussing only the problem of lengthy prison terms. *Rummel v. Estelle*, 100 S. Ct. 1133, 1139 (1980). Forfeitures constituting excessive punishment are still subject to an eighth amendment challenge. See 51-52 *supra* and accompanying text.

714. *United States v. Grande*, 620 F.2d 1026, 1039 (4th Cir.), *cert. denied*, 49 U.S.L.W. 3289 (U.S. Oct. 21, 1980) (No. 80-132).

715. *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga. 1979).

716. See *United States v. Marubeni Am. Corp.*, 611 F.2d 763, 769 n.12 (9th Cir. 1980); *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980). Forfeiture can be unduly severe in fact patterns similar to that in *Huber*. *Huber* involved forfeiture of a defendant's interest in parent corporations, the affairs of whose subsidiaries were conducted through racketeering activity. Although in the course of a scheme to defraud the defendant used seven corporate entities, some of which were subsidiaries of the others, the court permitted this forfeiture because it found that the entities were "sufficiently intertwined in the mail fraud to be deemed part of the RICO enterprise." *Id.* at 396. This finding was based on "evidence of continuous manipulation of the form of the business and the transfer of large sums among the corporations." *Id.* The court cautioned that "in some cases a pattern of racketeering activity in the conduct of a subsidiary's affairs may not be attributable to the parent." *Id.* For example, courts would be understandably reluctant to forfeit General Motors on the basis of two acts of bribery by a small subsidiary. Forfeiture may also be excessive in the situation under § 1962(a) which makes "maintaining" an enterprise with illegal money a violation. For example, if the violation arises from the simple use of racketeering funds to purchase janitorial supplies, forfeiture should pose an eighth amendment problem. See note 67 *supra* and accompanying text.

717. 611 F.2d 763, 769 n.12 (9th Cir. 1980).

scribed the "shopkeeper who over many years and with much honest labor establishes a valuable business [but] could forfeit it all if, in the course of his business, he is mixed up in a single fraudulent scheme."<sup>718</sup> This hypothetical reveals a significant defect in Title IX. The forfeiture provisions do not specify the extent to which the racketeering activity must contribute to the success of the enterprise. Consequently, racketeering activity that is only a small part of an overall business operation and produces miniscule benefits in relation to total revenue can result in the loss of the defendant's entire interest in the business.<sup>719</sup>

RICO forfeiture also violates the mandate that the punishment may not be unusual. The plurality in *Trop v. Dulles*<sup>720</sup> held that the term "unusual" signifies punishment that is "different from that which is generally done,"<sup>721</sup> and characterized all forms of punishment outside the bounds of the traditional penalties (fines, imprisonment, and execution) as "constitutionally suspect."<sup>722</sup> Under this standard, the *in personam* forfeiture in section 1963(a) is unusual punishment because it is not one of the traditional penalties mentioned in *Trop* and is certainly different from general practice.<sup>723</sup>

---

718. *Id.*

719. Taylor, *supra* note 659, at 389-91. The author cites as an example United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979), in which the indictment charged the defendants with conducting a pornography enterprise through racketeering. The alleged "enterprise" was an association formed for the purpose of operating the pornography business through illegal means. The government sought forfeiture of illegal and legitimate portions of the entire pornography business, but did not prove that the racketeering contributed to the success of the business. Perceiving constitutional problems, the court limited the enterprise to the association formed to conduct a pornography business illegally. Since there was no evidence that the illegal acts contributed to the success of the legitimate pornography business, only assets used to further the business' alleged illegal goals were forfeitable. 474 F. Supp. at 140-42.

720. 356 U.S. 86 (1958).

721. *Id.* at 100 n.32.

722. *Id.* at 100.

723. *In personam* forfeitures were unknown in the United States from 1790 to 1970; in fact, they were prohibited by 18 U.S.C. § 3563 (1976). It cannot be argued, as it was in *Thevis*, that forfeiture is a traditional criminal punishment. See notes 622-30 *supra* and accompanying text. In both United States v. Grande, 620 F.2d 1026 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3289 (U.S. Oct. 29, 1980) (No. 80-132) and United States v. Thevis, 474 F. Supp. 134 (N.D. Ga. 1979), the courts misconceived the issue when they cited *in rem* forfeiture statutes in support of their conclusion that § 1963 is not an unusual penalty, 620 F.2d at 1039; 474 F. Supp. at 141, because the eighth amendment deals only with criminal punishment. See *Santelises v. INS*, 491 F.2d 1254, 1255-56 (2d Cir.) (eighth amendment not applicable to deportation proceeding because proceeding is civil in nature and does not impose punishment), *cert. denied*, 417 U.S. 968 (1974); *Cortez v. INS*, 395 F.2d 965, 967-68 (5th Cir. 1968) (same). In contrast, *in rem* forfeitures are civil penalties imposed in civil actions. See *Glup v. United States*, 523 F.2d 557, 561 (8th Cir. 1975); *United States v. One 1969 Buick Riviera Auto.*, 493 F.2d 553, 554-55 (5th Cir. 1974); *United States v. Amore*, 335 F.2d 329, 331 (7th Cir. 1964).

Another factor affects the validity of section 1963(a) under the eighth amendment. In *Woodson v. North Carolina*,<sup>724</sup> the Supreme Court held that a North Carolina death penalty statute violated the eighth amendment, partly because of the mandatory imposition of the death penalty.<sup>725</sup> While the Court commented that discretionary penalties are not constitutionally mandated in non-capital cases,<sup>726</sup> it noted that an "enlightened policy" of justice generally calls for discretionary sentences.<sup>727</sup> Therefore, the absence of sentencing discretion may be a factor rendering section 1963(a) deficient under an eighth amendment analysis if, as stated in *L'Hoste*, the trial judge is deprived of discretion to remit or mitigate forfeitures.<sup>728</sup> Additionally, this deficiency is exacerbated by the RICO jury's lack of discretion to consider all of the circumstances of the offense when imposing forfeiture because it is given only a narrowly drawn special verdict concerning the facts of the crime.<sup>729</sup>

### E. Section 1963(b) Orders

#### 1. Procedure for Granting Order

Section 1963(b) authorizes the district court to protect the government's interest in forfeitable property by entering restraining orders and prohibitions and by accepting satisfactory performance bonds.<sup>730</sup> Designed to prevent defendants from avoiding forfeiture by disposing of property,<sup>731</sup> a section 1963(b) order may remain in effect until the end of the trial.<sup>732</sup>

---

724. 428 U.S. 280 (1976).

725. *Id.* at 303-05.

726. *Id.* at 304.

727. *Id.* The Court remarked that "[f]or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Id.* (quoting *Pennsylvania ex rel Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

728. *United States v. L'Hoste*, 609 F.2d 796, 812 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

729. See notes 635-37 *supra* and accompanying text.

730. 18 U.S.C. § 1963(b) (1976). Section 1963(b) provides that "[i]n 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."

731. *United States v. L'Hoste*, 609 F.2d 796, 811 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

732. RICO contains no language limiting the duration of a § 1963(b) order, nor any procedure providing for a preliminary injunction hearing upon the expiration of such an order. 18 U.S.C. § 1963(b) (1976). In contrast, Fed. R. Civ. P. 65(b) limits the duration of a civil temporary restraining order to 10 days after entry, 20 days if good cause is shown. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 433 (1974). In addition, rule 65(b) provides that a preliminary injunction must

In contrast to its holding regarding the ultimate forfeiture sentence imposed after conviction, *United States v. L'Hoste*<sup>733</sup> grants the trial court discretion to issue a section 1963(b) order.<sup>734</sup> The nature of the pre-order hearing and the requisite showing to obtain the order, however, are issues that have not generally been considered or definitively resolved. Although a few courts have considered the question, disagreement exists as to the type of hearing required prior to the issuance of the order. The Eighth Circuit has indicated in dicta that, when the indictment is returned, a district court can issue an order without holding an adversary hearing.<sup>735</sup> On the other hand, the district court in *United States v. Mandel*<sup>736</sup> held an adversary proceeding, although it refused to issue the order.<sup>737</sup> At a pre-order hearing, the government should be required to establish that it can prove the defendant's guilt beyond a reasonable doubt,<sup>738</sup> that the property allegedly subject to forfeiture belongs to the defendant, and that a nexus exists between the property and the racketeering activity.

In *Mandel*, the standard for issuing a section 1963(b) order was determined by reference to the standard for issuing a civil preliminary injunction.<sup>739</sup> The court focused on: (1) whether the government has made a strong showing that it is likely to prevail on the merits at trial; (2) whether the government has demonstrated that failure to grant relief will cause irreparable harm; (3) whether the issuance of the injunction will substantially harm other parties in-

---

issue if the effect of the temporary restraining order is to continue. Fed. R. Civ. P. 65(b). This distinction precludes the application by analogy of the *ex parte* hearing procedure of rule 65(b). Section 1964(b) authorizes "restraining orders" in RICO civil cases, 18 U.S.C. § 1964(b) (1976); one case applied § 1964(b) in a manner indicating that an evidentiary hearing is required. See *United States v. Winstead*, 421 F. Supp. 295, 296-97 (N.D. Ill. 1976).

733. 609 F.2d 796 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980).

734. *Id.* at 811.

735. *United States v. Scharf*, 551 F.2d 1124, 1126 (8th Cir.), *cert. denied*, 434 U.S. 824 (1977). See also *United States v. Rittenberg*, No. 80-0256-S (S.D. Cal. April 22, 1980) (temporary restraining order); *United States v. Thevis*, 474 F. Supp. 134 (N.D. Ga. 1979). In *Rittenberg*, at the time of the indictment, the government obtained an *ex parte* order preventing transfer of assets. It apparently made no evidentiary showing, offered no affidavits, and gave no prior notice to defendant's counsel or interested third parties. In a case involving a prosecution under 21 U.S.C. § 848 (1976), an order similar to one under § 1963(b) was issued after an *ex parte* hearing. See *United States v. Meneley*, No. 79-0365 (S.D. Cal., indictment filed Aug. 2, 1979) (temporary restraining order).

736. 408 F. Supp. 679 (D. Md. 1975).

737. *Id.* at 682; *United States v. Winstead*, 421 F. Supp. 295, 296 (N.D. Ill. 1976) (in considering request for a civil restraining order under § 1964(b), the court held evidentiary hearing and testimony was taken).

738. See *Taylor*, *supra* note 659, at 395.

739. 408 F. Supp. 679, 682 (D. Md. 1976).

terested in the proceeding; and (4) whether the public interest is served.<sup>740</sup>

The court held that the first factor, likelihood of success, militated against the issuance of a pretrial section 1963(b) order because it required a determination "incompatible with the presumption of innocence defendants enjoy until such time, if ever, as a jury finds them guilty beyond a reasonable doubt."<sup>741</sup> Proof of irreparable harm was considered satisfied by a showing that the defendants were transferring or attempting to transfer property that might be subject to forfeiture.<sup>742</sup> The question of harm to other parties focused on whether persons other than named defendants owned interests in the enterprise and whether a section 1963(b) order would impair the value of their interest.<sup>743</sup> Finally, the fourth element, public interest considerations, was characterized by *Mandel* as requiring the determination of whether failure to enter the order "would defeat the Congressional objective of removing legitimate business interests from criminal hands."<sup>744</sup> Like the first factor, however, the court regarded this element as entailing a determination of criminal involvement that the court believed should not be made before trial.<sup>745</sup> Consequently, *Mandel* denied the Government's petition for the order, but held that in some circumstances an order could be obtained.<sup>746</sup>

A subsequent case, *United States v. Bello*,<sup>747</sup> sharply criticized the *Mandel* approach and concluded that *Mandel's* refusal to make pretrial determination of guilt "emasculates" section 1963(b) and "renders it nearly useless."<sup>748</sup> *Bello* rejected the *Mandel* assertion that a section 1963(b) order stripped the defendant of the presumption of innocence, and responded that "[t]he restraining order does not make a determination that defendant is a racketeer, but only freezes those assets to prevent dissipation pending a determination of guilt or innocence."<sup>749</sup> In contrast to the *Mandel* standard, *Bello* indicated that a section 1963(b) order can issue upon a showing that the assets are

---

740. *Id.* at 682-83.

741. *Id.* at 683. The court recognized that even a hearing on this issue would prejudice the defendants as they would be compelled "to defend themselves against the government's allegations. If they choose to speak, what they say may later be used against them at trial. If they choose to remain silent, that silence may be taken by the public as an admission of guilt, rather than as the mere exercise of the right to force the government to prove its charges without aid from the defendants." *Id.*

742. *Id.*

743. *Id.*

744. *Id.*

745. *Id.*

746. *Id.* at 684.

747. 470 F. Supp. 723 (S.D. Cal. 1979).

748. *Id.* at 724.

749. *Id.* at 725; see *United States v. Scalzitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975), appeal dismissed, 556 F.2d 569 (3d Cir. 1977).

allegedly subject to forfeiture and that the defendant is attempting to transfer that property.<sup>750</sup> The court's interpretation of the requirements for granting a section 1963(b) order, however, was overly narrow. A determination that property is subject to forfeiture necessarily incorporates a finding of guilt inasmuch as a RICO forfeiture occurs only upon a showing of guilt and of involvement of the property in the criminal activity. The government will probably attempt to finesse the problem of establishing the two elements mentioned in *Bello* by contending that the grand jury indictment establishes probable cause as to both.<sup>751</sup> If this unpersuasive argument prevails, as it did in *Bello*,<sup>752</sup> the government will have to prove only that the defendant is

---

750. 470 F. Supp. at 724-25. *Bello* concluded that the government made a sufficient showing by contending "that the assets which are the subject of the restraining order are those used by Bello in connection with MB Financial, Inc. and would be subject to forfeiture under 18 U.S.C. § 1963(a) were Bello found guilty of the racketeering charges." *Id.* at 724. The court also noted "that the grand jury's indictment provides probable cause to believe Bello was involved in criminal activity [and that] Bello is attempting to transfer certain property in payment for attorney fees." *Id.*

751. If a post-order adversary hearing is constitutionally mandated, see notes 763-74 *infra* and accompanying text, the government must show probable cause that the property in question is forfeitable. See *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975). In holding that a Georgia prejudgment garnishment statute violated due process, the Court noted that one defect in the statute was that "[t]here is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment." *Id.* at 607; *cf. Morrissey v. Brewer*, 408 U.S. 471, 485 (1972) (at parole revocation hearing, due process requires that government establish that there is "probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions"). Probable cause that the property in question is forfeitable, however, cannot be established by the existence of a grand jury indictment. See notes 752-53 *infra* and accompany text. Grand jury findings are suspect in view of the general rule that indictments cannot be challenged on the ground that there was inadequate or incompetent evidence before the grand jury. *Costello v. United States*, 350 U.S. 359, 363 (1956). Additionally, the grand jury proceeding is not the adversary proceeding mandated by due process. *In re Grand Jury Proceedings Involving Berkley & Co.*, 466 F. Supp. 863, 867 (D. Minn. 1979). The accused has no right to present a case before the grand jury. *United States v. Donahay*, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976); *United States v. Tallant*, 407 F. Supp. 878, 883 (N.D. Ga. 1975). Although grand jury findings could support a pre-order showing, they are immaterial at a post-order adversary proceeding. See *Golden Grain Macaroni Co. v. FTC*, 472 F.2d 882, 886 (9th Cir. 1972) (due process violated when finding of fact against party is made without adversary hearing), *cert. denied*, 412 U.S. 918 (1973); *cf. Bell v. Burson*, 402 U.S. 535, 542 (1971) (striking down statute suspending driver's license on civil complaint, without hearing to determine whether driver would be liable on that complaint). The *Bell* Court noted that "[s]ince the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his licenses, the State may not, consistently with due process, eliminate consideration of that factor in its prior hearing." *Id.* at 541.

752. 470 F. Supp. 723 (S.D. Cal. 1979); see note 750 *supra*.



transferring or attempting to transfer the assets.<sup>753</sup> This result would thus confirm *Bello's* assertion that guilt is not at issue in a section 1963(b) hearing.<sup>754</sup>

If an *ex parte* pre-order hearing is deemed sufficient, the *Bello* holding might authorize an order based solely on an affidavit stating that the defendant is attempting to transfer assets and that no third parties would be harmed by the order,<sup>755</sup> although *Bello* did not decide what type of hearing is required. This procedure would work no fundamental unfairness if, like a civil temporary restraining order, a section 1963(b) order were merely of short duration.<sup>756</sup> Upon the expiration of the order, the government would be required to obtain the criminal equivalent of a preliminary injunction as it must after the expiration of pre-trial civil orders.<sup>757</sup> Because a full hearing must be conducted before the granting of a civil preliminary injunction,<sup>758</sup> a RICO defendant, by analogy, would receive a full hearing before the issuance of a permanent section 1963(b) order. Section 1963(b) orders, however, may continue until the date of the jury's verdict.<sup>759</sup> Issuing an order that freezes the defendant's assets for months or possibly years without a full pre-order or post-order hearing would infringe on the due process right of every citizen to a hearing prior to the deprivation of property.<sup>760</sup>

---

753. In distinguishing *Mandel*, the *Bello* court implied that it would also consider harm to a third party caused by the granting of the § 1963(b) order. 470 F. Supp. at 725. In *United States v. Rittenberg*, No. 80-0256-S (S.D. Cal. April 22, 1980), the government obtained a temporary § 1963(b) order without showing a transfer or attempted transfer.

754. 470 F. Supp. at 724-25.

755. *Id.* at 724; *cf.* *United States v. Meneley*, No. 79-0365 (S.D. Cal., indictment filed Aug. 2, 1979) (temporary restraining order) (similar procedure applied in prosecution under 21 U.S.C. § 848 (1976)).

756. Civil temporary restraining orders are issued after an *ex parte* hearing under Fed. R. Civ. P. 65(b). In *United States v. Rittenberg*, No. 80-0256-S (S.D. Cal. April 22, 1980) (temporary restraining order), the government obtained only a temporary restraining order under § 1963(b). An order to show cause was issued requiring the defendant to appear in court to show why the order should not continue until after the criminal trial.

757. Fed. R. Civ. P. 65(b).

758. Federal Rule of Civil Procedure 65(a) has been construed to require a full hearing prior to the granting of a civil injunction. *Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353, (5th Cir. 1971).

759. *See* note 732 *supra*.

760. *See* *Commissioner v. Shapiro*, 424 U.S. 614 (1976); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). To obtain a hearing, the defendant might be required to make a minimal showing that there are litigable issues to be considered at the § 1963(b) hearing. This burden could be satisfied by offering affidavits or by setting forth specific factual allegations in the moving papers. *See* *Cohen v. United States*, 378 F.2d 751, 760-61 (9th Cir.), *cert. denied*, 359 U.S. 897 (1967).

The applicability of due process was rejected in *United States v. Scalzitti*<sup>761</sup> when the court indicated that a section 1963(b) order did not deprive the defendant of his property but merely maintained the status quo.<sup>762</sup> *Scalzitti*, however, failed to comprehend the full scope of the constitutional protection. Due process is violated by freezing assets as well as by outright seizure. For example, in *Sniadach v. Family Finance Corp.*,<sup>763</sup> the prejudgment garnishment of a civil defendant's wages without notice or a prior hearing was held to constitute a taking of property in violation of due process.<sup>764</sup>

A subsequent Supreme Court decision observed that a temporary freezing of assets is protected by the due process clause.<sup>765</sup> In *Commissioner v. Shapiro*,<sup>766</sup> the *Sniadach* analysis was applied to a jeopardy assessment levy that prevented a defendant from posting bail. The Supreme Court held that the government could not seize a taxpayer's assets without providing some form of administrative hearing to determine the probable validity of the government's claim.<sup>767</sup>

---

761. 408 F. Supp. 1014 (W.D. Pa. 1975), *appeal dismissed*, 556 F.2d 569 (3d Cir. 1977).

762. *Id.* at 1015.

763. 395 U.S. 337 (1969).

764. *Id.* at 340-42.

765. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-07 (1975). Although the garnishment in *Sniadach* affected the defendant's ability to remain financially solvent, the impact of § 1963(b) is no less significant because the § 1963(b) order affects the defendant's ability to post bail, obtain counsel, and finance a defense. In *North Georgia Finishing, Inc.*, the Court dismissed the argument that *Sniadach's* construction of the term "taking" was limited to garnishment of wages. It stated that all substantial deprivations of use of property were within due process protections. *Id.* at 608. In construing a prior case, *Fuentes v. Shevin*, 407 U.S. 67 (1972), the *North Georgia Finishing* court commented "[t]hat the debtor was deprived of only the use and possession of the property, and perhaps only temporarily, did not put the seizure beyond scrutiny under the Due Process Clause. 'The Fourteenth Amendment draws no bright lines around three-day, 10-day, or 30-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.' Although the length or severity of a deprivation of use or possession would be another factor to weigh in determining the appropriate form of hearing, it was not deemed to be determinative of the right to a hearing of some sort." 419 U.S. at 606 (citation omitted).

766. 424 U.S. 614 (1976).

767. *Id.* at 630-32. In response to *Shapiro*, Congress amended the Internal Revenue Code of 1954 to expedite administrative and judicial review of jeopardy assessments. 26 U.S.C. § 7429 (1976). Within five days after the jeopardy assessment, the I.R.S. must give the taxpayer a written statement of the information on which it bases the assessment. *Id.* § 7429(a)(1). Within the next 30 days the taxpayer may ask the I.R.S. to review the property of its assessment action. *Id.* § 7429(a)(2). After that request, the I.R.S. must undertake an administrative review within 15 days. *Id.* § 7429(b)(1)(B). If the taxpayer is not satisfied with the results of the administrative review, the taxpayer can bring an action in federal district court to review the I.R.S. determination. *Id.* § 7429(b)(1). He has 30 days from the time of the review determination in which to file suit. *Id.* Within 20 days after the action is filed,

The combined impact of *Sniadach* and *Shapiro* is that the absence of a meaningful adversary hearing prior to or after the section 1963(b) order violates due process.<sup>768</sup> Moreover, the holding of a prior *ex parte* hearing does not satisfy due process in the absence of a post-order adversary hearing because the term "hearing" refers to the affected party's right to be heard.<sup>769</sup> The filing of affidavits is not an adequate substitute for a full hearing at which the defendant can confront witnesses and present testimony, documentary evidence, and arguments.<sup>770</sup> Although the formality and procedural requisites for hearings required by due process can vary "depending upon the importance of the interests involved,"<sup>771</sup> the Supreme Court requires an opportunity to confront and cross-examine adverse witnesses when "important decisions turn on questions of fact."<sup>772</sup> Factual ques-

---

the district court must determine whether the jeopardy assessment is reasonable and whether the amount assessed is appropriate. *Id.* § 7429(b)(2). At the judicial review stage, the I.R.S. has the burden of proving that the use of the jeopardy assessment procedure was reasonable, *id.* § 7429(g)(1), and the taxpayer has the burden as to the reasonableness of the amount assessed. *Id.* § 7429(g)(2).

768. Due process does not require a full hearing prior to the issuance of the § 1963(b) order. Prior notice and hearing might encourage the defendant to dispose of assets before the hearing or perhaps flee the jurisdiction. After notification that a § 1963(b) order has been issued, however, no persuasive policy considerations justify denying a prompt post-order hearing. *Cf.* *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976) (Court implied that persuasive policy considerations might exist but found none on the facts); *Wiren v. Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976) ("On the other hand, once seizure is accomplished, the justifications for postponement enumerated in *Calero-Toledo* evaporate, . . . and due process requires that notice and opportunity for some form of hearing be accorded swiftly, and, in any event, prior to forfeiture." (citation omitted)).

769. *See Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *cf. Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 611 (1974) (absence of presequestration hearing did not violate due process where defendant received a full hearing immediately afterward).

770. The Supreme Court has defined a "full hearing" as a hearing in which every party has "the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956); *accord, The New England Divs. Cases*, 261 U.S. 184, 200 (1923); *see New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960). A hearing based upon affidavits is inadequate in cases involving factual disputes. The Supreme Court and the Ninth Circuit have noted that affidavit hearings lack the flexibility of oral presentations and prevent a party from molding his argument to the issues that the decision maker regards as important. *See Mathews v. Eldridge*, 424 U.S. 319, 345-46 (1976); *Pence v. Kleppe*, 529 F.2d 135, 142-43 (9th Cir. 1976).

771. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971).

772. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Specifically, the right to confront and cross-examine witnesses is a fundamental element of due process when the issues are such that the credibility and veracity of witnesses are critical. *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959); *see Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969). In such situations, confrontation and cross-examination of witnesses are essential elements of a meaningful hearing because cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974).

tions, such as proof of the defendant's guilt, are central to the section 1963(b) decision.<sup>773</sup> Moreover, this determination is "important" to the extent that assets are frozen for a considerable period of time; this can affect the defendant's ability to defend the criminal prosecution and to pay personal expenses.

A hearing is also inadequate if the government is only required to show a threatened transfer of allegedly forfeitable property. *Shapiro* mandates a hearing "at which some showing of the probable validity of the deprivation must be made."<sup>774</sup>

The absence of a meaningful hearing requirement encourages government abuse of the section 1963(b) order. For example, *Bello* apparently sanctioned such abuse when it granted a section 1963(b) order to prevent the transfer of defendant's assets to an attorney to obtain representation.<sup>775</sup> This tactic allows the government to dis-

---

773. See *Jenkins v. McKeithen*, 395 U.S. 411, 428-29 (1969) (due process required cross-examination and presentation of evidence when a Louisiana Labor-Management Commission of Inquiry found that specific individual was guilty of a crime and suggested criminal prosecution). See generally *Mitchell v. W.T. Grant, Co.*, 416 U.S. 600 (1974) (full hearing required when a state garnishment statute requires a showing of "fault" on the debtor's part). For a writ *ne exeat republica*, which is similar to a § 1963(b) order, a decision on the merits of the case is required after a full adversary hearing. This writ is often used to protect the government's tax claims against a defendant. Prior to judgment on tax litigation, the government can obtain a writ *ne exeat republica* to prevent a defendant from leaving the United States or moving from one state to another. See *United States v. Shaheen*, 445 F.2d 6, 10-11 (7th Cir. 1971); *United States v. Robbins*, 235 F. Supp. 353, 356-57 (E.D. Ark. 1964). Like the § 1963(b) order, a temporary *ne exeat* writ may be issued on the basis of an *ex parte* application. *United States v. Shaheen*, 445 F.2d at 10; *Jacobsen v. Jacobsen*, 126 F.2d 13, 15 (D.C. Cir. 1942). The temporary writ however, can authorize no more than a brief period of initial restraint and can be extended only after a full evidentiary hearing. *United States v. Shaheen*, 445 F.2d at 10; *Jacobsen v. Jacobsen*, 126 F.2d at 14-15; *United States v. Robbins*, 235 F. Supp. at 357. At this hearing, due process requires the government to satisfy its burden "of proving probable success on the merits of its underlying claim by evidence other than a mere jeopardy assessment." *United States v. Shaheen*, 445 F.2d at 10.

774. *Commissioner v. Shapiro*, 424 U.S. 614, 629 (1976) (footnote omitted); see note 767 *supra* and accompanying text. See also *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 607 (1975) (pretrial garnishment statute defective where there was "no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment"). A pretrial hearing to determine which property is forfeitable may also be essential to protect the defendant's right to post bail. Some cases have held that even when a corporate surety bond is posted, the court can refuse to accept it if the court does not approve of the source of the security providing the collateral for the bond. See *United States v. Nebbia*, 357 F.2d 303, 304 (2d Cir. 1966); *United States v. Ellis DeMarchena*, 330 F. Supp. 1223, 1226 (S.D. Cal. 1971). A defendant who cannot obtain a hearing to determine which property is forfeitable may be deprived of the ability to post an acceptable bond or even pay the premium to a bondsman.

775. *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979). The *Bello* holding may encourage the government to allege the broadest possible forfeiture of property and obtain a § 1963(b) order precluding transfer of those assets. The defen-

courage competent attorneys from undertaking the defense of individuals charged with RICO violations. If the order covers most of the defendant's assets, the attorney either cannot be paid or risks contempt by receiving payment.<sup>776</sup> Furthermore, the risk of contempt is substantial. Although the attorney may not know the source of the defendant's payments, the prosecution can later contend that the attorney knew or should have known that the assets were subject to forfeiture. Even if a lawyer risks contempt and accepts payment from an apparently permissible source, the government can wait until all legal services are performed and then demand return of the funds.<sup>777</sup>

The use of a section 1963(b) order to deprive the defendant of funds with which to prepare a defense also violates the sixth amendment right "to have the assistance of counsel for his defense."<sup>778</sup> Judge Enright, the author of the *Bello* opinion, asserted that this right was not compromised because the order did "not deprive Bello of counsel, but only of the attorney of his choice [and] Bello will still be entitled to court-appointed counsel if he has no means to hire an attorney."<sup>779</sup> This novel analysis fundamentally distorts the scope of the sixth amendment guarantee. It is firmly established that the sixth amendment right is "'broader than . . . the bare right to legal representation . . .,' and encompasses the right to retain counsel of one's own choosing."<sup>780</sup> In non-RICO situations similar to *Bello*, courts

dant is then deprived of assets with which to defend the criminal case or to challenge the § 1963(b) order. If he persists in attempting to obtain representation and uses assets subject to the order, the defendant and the attorney can be held in contempt. See, e.g., *United States v. Meneley*, No. 79-0365 (S.D. Cal., indictment filed Aug. 2, 1979). In *Meneley*, the defendant sold a house in Costa Rica and discounted outstanding short term loans to pay \$60,000 to an attorney. The assets, allegedly those of a Costa Rican corporation, had been frozen by an order issued under 21 U.S.C. § 848(d) (1976). After defendant pleaded guilty to the § 848 offense, the government filed a contempt action against defendant.

776. See note 775 *supra*.

777. See note 775 *supra*.

778. U.S. Const. amend. VI, cl. 3.

779. *United States v. Bello*, 470 F. Supp. 723, 725 (S.D. Cal. 1979).

780. *People v. Holland*, 23 Cal. 3d 77, 86, 588 P.2d 765, 770, 151 Cal. Rptr. 625, 630 (1978) (quoting *People v. Byoune*, 65 Cal. 2d 345, 348, 420 P.2d 221, 224, 54 Cal. Rptr. 749, 752 (1966)); accord, *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979); *United States v. Cox*, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); *United States v. Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1969); *Releford v. United States*, 288 F.2d 298, 301 (9th Cir. 1961). In *Holland*, the defendant sought the return of his life savings seized by the police at the time of his arrest because he wished to retain a private attorney rather than be represented by a competent court-appointed public defender. The court held he had been deprived of his sixth amendment rights. 23 Cal. 3d at 89, 588 P.2d at 771-72, 151 Cal. Rptr. at 631-32. The Supreme Court has frequently recognized the right of the accused to "a fair opportunity to secure counsel of his own choice." *Powell v. Alabama*, 287 U.S. 45, 53 (1932); accord, *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954) (court reversed convic-

have found that the defendant was deprived of this constitutional right when the government stripped him of funds to secure counsel.<sup>781</sup> For example, the district court in *United States v. Brodson*<sup>782</sup> dismissed an indictment for tax evasion when a jeopardy assessment by tax authorities deprived him of funds to hire an accountant to assist him in preparing for trial.

The section 1963(b) situation produces an even more substantial sixth amendment problem than the one in *Brodson*, in which a taxing agency rather than the prosecution levied an assessment on the defendant's assets.<sup>783</sup> A Ninth Circuit case recognized this distinction when it upheld a lower court's denial of an injunction against an I.R.S. levy on the defendant's assets.<sup>784</sup> Noting that the actions of the prosecution, unlike the actions of the I.R.S., could be enjoined,<sup>785</sup> the court indicated that the district court was empowered to prevent a bad faith attempt by the prosecution to deprive the defendant of all funds to obtain representation.<sup>786</sup>

## 2. Forfeiture and Discovery

One of the few advantages of the *in personam* forfeiture procedure of RICO is that it simplifies discovery. Complex discovery problems occur when forfeiture is accomplished through a separate *in rem* civil action filed prior to or during a related criminal action.<sup>787</sup> In these cases, the defendant often attempts to use civil discovery to obtain

tion because trial court denied defendant's request for continuance to procure services of an attorney).

781. See *United States ex. rel. Ferenc v. Brierley*, 320 F. Supp. 406 (E.D. Pa. 1970); *People v. Holland*, 23 Cal. 3d 77, 588 P.2d 765, 151 Cal. Rptr. 625 (1978). In *Brierley*, the defendant sought the return of money seized at the time of his arrest to retain counsel. After concluding that the government had no justifiable claim to approximately \$600 of that money, the court held that the defendant was deprived of his sixth amendment right to counsel of his own choice. 320 F. Supp. at 408-09. The California Supreme Court has required that the defendant's rights to seized property be determined prior to trial, if that property will be used to obtain the counsel of his choice. *People v. Holland*, 23 Cal. 3d 77, 588 P.2d 765, 151 Cal. Rptr. 625 (1978).

782. 136 F. Supp. 158, 161, 165 (E.D. Wis. 1955), *rev'd on other grounds*, 241 F.2d 107 (7th Cir. 1957). The Court of Appeals noted the possible prejudice but concluded that the lower court should have tried the case and then ascertained whether the trial was unfair. 241 F.2d at 109-11.

783. 136 F. Supp. at 162.

784. *United States v. Marshall*, 526 F.2d 1349 (9th Cir. 1975), *cert. denied*, 426 U.S. 923 (1976).

785. *Id.* at 1353-55.

786. *Id.* at 1355 ("If a defendant could show that the prosecution was party to a conspiracy which deprived him of all funds to hire counsel of his choice, the court would not be powerless to take appropriate action.").

787. Similar problems arise when a defendant in a pending criminal case files a separate civil action against the government for return of property seized or levied upon by a jeopardy assessment.

information that would not be discoverable under the more restrictive discovery rules of criminal proceedings.<sup>788</sup> Similarly, the government may attempt to use civil discovery as a ruse to compel disclosure of matters that, in a criminal action, would be privileged under the fifth amendment.<sup>789</sup> Although the courts often stay civil discovery directed at the government until the disposition of the criminal case,<sup>790</sup> the results are less consistent when discovery is sought against the defendant. While some cases indicate that the defendant is not subject to civil sanctions for refusing to comply with discovery,<sup>791</sup> other cases reach a contrary conclusion.<sup>792</sup> Because Title IX incorporates forfeiture into the criminal action, it is likely that discovery problems are governed by the restrictive standard of pre-trial criminal discovery so that the government cannot force the defendant to disclose privileged matters.

Section 1963(b) hearings may pose other discovery problems. Although the rules of criminal discovery do not grant the defendant a general right to discover the government's case,<sup>793</sup> the government would be forced to disclose much of its evidence at a hearing held after a section 1963(b) order is issued. At such a hearing the government can satisfy its burden of proof only by offering testimony that tends to establish the defendant's guilt of the substantive offense.<sup>794</sup> The defendant, however, must be permitted to present evidence establishing that the property is not subject to forfeiture by calling the investigative agents and other essential government witnesses. The government may choose to abandon its attempt to obtain a section 1963(b) order rather than reveal its evidence at the hearing.

#### CONCLUSION

The present overbroad application of Title IX with its accompanying severe penalties has resulted from an abrogation of responsibility

---

788. *Campbell v. Eastland*, 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); *United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 352-54 (S.D.N.Y. 1966); *United States v. \$2,437.00 United States Currency*, 36 F.R.D. 257, 258-59 (E.D.N.Y. 1964). The scope of discovery in criminal prosecution is narrower than it is in civil cases. *United States v. Ross*, 511 F.2d 757, 762 (5th Cir.), *cert. denied*, 423 U.S. 836 (1975); *United States v. Hancock*, 441 F.2d 1255, 1287 (5th Cir.), *cert. denied*, 404 U.S. 833 (1971).

789. *Gordon v. FDIC*, 427 F.2d 578, 580-81 (D.C. Cir. 1970); *De Vita v. Sills*, 422 F.2d 1172, 1178-79 (3d Cir. 1970); *de Antonio v. Solomon*, 42 F.R.D. 320, 322-23 (D. Mass. 1967).

790. *See cases cited note 788 supra*.

791. *See Pizzarello v. United States*, 408 F.2d 579, 586-87 (2d Cir.), *cert. denied*, 396 U.S. 986 (1969); *de Antonio v. Solomon*, 42 F.R.D. 320, 322 (D. Mass. 1967).

792. *See Gordon v. FDIC*, 427 F.2d 578, 580-81 (D.C. Cir. 1970); *De Vita v. Sills*, 422 F.2d 1172, 1181 (3d Cir. 1970).

793. *McSurely v. McClellan*, 426 F.2d 664, 670 (D.C. Cir. 1970); *United States v. Lebron*, 222 F.2d 531, 535-36 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955).

794. *See notes 747-54 supra* and accompanying text.

at all stages of the criminal justice system. Congress has promulgated a vague statute that gives no clear warning of the proscribed activities. The courts have broadly interpreted it in derogation of their obligation to narrowly construe criminal statutes. The actions of the prosecuting authorities have belied their public pronouncements that they would not "power rape nickel and dime cases."<sup>795</sup> This situation can only be remedied by legislative action to clarify and revise the statute and by increased sensitivity of the courts directed toward protecting defendants from unfair and unconstitutional applications of Title IX.

---

795. See note 53 *supra*.