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# The RICO Civil Fraud Action in Context: Reflections on *Bennett v. Berg*

G. Robert Blakey\*

## I. Introduction

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

*Heydon's Case*, 76 Eng. Rep. 637, 638 (Ex. 1584).

In *Bennett v. Berg*,<sup>1</sup> the United States Court of Appeals for the Eighth Circuit, as a matter of “first impression in the Circuit Courts of Appeals,”<sup>2</sup> faced and resolved a number of significant issues in the construction of Title IX, the Racketeer Influenced and Corrupt Organizations (hereinafter “RICO”) provisions of the Organized Crime Control Act of 1970.<sup>3</sup> In *Bennett*, the plaintiffs, residents in a “life

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\* Professor of Law, Notre Dame Law School. A.B. 1957, J.D. 1960, Notre Dame. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures of the United States Senate in 1969-1970, when the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 941 (1970), was processed.

1 685 F.2d 1053 (8th Cir. 1982). A rehearing *en banc* in *Bennett* was granted on September 17, 1982. Oral argument was held on January 13, 1983.

2 685 F.2d at 1057.

3 18 U.S.C. §§ 1961-1968 (1976). Judge Shadur in *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 21 n.1 (N.D. Ill. 1982) wondered, “[g]iven . . . [RICO’s] very awkward title and the convenient acronym it generated . . . [whether] the person who christened the legislation was a movie buff with a sense of humor . . . [for in] ‘Little Caesar,’ the first Hollywood gangster movie of the ‘30s . . . , Edward G. Robinson played the thinly disguised Al Capone leading role—and was named ‘RICO.’” Judge Shadur’s question was first raised by Newsweek reporters, Tony Marro and Elaine Shannon, in a story on RICO that appeared in *The Legal Times of Washington*, Oct. 8, 1979, at 32, col. 1. They reported that G. Robert Blakey, “who had a major role in drafting the statute . . . will neither admit nor deny that the title was [so] constructed.” See Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1025 n.91 (1980) [hereinafter cited as *Basic Concepts*] for an alternative, but not necessarily inconsistent explanation of the development of RICO’s title.

The following state statutes are modeled on the federal act: ARIZ. REV. STAT. ANN. § 13-2312 (1978); CAL. PENAL CODE § 186 (West Supp. 1983); COLO. REV. STAT. § 18-17-101 (1981); 1982 CONN. PUB. ACTS 343; FLA. STAT. ANN. § 895.01 (West Supp. 1982); GA. CODE ANN. § 26-3401 (Supp. 1982); HAWAII REV. STAT. § 842-1 (1976); The Narcotics Profit Forfeiture Act, H.B. 2450, State of Ill. (1982); IND. CODE ANN. § 35-45-6-1 (Burns Supp. 1982); N. J. STAT. ANN. 2C:41 (West 1982); N.M. STAT. ANN. § 30-42-1 (Supp. 1978); OR.

care" retirement village, sought treble damages and equitable relief under 18 U.S.C. § 1964 from a number of defendants, including named individuals, a not-for-profit corporation, the John Knox Village, attorneys, accountants, the firm of Snyder, Ernst & Muehling, and the Prudential Life Insurance Company, a mortgage lender. The district court dismissed the complaint, and an appeal was taken. On appeal, the defendants sought to sustain the dismissal by arguing that:

- (1) no allegation of a connection between organized crime and the plaintiffs had been made;
- (2) no allegation of a culpable "person" separate from the charged "enterprise" had been made;
- (3) no allegation of an "enterprise" separate from the charged "pattern of racketeering activity" had been made;
- (4) no allegation of a "pattern of racketeering" had been made;
- (5) no allegation of "investment," "acquisition," or an association with the "conduct" of an enterprise through a pattern of racketeering activity had been made;
- (6) no allegation of a cognizable "injury" had been made; and
- (7) the equitable relief sought was not available to private plaintiffs.<sup>4</sup>

The court of appeals reversed in part and affirmed in part the district court's dismissal of the complaint. Because the *Bennett* court's decision represents the first comprehensive effort by a court of appeals to treat a number of important issues regarding the construction of RICO in the context of civil litigation, it merits extended comment.<sup>5</sup>

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REV. STAT. § 166-715 (1981); 18 PA. CONS. STAT. § 911 (1978); R.I. GEN. LAWS § 7-15-1 (Supp. 1982); WIS. STAT. ANN. § 946.80 (Supp. 1982). Legislation is under consideration in Louisiana, New York, and Ohio. For newspaper coverage of the use of the state legislation, see Siegel, *Arizona Hits Racketeers in Wallet*, L.A. Times, May 3, 1982, at 1, col. 1; Granelli, *Playing for Keeps With State RICO*, The National Law Journal, July 5, 1982, at 1, col. 4.

<sup>4</sup> 685 F.2d at 1057. For purposes of analysis, the order of the defendants' appellate arguments has been altered.

<sup>5</sup> The courts of appeals for the Second, Sixth, and Seventh Circuits have also faced civil RICO appeals. In *Cullen v. Margiotta*, 618 F.2d 226 (2d Cir. 1980), the court of appeals dismissed an appeal of the dismissal of a civil RICO suit for the failure to allege a sufficient connection to interstate commerce, holding that certifying the orders under Rule 54(b) of the Federal Rules of Civil Procedure as final was an abuse of discretion. See *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982) (mail fraud and extortion conviction of political leader of Nassau County, N.Y., upheld). In *Grayson v. Wooden*, No. 80-5460 (6th Cir. Feb. 10, 1982), the court of appeals affirmed the granting of a motion for summary judgment and the dismissal of a civil RICO suit, since the plaintiff did not allege two acts of racketeering. In *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), cert. denied, 103 S. Ct. 177 (1982), the court of appeals affirmed the dismissal of a civil RICO counterclaim, since only "indirect injury" was alleged. In *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982), the court of appeals upheld the issuance of an injunction to preserve the status quo

Before examining the court of appeals' opinion in that case, however, this article will discuss the facts of the case, the text of RICO, the legislative history of RICO, and the jurisprudence under RICO.

## II. The Facts of *Bennett v. Berg*<sup>6</sup>

The plaintiffs in *Bennett* alleged to be present and former residents, 423 in number, of the John Knox Village retirement community in Lee's Summit, Missouri.<sup>7</sup> Owned and operated by a not-for-profit corporation, the John Knox Village is the "largest retirement community of its kind in the country."<sup>8</sup> The residential community consisted of approximately 2,500 residents, who occupied units in the facility pursuant to "Occupancy Agreement" contracts. In return for the payment of an initial lump sum—an "Entrance Endowment"—the residents were entitled to occupy specific apartments for life. Endowments paid ranged from \$9,000 to more than \$50,000. In addition, the "Occupancy Agreement" provided for the payment of a monthly lodging and service charge, "in such amounts as determined by the Board of Directors of the Village."<sup>9</sup> More than fifty million dollars has been paid in endowments or collected in monthly fees.<sup>10</sup> The monthly charge was to cover fifty-one services and facilities, including tray and diet service, building and grounds maintenance, scheduled transportation, laundry service, and various forms of medical care. According to the complaint, the Village was also "promoted as being a religiously or spiritually oriented, Christian community."<sup>11</sup>

The plaintiffs alleged, however, that the Village was in fact on

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*pendente lite* in a civil RICO suit. Neither *Cullen* nor *Grayson* merits further comment. *Cenco Inc.* is discussed at text accompanying note 139 *infra*; *USACO Coal Co.* is discussed at note 217 *infra*.

6 The facts are taken from the opinion of the court of appeals, except where supplemented, as noted, from the pleadings or papers. Since the appeal was heard on the pleadings, the facts alleged in the pleadings were accepted as true. 685 F.2d at 1056 n.4 ("accept . . . factual allegations as true"), 1057-58 ("A complaint must be viewed in the light most favorable to plaintiff"). In addition, the court followed the "accepted rule that a complaint states a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); 685 F.2d at 1057. See *McLain v. Real Estate Bd.*, 444 U.S. 232, 246 (1980). The pleadings, too, were construed to do "substantial justice" under FED. R. CIV. P. 8(f). 685 F.2d at 1058.

7 Brief for Plaintiff-Appellant at 5, *Bennett v. Berg*, 685 F.2d 1053 (8th Cir. 1982).

8 Complaint para. 1(a).

9 685 F.2d at 1056.

10 Complaint para. 1(c)(1).

11 Complaint para. 41.



the verge of bankruptcy, that service had markedly deteriorated, and that they faced the loss of the "life care" that they had expected and would have received but for the "fraud . . . in the inducement of residents to live in the community and in the operation of the Village."<sup>12</sup>

According to the complaint, the various defendants, through the use of the mails, had fraudulently promoted the retirement community with materially false statements relating to its financial soundness. In addition, the lawyers, accountants, and the mortgage lender were alleged to have conspired to conceal from the plaintiffs the fraudulent promotion and operation of the Village, which included a pattern of self-dealing in breach of fiduciary duties. The complaint was drafted in eleven counts, two of which were premised on RICO, the rest of which were premised, under principles of pendent jurisdiction, on theories of common law fraud, breach of fiduciary duties, and specific Missouri statutes. Count I, a RICO count, prayed for treble damages, costs, and attorneys fees; Count II, a RICO count as well, prayed for equitable relief, including, if appropriate, the reorganization of the Village.

### III. The Text of RICO

As the Supreme Court has repeatedly noted, the scope of a statute is to be determined in the first instance by examining its text.<sup>13</sup>

<sup>12</sup> 685 F.2d at 1057.

<sup>13</sup> It ought to be, but apparently is not, a matter of embarrassment for lower court judges and lawyers that the Supreme Court has felt the need, "repeatedly of late," to point out that the "language of [a] statute" is the "starting point" in ascertaining legislative intent. *Lewis v. United States*, 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). RICO, too, falls within that basic rule. *United States v. Turkette*, 452 U.S. 576, 580 (1980) ("[w]e look first to . . . [RICO's] language"). *See also United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) (construction of Title II of Organized Crime Control Act, "absent clear evidence of a contrary legislative intent, a statute should be interpreted according to its plain language"); *Iannelli v. United States*, 420 U.S. 770, 786-89 (1975) (construction of Title VIII of Organized Crime Control Act, general rule of statutory construction must "defer to a discernible legislative judgment . . . [as] act is a carefully crafted piece of legislation"). Chief Justice Burger in *Diamond v. Chakrabarty*, 447 U.S. 303, 318 (1980), described the proper role of courts in construing statutes:

We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute. . . . Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted.

*See also Bread Political Action Comm. v. Federal Election Comm.*, 50 U.S.L.W. 4291 (U.S. March 18, 1982) ("plain language" controls "construction, at least in the absence of 'clear

Section 1964(c) of RICO authorizes “[a] person injured in his business or property by reason of a violation of Section 1962” to “sue.”<sup>14</sup> A congressional grant of the right to sue conveys, in the absence of statutory limitations, the availability of all necessary and appropriate relief. Significantly, the right to sue clause of section 1964(c) reads “sue *and*,” not “sue *to*.”<sup>15</sup> Accordingly, all necessary and appropriate relief is included in the text of section 1964(c). Recovery of treble damages, costs, and attorney’s fees is explicitly added.

Under section 1961(3), “person” is defined to include “any . . . entity capable of holding a legal or beneficial interest in property.”<sup>16</sup> On its face, the text of section 1964 contains no modifiers.<sup>17</sup> It is diffi-

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evidence’ . . . of a ‘clearly expressed legislative intent to the contrary’ ”); *United States v. Martino*, 681 F.2d 952, 954, 956 n.16 (5th Cir. 1982) (plain meaning controls construction of RICO in criminal context), *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub nom. Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (“literal reading of RICO is consistent with . . . *Turkette* and . . . Congress[ional]. . . inten[t] that RICO be liberally construed to effectuate its remedial purpose in a civil context”). See note 150 *infra* for an outline of the proper approach in the interpretation of RICO.

14 18 U.S.C. § 1964(c) (1976) provides:

Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover three-fold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee.

15 *See, e.g.*, *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946). In *Bell*, the Court stated: “[I]t is [a] well-settled [rule] that where legal rights have been invaded, and a federal statute provides for a general right to sue . . . federal courts may use any available remedy to make good the wrong done.” See note 217 *infra* for a discussion of *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940), which broadly construed the more narrow language of the securities laws.

16 18 U.S.C. § 1961(3)(1976) (emphasis added) provides:

As used in this chapter

. . . .

(3) ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.

The use of the term “includes” in the definition manifests an intent to adopt an illustrative, not an exhaustive definition. *United States v. Huber*, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980) (“enterprise” illustrative not exhaustive since defined to include); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982) (“Includes is a term of enlargement, not of limitation”); *United States v. Thevis*, 474 F. Supp. 134, 138 (N.D. Ga. 1979), *affd.*, 665 F.2d 616 (5th Cir. 1982) (“includes” rather than “means”). See note 166 *infra*.

17 *See Lewis v. United States*, 445 U.S. 55, 60, 62 (1980) (“directed unambiguously at any person”; “no modifiers . . . present”; “on its face . . . contains nothing by way of restrictive language”); *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978) (“person” under § 4 of Clayton Act given “naturally broad and inclusive meaning”). *But see United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) (“person” under § 4 of the Clayton Act does not include “United States” as “in common usage, the term ‘person’ does not include the sovereign.”). The broad reading of “person” under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976) ought to be particularly

cult to see, therefore, how the plaintiffs in *Bennett* could have been excluded from the class of "persons" entitled to sue under it. The moneys obtained by the defendants through the alleged fraud, moreover, constituted "property."<sup>18</sup> Accordingly, it is also difficult to see how the plaintiff's injuries could have been excluded from the class of injuries meriting relief under section 1964(c).

Section 1962<sup>19</sup> is violated by "any person . . . associated with

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persuasive authority for a similar reading of § 1964, since § 1964 was modeled on antitrust law. S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969); H.R. REP. NO. 1549, 91st Cong., 2d Sess. 56-60 (1970). To the degree that RICO was drafted outside of the antitrust provisions, it was to avoid restrictive antitrust precedent. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 680 (N.D. Ind. 1982) ("[S]ection 1964(c) was . . . cast as a separate statute intentionally to avoid the *restricted* precedent of antitrust jurisprudence") (emphasis added). See text accompanying notes 72-74 *infra*. RICO ought, therefore, be read at least as broadly as the comparable antitrust provisions; it should not be read as narrowly.

18 Such "injury" has been held to be injury within § 4 of the Clayton Act, 15 U.S.C. § 15 (1976). *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979) ("property" held to have "naturally broad and inclusive meaning"). See note 199 *infra* for a detailed analysis of the litigation in *Reiter*. See also *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723, 4724-25 (U.S. June 21, 1982).

19 18 U.S.C. § 1962 (1976) 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 of racketeering activity or the collection of any 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.

(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.

The plaintiffs alleged violations of subsections (a) through (d). 685 F.2d at 1057. Nevertheless, the court of appeals chose to analyze only § 1962(c), since it was "the statutory section under which "[plaintiffs] state[d] their strongest claim." *Id.* at 1060 n.8. The court did not reach the plaintiffs' other claims. *Id.*

any enterprise . . . the activities of which affect . . . commerce, conduct[ing] . . . [the] enterprise's affairs through a pattern of racketeering activity . . . ."<sup>20</sup> As noted above, the definition of a "person," is, of course, not limited by language in the text of the statute. "Enterprise," too, is defined to include "any corporation."<sup>21</sup> "Pattern[ed]"

20 Section 1962 states "standards" enforced through "criminal" and "civil" remedies. Section 1963 sets out the *criminal* remedies. Section 1964 sets out the *civil* remedies. See S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969) ("section 1962 is subject to the remedies of . . . sections 1963 and 1964."). Accordingly, § 1962 is *not* a criminal statute; it says "unlawful," not "criminal." Not all courts, however, have recognized that the role of § 1962 is to set a legal standard, not to define a crime. Compare *Bays v. Hunter Savings Ass'n*, 539 F. Supp. 1020, 1023 (S.D. Ohio 1982) ("RICO has a criminal provision (§ 1962) and a civil remedies provision (§ 1964) and there can be no recovery of damages under § 1964 unless there has been a violation of § 1962."), with *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-76 (N.D. Ind. 1982) ("Section 1964(c) refers to a 'violation' of the standards of Section 1962, not to the criminal penalties of Section 1963. Section 1962 says that acts in violation of it are 'unlawful,' not criminal. Criminal and civil sanctions are applied to violations of Section 1962 by Section 1963 (criminal) and Section 1964 (civil)."). *State Farm*, not *Bays*, correctly read the statutory scheme, as the court of appeals noted in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). Indeed, RICO is not a criminal statute at all in the traditional sense, since its violation depends on the commission of at least two acts that violate *independent* criminal statutes; it does not "draw a line" between innocent and criminal conduct. See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). That line is drawn by the offenses that constitute the "racketeering activity" of 18 U.S.C. § 1961(1) (1976 & Supp. 1980). *United States v. Swiderski*, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). Note, too, that the class capable of committing a violation of § 1963 is not defined by "person," but "whoever." "Whoever" is, in turn, defined by 1 U.S.C. § 1 (1976) to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." As such, it does not extend to sovereign governments. *United States v. UMW*, 330 U.S. 258, 275 (1946); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). See also *Attorney General v. City of Woborn*, 322 Mass. 634, 637, 79 N.E.2d 187, 189 (1948) (definition of "whoever" for civil and penal liability of unit of government). Nothing in RICO purports, therefore, to make criminal penalties applicable to state and local units of government. Civilly, however, state and local units of government can sue and be sued, as they are "entities" capable of holding property. Accordingly, it is also not necessary to have a *criminal* violation of § 1962 through § 1963 before a *civil* suit can be brought under § 1962 through § 1964. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (government equity suit); *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (private treble damage suit); *Farmers Bank v. Bell Mtg. Corp.*, 452 F. Supp. 1278, 1279-80 (D.C. Del. 1978) (private treble damage); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979) (private treble damage); *Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1980) (private treble damage); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 675-77 (N.D. Ind. 1982) (private treble damage). See also note 59 *infra* (antitrust rule).

21 18 U.S.C. § 1961(4) (1976) provides:

As used in this chapter—. . . (4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

See *Basic Concepts*, *supra* note 3, at 1023-28; text accompanying notes 152-66 *infra*.

The district court "expressly declined to rule on the interstate commerce element of the

activity means activity that is not "isolated" or "sporadic," but is "continu[ous] and relat[ed]." <sup>22</sup> Finally, "racketeering activity" may be conducted "through" the offense of "mail fraud."<sup>23</sup>

As such, the possible application of RICO to the fact pattern alleged by the plaintiffs in *Bennett* should have been considered "neither absurd nor surprising."<sup>24</sup> If there were thought to be any

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complaints." 685 F.2d at 1064 n.17. Accordingly, the court of appeals did not pass on it. *Id.* Common methods used to prove an effect on commerce, on the other hand, include the movement of goods, money, or people among the states. *See, e.g.*, *United States v. Altomare*, 625 F.2d 5, 8 (4th Cir. 1980) (supplies and materials purchased out of state by prosecutor's office); *United States v. Martino*, 648 F.2d 367, 379 (5th Cir. 1981) (arson ring used mails to obtain insurance proceeds by fraud), *rev'd on other grounds en banc*, 681 F.2d 952 (5th Cir.), *cert. denied*, 102 S. Ct. 2006 (1982) *cert. granted sub. nom.* *Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983); *United States v. Morris*, 532 F.2d 436, 442 (5th Cir. 1976) (interstate travel associated with rigged card game). Interstate phone calls, too, will suffice. *United States v. Morelli*, 643 F.2d 402, 411 (6th Cir.) (interstate phone calls to obtain money for illegal scheme), *cert. denied*, 453 U.S. 912 (1981). As such, the element would not have been difficult to meet under the facts as alleged. *But see* *Fields v. National Republic Bank*, 546 F. Supp. 123, 125 n.6 (N.D. Ill. 1982) (bank not thought to engage in interstate commerce). The dictum in *Fields* can hardly be squared with the general jurisprudence of commerce under RICO.

22 S. REP. NO. 617, 91st Cong., 1st Sess. 158 (1969). *See* *United States v. Starnes*, 644 F.2d 673, 677-78 (7th Cir.) (single arson with mail fraud sufficient), *cert. denied*, 102 S. Ct. 116 (1981); *United States v. Weatherspoon*, 581 F.2d 595, 601-02 (7th Cir. 1978) (multiple mailings in fraudulent operation of a Veterans Administration supported school held sufficient); *United States v. Kaye*, 556 F.2d 855, 860-61 (7th Cir.) (multiple payments to union representative held sufficient), *cert. denied*, 434 U.S. 921 (1977). *See generally* *United States v. Weisman*, 624 F.2d 1118, 1121-23 (2d Cir.) (bankruptcy and securities fraud in operation of theatre; analysis of cases that acts need not be related to each other, but may be related to the conduct of the affairs of the enterprise), *cert. denied*, 449 U.S. 871 (1980); *Basic Concepts*, *supra* note 3, at 1029-31.

23 18 U.S.C. § 1961(1)(B). *See, e.g.*, *United States v. Clark*, 649 F.2d 534, 541 (7th Cir. 1981) (stock purchase agreement). Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771 (1980), is the best general treatment of the statute. *See also* Shaw, *Mail and Wire Frauds*, in I MATERIALS ON RICO: CRIMINAL OVERVIEW, CIVIL OVERVIEW, INDIVIDUAL ESSAYS 120 (Cornell Institute on Organized Crime, G. Blakey ed., 1980) [hereinafter cited as MATERIALS]. While the scope of mail fraud is wide, no honest person need fear a civil suit under RICO based on the underlying theory of mail fraud, for good faith has always been a complete defense. *Durland v. United States*, 161 U.S. 306, 314 (1896) (if evidence had shown that defendant acted in good faith, "no conviction could be sustained."); *United States v. Martin-Irigona*, 684 F.2d 485, 492-93 (7th Cir. 1982) ("[G]ood faith, or the absence of an intent to defraud, is a complete defense to a charge of mail fraud."); *United States v. Curry*, 681 F.2d 406, 417 (5th Cir. 1982) ("Because there was evidence to support a good faith defense, it was reversible error to not include the instructions."); *New England Enters. v. United States*, 400 F.2d 58, 71 (1st Cir. 1968) (good faith defense "settled law"), *cert. denied*, 393 U.S. 1036 (1969); *United States v. Westbo*, 576 F.2d 285, 288 (10th Cir. 1978) ("entitled to instruction covering good faith").

To date, the courts have declined to create an implied civil cause of action under either the mail fraud or wire fraud statutes. *See, e.g.*, *Ryan v. Ohio Edison Co.*, 611 F.2d 1170, 1177-79 (6th Cir. 1979); *Bell v. Health-Mor, Inc.*, 549 F.2d 342, 346 (5th Cir. 1977).

24 *United States v. Turkette*, 452 U.S. 576, 587 (1981).

ambiguity in the language of RICO, moreover, it should have been "liberally construed to effectuate its remedial purposes."<sup>25</sup> In addi-

25 The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 ("The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes."). RICO has been construed liberally in the application of its criminal remedies. *See, e.g.*, *United States v. Thompson*, 685 F.2d 993, 997-98 (6th Cir. 1982) (extension of "enterprise" to government); *United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1317 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 636 (1982) (extension of "enterprise" to government); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978) (extension of "enterprise" to illicit association), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliot*, 571 F.2d 880, 899 (5th Cir.) (extension of "enterprise" to illicit association), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Frumento*, 563 F.2d 1083, 1089-92 (3d Cir. 1977) (extension of "enterprise" to government), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Parness*, 503 F.2d 430, 439 n.12 (2d Cir. 1974) (extension of "enterprise" to foreign corporation), *cert. denied*, 419 U.S. 1105 (1975). Even among those judges (and a law professor) who have questioned applying the liberal construction clause in criminal prosecutions, no objection has been voiced to applying it in civil actions. *See, e.g.*, *United States v. Anderson*, 626 F.2d 1358, 1369 (8th Cir. 1980) ("The extent of judicial deference that should be accorded [to the liberal construction clause] stands unclear."); *United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting) ("unclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX"), *cert. denied*, 446 U.S. 935 (1980); *United States v. Davis*, 576 F.2d 1065, 1070 (3d Cir. 1978) (Aldisert, J., dissenting) ("I detect nothing [in the liberal construction clause] that precludes the application of the rule of narrow construction . . . to defining crimes"); *United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting) ("Notwithstanding" the liberal construction clause, choice to make conduct a crime should be of harsher alternative only where language is "clear and definite"), *cert. denied*, 429 U.S. 1039 (1977); *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976) ("Congress may instruct courts to give broad interpretations to civil provisions, [but] it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency."), *rev'd*, 591 F.2d 1347 (4th Cir.), *aff'd by equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980); Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 860 n.126 (1980) ("Presumably, . . . the congressional statement is only applicable to the remedial civil portions of the statute.") [hereinafter cited as Bradley]. *See also* *United States v. Computer Sciences*, 689 F.2d 1181 (4th Cir. 1982) (liberal construction clause overlooked, lenity followed, and "person" and "enterprise" held mutually exclusive); *United States v. Rubin*, 559 F.2d 975, 990-93 (5th Cir. 1977) (strict construction followed, but forfeiture provision held to extend to union office), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir. 1979), *cert. denied*, 444 U.S. 864 (1969). *Rubin* is discussed in note 177 *infra*; *Computer Sciences* is discussed in note 181 *infra*. In fact, the clause has been implicitly or explicitly given effect in civil RICO suits brought by the government, *United States v. Capetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (implicit), *cert. denied*, 420 U.S. 925 (1975), and private parties, *USACO Coal Company v. Carbomin Energy Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) (explicit); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681 (N.D. Ind. 1982) (explicit). Indeed, those judges (and the law professor too), who have objected to the application of the liberal construction clause in criminal prosecutions and suggested that strict construction or the rule of lenity should apply have misunderstood both the clause and the rule. *See* note 150 *infra*. The modern rule of lenity is rooted in two policies: the principle that fair warning of criminality ought to be given, and the related principle that the moral condemnation of criminality should be based on a legislative, not a judicial determination. *Dunn v. United States*, 442 U.S. 100, 113 (1979); *United States v. Bass*, 404 U.S. 336, 347-48 (1971). The principle of fair

tion, the application of RICO to the facts alleged would have been

warning, however, is fully met when the predicate offenses are so construed. *See* United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978) (notice stems from predicate offenses), *cert. denied*, 441 U.S. 933 (1979). *See* note 20 *supra*. Once the policy of leniency has been implemented in the construction of the underlying "racketeering activity," and the line has been crossed in the sphere of criminality, not once, but twice, it would be perverse to apply it again. Similarly, it is the violation of the two predicate offenses that underwrites the basic moral condemnation of the community. To the degree that RICO adds to that condemnation through liberal construction, that construction and its condemnation are the product, not of a judicial determination, but an express congressional direction. For a comprehensive analysis of the background and rationale of the liberal construction clause, see Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980). The American Bar Association gave "unqualified" support to the Organized Crime Control Act in 1970. It suggested only two amendments, both adopted, to Title IX: the treble damage provision, and an amendment giving courts discretion to close certain proceedings. *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. 538, 543-44 (1970) (testimony of ABA President Edward L. Wright) [hereinafter cited as *House Hearings*]. Nevertheless, at the urging of the Section on Criminal Justice, the House of Delegates of the American Bar Association adopted a recommendation that the liberal construction clause be repealed, not only for criminal, but also civil proceedings. ABA: REPORT TO THE HOUSE OF DELEGATES, SECTION ON CRIMINAL JUSTICE 12-13 (1982) [hereinafter cited as ABA]. *See also* notes 88 & 150 *infra*. The fallacious reasoning employed by the Section to persuade the House reflects the misguided minority judicial view, noted *supra*. There is also an echo of the sound of a losing litigant in the ABA's plea that issues lost in a judicial forum now be reversed in the legislative arena. The principal moving force behind the ABA's position has been Mr. Barry Tarlow, a Los Angeles criminal defense lawyer. *See* Burke, *Did Jurors Hear About "Mafia Ties"?*, National Law Journal, Mar. 28, 1981, at 3, col. 1; Seigel, *supra* note 3, at 17. Mr. Tarlow has written urging a narrow construction of RICO. *See, e.g.*, Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980) [hereinafter cited as Tarlow]; *Using the RICO Statute in Civil Litigation*, The National Law Journal, May 24, 1982, at 1, col. 3. He also filed an amicus curiae brief for the California Attorneys for Criminal Justice in *United States v. Turkette*, 452 U.S. 576, 577 (1980), which advocated that RICO be held not to apply to illicit associations, a position that the Supreme Court rejected eight to one. Like the Supreme Court, but unlike the ABA, it is doubtful that Congress will be misled by Mr. Tarlow's efforts. *See* S. REP. NO. 307, 97th Cong., 1st Sess. 24-28 (1981) for the Judiciary Committee's rationale for rejecting an amendment to the criminal code bill, S. 1630, which would have imposed a rule of "strict" construction on the code; the committee adopted instead a rule of "fair import."

A significant majority of states has abolished the common law rule of strict construction either by expressly abrogating it or adopting some variation of "fair import" or "liberal" construction. ALA. CODE § 13A-1-6 (repl. 1982) ("fair import"); ALASKA STAT. § 11.81.100 (Supp. 1982) ("fair warning"); ARIZ. REV. STAT. ANN. § 13-104 (West 1978) (abrogated "fair import"); ARK. STAT. ANN. § 1-203, 1-204 (repl. 1976) ("fair warning"); CAL. PENAL CODE § 4 (West 1970) (abrogated "fair import"); COLO. REV. STAT. § 18-1-102(1)(a) (repl. 1978) ("fair warning"); DEL. CODE ANN. tit. 11, § 203 (rev. 1974) (abrogated "fair import"); GA. CODE § 26-102(b) (rev. 1982) ("fair warning"); HAWAII REV. STAT. § 701-104 (repl. 1976) ("fair import"); IDAHO CODE § 73-102(1) (Supp. 1982) (abrogated "liberal construction"); ILL. REV. STAT. ANN. ch. 1, § 1002 (West 1980) ("liberal construction"); IOWA CODE § 4.2 (West 1967) (abrogated "liberal construction"); KY. REV. STAT. § 500.030 (Baldwin 1975) ("liberal construction"); LA. REV. STAT. ANN. § 14:3 (West 1974) ("fair import"); ME. REV. STAT. ANN. tit. 1, § 71 (1979) ("plain meaning"); MASS. GEN. LAWS ANN. ch. 4, § 6 (Law.

fully consistent with RICO's express purpose and statutorily stated findings of fact.<sup>26</sup> Congress found that "organized" criminal "activity" used "fraud" to "drain" "dollars" from the American economy

Co-op. 1980) ("common and approved usage"); MICH. STAT. ANN. § 28.192(2) (Callaghan 1981) (abrogated "fair import"); MINN. STAT. ANN. § 609.01 (West 1964) ("fair import"); MISS. CODE ANN. § 1-365 (1972) ("common and ordinary meaning"); MO. ANN. STAT. § 1.010 (Vernon 1969) ("liberal construction"); MONT. CODE ANN. § 45-1-102(2) (1981) (abrogated "fair import"); NEB. REV. STAT. § 29-102 (1979) ("fair import"); NEV. REV. STAT. § 193.030 (1979) ("fair import"); N.H. REV. STAT. ANN. § 625.3 (1974) (abrogated "fair import"); N.J. STAT. ANN. § 2C:1-2(c) (West 1982) ("fair import"); N.M. STAT. ANN. § 12-2-2 (1978) ("approved usage"); N.Y. PENAL LAW § 5 (McKinney 1975) (abrogated "fair import"); N.D. CENT. CODE § 29-01-29 (repl. 1974) (abrogated "liberal construction"); OR. REV. STAT. § 161.025(2) (1981) (abrogated "fair import"); PA. CONS. STAT. ANN. § 105 (Purdon 1973) (abrogated "fair import"); S.D. CODIFIED LAWS ANN. § 22-1-1 (Rev. 1979) (abrogated "fair import"); TENN. CRIM. CODE ANN. § 39-6-1706 (1982) ("liberal construction"); TEX. PENAL CODE ANN. tit. 1, § 1.05(a) (Vernon 1974) (abrogated "fair import"); UTAH CODE ANN. § 76-1-106 (1978) (abrogated "fair import"); WASH. REV. CODE § 9A.04.02(2) (1977) ("fair import"). Only two states expressly provide for strict construction. FLA. STAT. ANN. § 775.021 (West 1976); OHIO REV. CODE ANN. § 2901.04(A) (Page 1982). Modern courts have expressed no reservations about following the legislative directive setting aside the common law rule. *See, e.g.*, *State v. Roger A.*, 424 A.2d 1339, 1341 (N.H. 1981); *People v. Ditta*, 52 N.Y.2d 657, 659, 422 N.E.2d 515, 517, 439 N.Y.S.2d 855, 857 (1981). *See also Turner v. State*, 8 Okla. Crim. 11, 12, 126 P. 452, 455-56 (1912) (statutory abrogation and "fair import" followed) ("Judges and lawyers have been educated in and are accustomed to an antiquated system of procedure, and have been taught to look with reverence upon old legal theories, and are thereby unduly biased against any change in legal procedures. . . . When the Legislature has made a change in legal procedure, it is the duty of the courts to lay aside their preconceived ideas, and construe such legislation according to its spirit and reason. . . . The great trouble with the judiciary of the entire country is that many judges try to so twist and evade statutes as to enable them to substitute their own private views for regularly enacted statutes."). It may be wondered if the ABA has now committed itself—at least in principle—to seeking to reverse these legislative judgments, too. On how the liberal construction clause should be interpreted, see note 150 *infra*.

26 The Organized Crime Control Act of 1970, 84 Stat. 922-23 (1970) states:

Statement of Findings and Purpose

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (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; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions



and to "harm innocent investors."<sup>27</sup> Congress, therefore, passed RICO to "provid[e] enhanced sanctions and new remedies."<sup>28</sup> "Nothing on the face of . . . [RICO] suggests a congressional intent to limit its coverage . . . ."<sup>29</sup> In fact, the "words do not lend themselves to restrictive interpretation."<sup>30</sup> "The language of the statute . . . [is] the most reliable evidence of its intent . . . ."<sup>31</sup> "[I]n the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive."<sup>32</sup> Obviously, no contrary legislative intent was expressed on the face of RICO. It is appropriate, therefore, to determine if any was expressed in its legislative history.<sup>33</sup>

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and remedies available to the Government are unnecessarily limited in scope and impact.

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

*See Lewis v. United States*, 445 U.S. 55, 61 (1980) ("obvious breadth of the language may well reflect the expansive legislative approach revealed by Congress' express findings and declarations.").

27 84 Stat. 922-23. *See* note 26 *supra*.

28 *Id.* at 923. It is a mistake to argue that the findings and statement of purpose that now appear before the Organized Crime Control Act do not apply to Title IX or have primary application to other titles. *See, e.g., United States v. Thompson*, 685 F.2d 993, 1003 (6th Cir. 1982) (Lively, J., dissenting); Note, *Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in Its Application and Proposal for Reform*, 33 VAND. L. REV. 441, 474 (1980). In fact, the basic findings appeared before S. 1861, the predecessor of Title IX. *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 61-62 (1969) [hereinafter cited as *Senate Hearings*]; S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969) (Title IX "derived from" S. 1861).

29 *United States v. Culbert*, 435 U.S. 371, 373 (1978) (apropos of an argument that "racketeering" ought to be read into 18 U.S.C. § 1951 (1970)).

30 *Id.* *See also United States v. Wurzbach*, 280 U.S. 396, 398 (1930) ("[T]here is no warrant for seeking refined arguments to show that the statute does not mean what it says.").

31 *United States v. Turkette*, 452 U.S. 576, 593 (1981). Chief Justice Marshall made the same point more than 100 years ago: "[A] law is the best expositor of itself." *Pennington v. Cox*, 6 U.S. (2 Cranch) 34, 52 (1804).

32 452 U.S. at 580.

33 While RICO's legislative history establishes that Congress meant what it said, courts have unfortunately and improperly read the absence of *specific* legislative history on a particular point to negate the *general* language of the statute. *See, e.g., United States v. Thompson*, 669 F.2d 1143, 1145 n.2 (6th Cir.) (government held not to be an "enterprise"), *reversed en banc*, 685 F.2d 993 (6th Cir. 1982). That approach is mistaken. *Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction that may arise"); *Standefer v. United States*, 447 U.S. 10, 20 n.12 (1980) (need not mention in committee report); *Harrison v. PPG Indus.*, 446 U.S. 578, 592 (1980) ("[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."). *See also United States v. Turkette*,

## IV. The Legislative History of RICO

### A. *The Origins of the Ideas in RICO*

After the Special Committee to Investigate Organized Crime in Interstate Commerce (the Kefauver Committee) disclosed in 1951 the problem of organized crime's infiltration into legitimate business and state and local government,<sup>34</sup> the American Bar Association ("ABA"), in response to a request of the chairman of the Special Committee, Senator Estes Kefauver, established the ABA Commission on Organized Crime.<sup>35</sup> The Commission examined various legislative proposals to strengthen the law as it dealt with organized crime, including measures that recognized that "money . . . [was] the key to power in the underworld."<sup>36</sup> By 1960, the problem of criminal infiltration into labor unions had been fully documented by the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee).<sup>37</sup> Hearings, too, had been held exposing the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra.<sup>38</sup> In addition, the Department of Justice had begun to move against racketeer infiltration of various unions by imaginatively utilizing antitrust theo-

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452 U.S. 576, 591 (1981)(negative inference from legislative history impermissible; *one* purpose cannot be read negatively as *sole* purpose). Similarly, the technique of pointing to one expressed aspect of RICO's legislative history—a concern, for example, with organized crime (in the classic mobster sense) and its infiltration of legitimate business—and then confining the application of RICO's general language, despite contrary legislative history and the liberal construction clause, to that one aspect of its legislative history is improper. *See, e.g., Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981)(RICO count in federal securities fraud litigation dismissed, as "[n]othing suggested in . . . [complaint] even remotely brings . . . [it] within the ambit of . . . [the] purpose 'to deal' with organized crime's control over business."). That approach, too, is mistaken. *Diamond v. Chakrabarty*, 447 U.S. 303, 315-16 (1980)(The "Court frequently has observed that a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *See Basic Concepts, supra* note 3, at 1035 n.117 ("common mistake"). Nor is it proper to invoke the "spirit" rule of *Church of Holy Trinity v. United States*, 143 U.S. 457 (1892), for it has been confined to "rare and exceptional cases." *TVA v. Hill*, 437 U.S. 187 n.33 (1978) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 66 (1930)).

34 *See generally Basic Concepts, supra* note 3, at 1014-15.

35 *House Hearings, supra* note 25, at 544 (testimony of Edward L. Wright). While the Kefauver Committee attracted a great deal of national attention in the 1950s, the process of a national examination of organized crime and racketeering in fact had its origins in the hearings held by Senator Royal S. Copeland in the 1930's. *See Investigation of So-Called "Rackets," Hearings Before a Subcomm. of the Senate Comm. on Commerce*, 73d Cong., 2d Sess. (1933). S. REP. NO. 1189, 75th Cong. 1st Sess. 1 (1937) contains a "complete picture" of the work of the "Rackets Committee."

36 *House Hearings, supra* note 25, at 544.

37 *Basic Concepts, supra* note 3, at 1015 n.22.

38 *Id.* at 1015 n.23.

ries.<sup>39</sup> Accordingly, the pervasive problem of organized crime<sup>40</sup> and racketeering<sup>41</sup> in the world of government, business, and unions<sup>42</sup>

39 *See, e.g.*, *Los Angeles Meat & Provision Drivers Union v. United States*, 371 U.S. 94 (1962); *United States v. Pennsylvania Refuse Removal Ass'n*, 357 F.2d 806 (3d Cir. 1966); *United States v. Bitz*, 282 F.2d 465 (2d Cir. 1960).

40 On the many meanings of "organized crime," see *Basic Concepts*, *supra* note 3, at 1013 n.15. In addition, the tendency of some to identify "organized crime" with the principal syndicate involved in it, the Mafia, has been decried by no less than the sponsor of the Organized Crime Control Act, Senator John L. McClellan. *GAMBLING IN AMERICA: REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING* 181-82 (1976) ("in none of the hearings or in the processing of legislation in which I have been involved has the term been used in . . . [such a] circumscribed fashion"). For a breakdown of the concept into "syndicate," "enterprise," and "venture," see *ELECTRONIC SURVEILLANCE: REPORT OF THE NATIONAL COMMISSION ON THE REVIEW OF FEDERAL AND STATE LAWS RELATING TO WIRETAPPING AND ELECTRONIC SURVEILLANCE* 190-92 (1976) (concerning statement of Commissioner Blakey). *See also* *United States v. Compagna*, 146 F.2d 524, 525, 526 (2d Cir.) (prosecution of motion picture industry extortion by Capone syndicate), *cert. denied*, 324 U.S. 867 (1944); *TASK FORCE REPORT: ORGANIZED CRIME, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 10 (1967) [hereinafter cited as *TASK FORCE REPORT*]. The Second Circuit had this to say in *United States v. Carter*, 493 F.2d 704 (2d Cir. 1974), in defining "organized crime" in Title VI of the Organized Crime Control Act, *codified at*, 18 U.S.C. § 3503 (1976) (deposition taken where attorney general certifies "organized criminal activity"):

The fact that the alleged perpetrators are presumably respected and entrusted with responsibility . . . by stockholders does not suggest . . . that they are incapable of engaging in organized criminal activity. We all stand equal before the bar of criminal justice, and the wearing of a white collar, even though it is starched, does not preclude the organized pursuit of unlawful profit.

493 F.2d at 708. *See* *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

41 Burke put it well to his son in 1793: "A very great part of the mischiefs that vex the world arises from words. People soon forget the meaning, but impression and the passion remain." E. BURKE, *SELECTED WRITING AND SPEECHES* 269 (P. Stanlis ed. 1963). Contrary to the contentions of defense counsel, "racket" and "racketeer" have never been words limited to "organized crime" in the classic mobster sense. Etymologically, the basic term is probably onomatopoeic. VIII *THE OXFORD ENGLISH DICTIONARY* 94 (1933). Its principal meaning is "noise"; its secondary meaning is "reveling" or "merrymaking"; and its tertiary meaning is "a fraudulent scheme, enterprise or activity." *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED* 1871 (1966). *See also* *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* (Morris ed. 1970) ("racket": 1. A clamor; uproar. 2a. A business that obtains money through fraud or extortion, b. An illegal or dishonest practice;" "racketeer": One engaged in an illegal business."). Murrari I. Gurfein wrote:

Racketeering, a term loosely applied to a variety of criminal schemes has not yet received exact legal definition . . . . It . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business. . . . The word gained currency in the 1920s, but its origin remains obscure. . . . [T]he most plausible [theory notes that the] word racket has long been used to describe a loud noise and hence a spree or party or 'good time.' In the 1890s social clubs of young men in New York City, under the auspices of political leaders, gave affairs called rackets; since among their number there were members of neighborhood gangs, it was found easy to coerce local tradesman to buy tickets.

was well-known by 1967, when the President's Commission on Law

ORGANIZED CRIME IN AMERICA 181-82 (G. Tyler ed. 1962). Hence, "obtaining money by coercion or fraud" became "racketeering."

Similarly, the Supreme Court noted in *United States v. Culbert*, 435 U.S. 371, 375 (1978) that the Copeland Committee "found that . . . [racketeering] and the associated word 'racket' had 'for some time been used loosely to designate every conceivable sort of practice or activity which was either questionable, unmoral, fraudulent or even disliked, whether criminal or not.' S. REP. NO. 1189, 75th Cong., 1st Sess. 2 (1937)."

RICO, of course, follows this common usage by terming its predicate offenses "racketeering activity" and making, for example, the operation of an "enterprise" through a "pattern of racketeering activity" that "affects commerce" the gravamen of one of its standards of unlawful conduct. *See, e.g.*, 18 U.S.C. §§ 1961 (1),(4),(5), 1962(c) (1976). This usage did not trouble the ABA Criminal Justice Section (or its Council) in 1970. *See House Hearings, supra* note 25, at 556-59. The principal objection voiced was to vagueness and overbreadth; the suggested amendments were requiring three (rather than two) acts within five (rather than ten) years to form a pattern; making the criminal forfeiture sanction discretionary (rather than mandatory); affording courts discretion in holding proceedings in private; and adding the remedy of treble damages in private suits. The Section has, however, now convinced the House of Delegates of the ABA to recommend to Congress that "criminal" be substituted for "racketeering" in RICO.

The present law brands the accused as a racketeer with resulting prejudicial impact on judges and juries. This stigma is particularly unfair since RICO is not applied solely to racketeers or offenses committed by racketeers but has also been applied to businessmen and politicians engaged in criminal conduct unrelated to traditional notions of organized crime.

ABA, *supra* note 25, at 4. If the suggestion of the ABA were carried to its logical conclusion, the Congress should also rename federally cognizable "murder," "rape," and "robbery" with less pejorative terms. Apparently the Section—and now the House of Delegates—has forgotten the proper role of social opprobrium in the administration of justice, criminal and civil. *See, e.g.*, J. FEINBERG, *DOING AND DESERVING* 98, 100-05, 115-16 (1970) ("At its best, in civilized and democratic countries, punishment surely expresses the community's strong *disapproval* of what the criminal did. Indeed, it can be said that punishment expresses the *judgment* (as distinct from any emotion) of the community that what the criminal did was wrong.") (emphasis in original); II J. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 81-82 (1883) ("[T]he sentence of the law is to the moral sentiment of the public in relation to any offence what a seal is to hot wax. . . . In short, the infliction of punishment by law gives definite expression . . . to . . . the moral or popular . . . part of morality."). On the role of euphemisms in encouraging public and official reluctance to enforce the law and providing rationalizations for the violators themselves in the "white-collar crime" area, see *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT: TASK FORCE ON ASSESSMENT, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE* 104-08 (1967) ("most white collar crime is not at all morally neutral"); D. CRESSEY, *OTHER PEOPLES MONEY* 102 (1952) (that embezzlers rationalize their conduct as different from theft is important factor in behavior pattern). Indeed, it was persuasively argued in 1934 before the Copeland Committee that it was in part our failure to bring "white-collar crime" to justice that significantly contributed to the developments during prohibition of what all now concede to be "organized crime," a problem that did not end with prohibition's repeal:

Both crime and racketeering of today have derived their ideals and methods from the business and financial practices of the last generation. . . . It is a law of social psychology that the socially inferior tend to ape the socially superior. . . . It was inevitable that, sooner or later, we would succeed in "Americanizing" the "small

Enforcement and the Administration of Justice (the Katzenbach Commission) made its monumental report and recommended a comprehensive crime control strategy.<sup>43</sup> Among other things, the Com-

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fry"—especially the foreign small fry. . . . All was relatively safe, since the legal profession was already ethically impaired through its affiliations with the reputable racketeers. . . . The idea that when prohibition is ended the racketeers . . . will meekly and contritely turn back to blacking shoes . . . is downright silly. They will apply the technique they have mastered to the dope ring. . . . They will find crafty lawyers all too willing to defend them from the "strong arm" of the law for value received. . . . So long as the lawless can get protection in return for keeping corrupt politicians in office, we shall not be free from the crime millstone about our necks.

*Investigation of So-Called "Rackets": Hearings Before a Subcomm. of the Senate Committee on Commerce*, 73rd Cong. 2d Sess. 710-11 (1934) (testimony of Harry Elmer Barnes). It will be interesting to see if the ABA can persuade Congress to so amend RICO. See also *White Collar Crime: Hearings Before the Subcomm. on Crime of the House Jud. Comm.*, 95th Cong., 2nd Sess. 109 (1978) (testimony of Donald R. Cressey) ("It is not just that businessmen have a reckless disregard for the law. Also significant is the fact that they have a powerful voice in determining what the law shall be, how it shall be interpreted and enforced.").

Nevertheless, it must be conceded that "racketeer" is a "fighting word." See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 574 (1942) ("Argument is unnecessary to demonstrate that the appellations 'damned racketeer' . . . [is an epithet] likely to provoke the average person to retaliation, and thereby cause a breach of peace."). Care must be used, therefore, in trying all RICO cases, criminal and civil, to see that the opprobrium rightly attaching to the conduct of one who violates RICO is not a factor in determining whether the conduct occurred and was engaged in by the person charged as a defendant. Where a RICO charge is improperly brought, it may, for example, warrant a new trial. Compare *United States v. Guiliano*, 644 F.2d 85, 88-89 (2d Cir. 1981) ("distinct risk that the jury was influenced in its disposition of the [case]. . . by the allegations of the RICO count"), with *United States v. Sam Goody Inc.*, 506 F. Supp. 380, 391 (E.D.N.Y. 1981) (RICO charge facially proper for fraudulent operation of record store as "enterprise," where corporations and individuals charged as defendants); and *United States v. Sam Goody, Inc.*, 518 F. Supp. 1223, 1225-26 (E.D.N.Y. 1981) (after dismissal of RICO charge, court "remain[ed] concerned about the effect of the . . . charge, particularly the 'racketeering' implications [although in a] normal case . . . might not order a new trial"), *appeal dismissed*, 675 F.2d 17, 26, 27 (2d Cir. 1982) ("less concerned" about possibility of prejudice but not clear and indisputably wrong) (Mansfield, J., dissenting in part: verdict "fairly-won and fully-supported" as prosecutor made clear not "organized crime or the mob"). That possibility alone ought to counsel care. In addition, a RICO conviction may warrant exercising discretion under the concurrent sentence doctrine to review the RICO count, even though it might not otherwise be necessary. *United States v. Webster*, 639 F.2d 174, 183 (4th Cir. 1981), *modified on other grounds on rehearing*, 669 F.2d 185 (4th Cir. 1982); *United States v. Anderson*, 626 F.2d 1358, 1361 n.2 (8th Cir. 1980). RICO convictions may also carry parole and other confinement consequences. See, e.g., *Carter v. Carlson*, 545 F. Supp. 1120, 1122 (S.D. W. Va. 1982) (RICO conviction warrants classification of prisoner in "sophisticated criminal activity").

42 THE ABA REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 10 (1952-1953) [hereinafter cited as ABA REPORT], for example, echoed the Kefauver Committee and observed:

[T]he largest single factor in the breakdown of law enforcement agencies in dealing with organized crime [documented by the Kefauver Committee was] the corruption and connivance of many public officials.

43 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUS-

mission analyzed various aspects of organized crime,<sup>44</sup> but it paid special attention to infiltration of legitimate business.<sup>45</sup> It recommended the use of new approaches to control such infiltration.<sup>46</sup> Finally, the fundamental reexamination of federal criminal jurisprudence undertaken between 1966 and 1971 by the National Commission on Reform of the Federal Criminal Law (the Brown Commission) developed significant insights into the character of the issues that faced the Congress.<sup>47</sup>

### B. *The Initial Stages of the Legislative Process*

In 1967 Senator Roman L. Hruska proposed bills S. 2048 and S. 2049 to implement aspects of the Katzenbach Commission's recommendations, particularly the suggestion that antitrust theories be

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TICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 200-09 (1967) [hereinafter cited as *PRESIDENT'S REPORT*].

44 The Commission looked at the structure of the 24 "families" of the national syndicate, *id.* at 193, as well as such organized crime activities as gambling, *id.* at 188; loan sharking, *id.* at 189; narcotics, *id.*; the infiltration of legitimate business, *id.*; labor racketeering, *id.* at 190; and political corruption, *id.* at 191.

45 The President's Crime Commission noted that legitimate businesses "rang[ing] from accounting firms to yeast manufacturing" have been corrupted. *PRESIDENT'S REPORT*, *supra* note 43, at 190. See *Basic Concepts*, *supra* note 3, at 1015 n.24.

46 *Basic Concepts*, *supra* note 3, at 1015 n.25. Two seminal papers commissioned by the Commission were Cressey, *The Functions and Structure of Criminal Syndicates*, in *TASK FORCE REPORT*, *supra* note 40, at 25, and Schelling, *Economic Analysis and Organized Crime*, *id.* at 114. Each contributed important elements to the development of RICO, particularly the concepts of "enterprise" and "pattern of racketeering activity." Indeed, the concept of "enterprise criminality" that RICO embodies—whether organized crime, white collar crime, or violent crime—owes its origin, in significant part, to Professor Cressey's paper. See *id.* at 56-60 for a discussion of "organization" plus "crime."

47 The Commission was created by Act of Nov. 9, 1966, Pub. Law No. 89-801, 80 Stat. 1516 (1966). Its chairman was Edmund G. Brown; its vice-chairman was Congressman Richard H. Poff. Two of its members were Senators John L. McClellan and Roman L. Hruska. In addition, staff work for the Commission examined a number of concepts subsequently embodied in RICO. See, e.g., *Consultants Report on Conspiracy and Organized Crime*, I *WORKING PAPERS: NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS* 381 (1970) (Professor G. Robert Blakey) ("enterprise," "pattern of racketeering"). The staff work is important, for it indicates how the appropriate scope of the predicate offenses in RICO was narrowly conceived at the earliest stages of the legislative process.

The principle of selection followed in designating the 'racket' crimes is to include those crimes which experience has shown to be the specialities of the criminal syndicates, yielding illicit funds and power. Excluded from the list are ordinary crimes of violence, . . . ordinary commercial frauds, violators [sic] of antitrust, securities, and other regulatory laws.

*Id.* at 383-84. Subsequently, the scope of RICO was deliberately both widened and narrowed. See 18 U.S.C. § 1961 (1976). Ultimately, Congress decided that "ordinary commercial frauds" *should* be included in RICO; included, too, were "crimes of violence."

brought to bear on organized crime.<sup>48</sup> As originally introduced, S. 2048 focused on the use of unreported income from one line of business in another line of business, while S. 2049 dealt with the "investment" of proceeds from "criminal activity" in a "business enterprise."<sup>49</sup> Congressman Richard H. Poff introduced companion bills in the House.<sup>50</sup> Although no action was taken on them, they were studied by the ABA.<sup>51</sup> Significantly, while commenting that the

48 *Basic Concepts*, *supra* note 3, at 1015-16. See 113 CONG. REC. 17,997-18,002 (1967) for Senator Hruska's introductory remarks discussing previous studies, the nature of organized crime, and its infiltration into legitimate businesses; for example, "brokerage houses" and "accounting firms." *Id.* at 17,998. He also noted that "[m]ergers and acquisitions, real or imagined, were promoted. When stock values soared to desired levels, profit-taking would occur. Then the helpless management, stockholders, and creditors were left holding the bag." *Id.* Accordingly, Senator Hruska was manifestly concerned even at this early stage of RICO's processing with a wide range of victims, including stockholders and creditors.

49 See S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th Cong., 1st Sess. (1967). The original text of S. 2049 defined "criminal activity" more narrowly than the ultimate text of RICO, largely excluding the fraud type offenses, although bankruptcy fraud was included. "Persons" who could violate the bills were limited to "individuals," "corporations," or other "legal entities." *Id.* Criminal and civil remedies were provided for governmental and private suits. *Id.*

Professor Bradley, *supra* note 25, at 884, suggests that society "is not harmed further by the investment" of racketeering proceeds. His reasoning has led one court to term the concept of the legal sterilization of the fruits of racketeering "basic[ally] irrational." *United States v. Loftin*, 518 F. Supp. 839, 853 (S.D.N.Y. 1981). Professor Bradley's, and the court's, view is mistaken. It illustrates a common mistake in reading RICO. See *Basic Concepts*, *supra* note 3, at 1035 n.117. While RICO had as *one* of its purposes preventing the takeover of legitimate business by organized crime, it is myopic to read RICO as if that were its *only* purpose. RICO was also aimed at racketeering. *United States v. Turkette*, 452 U.S. 576, 591 (1981) ("deal[s] with problem at its very source"). Ultimately, organized crime's "revenue and power" stem from its illicit activities. *Id.*; *United States v. Rone*, 598 F.2d 564, 569 (9th Cir. 1979) (denied the source of income to use to invest), *cert. denied*, 445 U.S. 946 (1980). Accordingly, prohibiting the investment of racketeering proceeds makes engaging in racketeering itself less attractive. "[T]o the extent that profits earned in organized crime can be safely invested in legitimate activities to yield additional profits, the expected return to organized crime [in its illicit activities] is higher than it would otherwise be." R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.6, at 176 (2d ed. 1977). "[T]he illegal market enterprises of [organized crime]. . . members generate a considerable illegal cash flow." A. ANDERSON, *THE BUSINESS OF ORGANIZED CRIME* 77 (1979). Attempting legally to sterilize that cash flow from direct or indirect investment in licit—or illicit—enterprises is, therefore, hardly irrational.

50 *Basic Concepts*, *supra* note 3, 1016 n.27. Congressman Bob Wilson, co-sponsor with Congressman Poff, also noted, citing the Crime Commission, "accounting firms." 113 CONG. REC. 17,949 (1967). He also spoke of the "novel" approach of the bills. *Id.* Congressman Poff had noted that the "package [would] not only sharpen old tools but forge new tools of law enforcement." *Id.* at 17,947. Another co-sponsor, Congressman Robert McClory, noted that "business racketeers" and "criminal cartels" employ "staffs of attorneys, accountants, and business consultants" to "protect themselves from suit and prosecution." *Id.* at 17,950. See *Lewis v. United States*, 445 U.S. 55, 63 (1980) (sponsor's statements entitled to weight); *Simpson v. United States*, 435 U.S. 6, 13 (1978).

51 The ABA's report of its study is reprinted in 115 CONG. REC. 6994-95 (1969).

“time tested machinery of the antitrust law contains several useful and workable features,” the ABA suggested that the underlying theory of the antitrust law—the maintenance of competition—might make the direct use of the antitrust laws maladapted to the goal of curtailing organized crime’s influence in the underworld. The ABA expressed particular concern that antitrust concepts like “standing” and “proximate cause”—“appropriate in a purely antitrust context”—would create “inappropriate and unnecessary obstacles” in the way of persons injured seeking “treble damage recovery.”<sup>52</sup> Ac

52 The Report observed:

Some of the conduct of organized crime in legitimate businesses can be . . . reached by the existing antitrust laws. . . . Other activities of organized crime in legitimate businesses may or may not be subject to antitrust laws. Thus, some extortion tactics and business take-overs by organized crime might not be reached under the antitrust laws, particularly if they affected only the victimized business rather than resulted in a lessening of competition in an entire line of commerce. . . . As described above, S. 2048 and 2049 extend the use of the antitrust machinery as a weapon against organized crime.

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

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

S. 2048, on the other hand, by inserting in the Sherman Act a provision which does not have as its primary objective the establishment or maintenance of free competition, may result in an undesirable blending of otherwise laudatory statutory objectives. Criminal conduct which violates existing antitrust laws can be proceeded against under those laws. Additional conduct sought to be reached should be attacked under separate legislation.

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

For the foregoing reasons, the Section of Antitrust Law recommends that the House of Delegates adopt the attached resolution endorsing the principles and objectives of S. 2048 and S. 2049, and all similar legislation having the purpose of adapting the machinery of the antitrust laws to the prosecution of organized crime, but recommending that any such legislation be enacted as an independent statute and not be included in the Sherman Act, or any other antitrust law.

*Id.* at 6995. The ABA’s recommendation for separate legislation was, of course, adopted. Accordingly, any suggestion that RICO actions be limited by antitrust-type limitations—“competitive,” “commercial,” or “direct/indirect” injuries—flies in the face of the very consideration that led to the drafting of RICO as a separate statute from the antitrust statutes that are so limited. *Compare* State Farm Fire & Casualty Co. v. Estate of Caton, 540 F. Supp.



cordingly, the ABA recommended that the Hruska and Poff bills be redrafted outside of the antitrust context to avoid the impact of restrictive antitrust precedent.<sup>53</sup>

### C. *The Introduction of the Organized Crime Control Act*

On January 15, 1969, Senator John L. McClellan introduced S. 30, the Organized Crime Control Act. The Act was drafted to implement a number of the recommendations of the Katzenbach Commission, although it did not at that time contain a RICO-type title.<sup>54</sup> On March 11, 1969, Senator McClellan made a major speech on the floor of the Senate, in which he reviewed the development of organized crime in the United States, including its structure and its activities in gambling, narcotics, loansharking, the infiltration of businesses, the takeover of unions, and the subversion of democratic processes.<sup>55</sup> In addition, Senator McClellan addressed the failure of traditional laws and law enforcement procedures to arrest its growth, and he analyzed the various provisions of S. 30 that were designed to change those laws and procedures. Noting the specific businesses infiltrated, Senator McClellan had this to say about that infiltration:

Usually, after [the] takeover [of a business] . . . defaulted loans are liquidated by professional arsonists burning the business and then collecting the insurance or by various bankruptcy fraud techniques, which are called "scam." . . . Often, however, the organization, using force and fear, will attempt to secure a monopoly in the service or product of the business. When the campaign is successful, the organization begins to extract a premium price from customers. Purchases by infiltrated businesses are always made from specified allied firms. With its extensive infiltration of legitimate business,

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673, 679-80 (N.D. Ind. 1982) ("contrary to express legislative history") and *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, No. C-81-4099 SC (N.D. Cal. 1982) ("by reason of" limitation rejected), with *Harper v. New Japan Sec.*, 545 F. Supp. 1002, 1004-05, 1007 (C.D. Cal. 1982) ("by reason of" limitation imposed on civil RICO based on antitrust analogy that Congress considered). *State Farm* and *Crocker* were correctly decided; *Harper* was wrongly decided; the court's legislative history and policy analysis is contrary to what actually happened. Because the argument in Comment, *Reading the "Enterprise" Element Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. U.L. REV. 100 (1981), for adoption of a "competitive limitation" ignores significant aspects of the legislative history materials, it should be rejected. The proper approach is set out in Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982) [hereinafter cited as Note, *Judicial Restriction*]. The Northwestern note's use of legislative history has been aptly termed "selective." Strafer, Massumi, Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 AM. CRIM. L. REV. 655, 707 (1982) [hereinafter cited as *Civil RICO*].

53 115 CONG. REC. 6995 (1969).

54 *Basic Concepts*, *supra* note 3, at 1017.

55 115 CONG. REC. 5872 (1969), *reprinted in Senate Hearings*, *supra* note 28, at 493-511.

organized crime thus poses a new threat to the American economic system. The proper functioning of a free economy requires that economic decisions be made by persons free to exercise their own judgment. Force or fear limits choice, ultimately reduces quality, and increases prices. When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can be effectively eliminated and customers can be effectively confined to sponsored suppliers. The result is more unwholesome than other monopolies because the newly dominated concern's position does not rest on economic superiority.<sup>56</sup>

Senator McClellan had this to say about the infiltration of unions:

Closely paralleling its takeover of legitimate businesses, organized crime has moved into legitimate unions. Control of labor supply through control of unions can prevent the unionization of some industries or can guarantee sweetheart contracts in others. It provides the opportunity for theft from union funds, extortion through the threat of economic pressure, and the profit to be gained from the manipulation of welfare and pension funds and insurance contracts. Trucking, construction, and waterfront entrepreneurs have been persuaded for labor peace to countenance gambling, loan-sharking and pilferage. All of this, of course, makes a mockery of much of the promise of the social legislation of the last half century.<sup>57</sup>

Senator McClellan had this to say about the subversion of democratic processes:

To exist and to increase its profits, . . . organized crime has found it necessary to corrupt the institutions of our democratic processes, something no society can long tolerate. Today's corruption is less visible, more subtle and therefore more difficult to detect and assess than the corruption of the prohibition and earlier eras. Organized

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<sup>56</sup> 115 CONG. REC. 5874; *Senate Hearings, supra* note 28, at 496. The list included "advertising, amusement, appliances, automobile, baking, ballrooms, bowling alleys, banking, basketball, boxing, cigarette distribution, coal, communications, construction, drugstores, electrical equipment, florists, food, football, garment, gas, hotels, import-export, insurance, juke box, laundry, liquor, loan, news services, newspapers, oil, paper products, radio, real estate, restaurants, scrap, shipping, steel, surplus, television, theaters, and transportation." *Id.* Here, too, the concern of Senator McClellan with the direct victims—the immediate business, the insurance company, and the customers—is clearly manifested. *More* than the narrow class "competitor" was, in short, of concern.

<sup>57</sup> *Id.* Here, too, the point must be made: when a union fund is looted, how are competitors injured? Limiting civil suits under RICO to competitive injuries would *exclude* union members from the class who could civilly sue under RICO, hardly a result consistent with Senator McClellan's express concerns. Nor would the members' injuries be solely "commercial" in character. *But see* *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1136-37 (D. Mass. 1982) (RICO injury must be "commercial"). *Van Schaick* was wrongly decided; it is discussed in note 147 *infra*.

crime operates even in the face of honest law enforcement, but it flourishes best in a climate of corruption. As the scope of organized crime's activities has expanded, its efforts to corrupt public officials at every level of government have grown. For with the necessary expansion of governmental regulation of private and business activity, its power to corrupt has given organized crime greater control over matters affecting the everyday life of each citizen. The potential for harm today is thus greater if only because the scope of governmental activity is greater.<sup>58</sup>

#### D. *The Introduction of S. 1623*

On March 20, 1969, Senator Hruska introduced S. 1623, the Criminal Activities Profits Act.<sup>59</sup> Senator Hruska noted Senator Mc-

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58 *Senate Hearings*, *supra* note 28, at 497. What was said above about unions applies equally to governments. How can they be hurt competitively or commercially? Should they not be able to sue under RICO to vindicate their rights civilly? State and local governmental units can sue under the antitrust statutes as victims. *See Hawaii v. Standard Oil Co.*, 405 U.S. 251, 260-64 (1972); *Chattanooga Foundry v. City of Atlanta*, 203 U.S. 390 (1906). Surely, RICO ought to be read at least as broadly as the antitrust statutes on which its civil relief provisions were modeled. *See* note 17 *supra*.

59 The focus of the bill, as then drafted, was reflected in its title. The final scope of RICO, too, is reflected in its title, which is *not* limited to investment in or takeover of legitimate businesses, but extends to the *operation* of "enterprises," lawful as well as unlawful, by "racketeering acts" defined to include various forms of crime. *See Basic Concepts*, *supra* note 3, at 1025 n.91 (history of development of language of title). Assistant Attorney General Wilson criticized S. 1623 because its "remedies [were not] . . . at least as broad as the evil sought to be suppressed." *Senate Hearings*, *supra* note 28, at 387. He called for legislation that went beyond investment and attacked operation too. *Id.* He found S. 1861, however, more to his liking because it went beyond investment, and because he foresaw the usefulness of its civil remedies that could be invoked "by the lesser standard of proof, i.e. by a preponderance of the evidence rather than beyond a reasonable doubt." *Id.* at 388.

Traditionally, of course, what measure of proof should be applied in establishing a civil "violation" of a statute has been left to the courts. *Santosky v. Kramer*, 102 S. Ct. 1388, 1395 (1982). The issue, however, is first a matter of legislative intent. *Id.* at 1403, 1404 n.2; *Steadman v. SEC*, 450 U.S. 91, 96 n.10 (1981) ("task of determining the appropriate standard of proof is one of discerning congressional intent."); *Vance v. Terrazas*, 444 U.S. 252, 265 (1980) ("traditional powers . . . to prescribe . . . standards of proof . . ."). Here that intent was clearly manifest in the legislative history as "preponderance of the evidence." *Senate Hearings*, *supra* note 28, at 388 (testimony of Assistant Attorney General Wilson) (testimony of Senator McClellan) ("preponderance"). *See also House Hearings*, *supra* note 25, at 106-07 (not "proof beyond reasonable doubt," but "[s]ince . . . civil sanctions would be remedial rather than punitive . . . [there would be] procedural equality."). *Id.* at 664 (remarks of Congressman Poff) "[T]itle IX is really in two parts, one criminal and one civil. The burden of proof under the civil-remedy section, section 1964, is much less." Accordingly, the measure has been adopted by the courts. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government civil suit), *cert. denied*, 420 U.S. 925 (1975); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 677 (N.D. Ind. 1982) (private civil suit); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980) (same); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979) (same); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (same). Congressional intent might well be

Clellan's March 11th speech, commenting that he "need not reiterate

frustrated, however, should a specifically defined "organized crime" or "racketeering" type limitation focusing only on mobsters in the classic sense be adopted to curtail the scope of civil RICO, for then a civil RICO proceeding might well be thought to carry a "stigma"—contrary to Congress's intent—and powerful arguments could be made for the adoption of a higher measure of proof. See *Civil RICO*, *supra* note 52, at 715-17; Note, *Judicial Restrictions*, *supra* note 52, at 1107 ("RICO claims can stigmatize defendants *only* if courts restrict the applicability of the broad statutory language to proven organized criminals.") (emphasis added). Congress knew that the old "sanctions and remedies available" were "limited in scope and impact." The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970). It sought, in RICO, to "establish . . . new remedies." *Id.* The implementation of those new remedies ought not now be frustrated by judicial fiat through the adoption of a "strained construction" of Title IX having no support in the "statutory language itself, nor in its legal history." *United States v. Sutton*, 642 F.2d 1001, 1004 (6th Cir. 1980) (*en banc* reversal of panel opinion excluding illicit "enterprises" from "enterprise" under RICO). Courts should, therefore, "decline . . . [any] invitation to emasculate Title IX." *Id.* See *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 547 (1871) (multiple damage award does not warrant different rules of evidence).

The general practice that obtains under the antitrust statutes, moreover, is equally suitable under RICO. A suit to restrain a violation of the antitrust statutes is civil, not criminal, in character. *United States v. National Lead Co.*, 332 U.S. 319, 338, 348 (1947) ("civil, not a criminal proceeding"; "not . . . for punishment. . . [but]. . . future prevention"); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 446 (1945) ("civil, not a criminal, proceeding"). No prior criminal conviction is necessary before a civil suit may be brought. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) ("[T]he Sherman Act provides for a criminal proceeding to punish violations and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the Government. . . . [An] action for damages by a 'person injured' . . . [need not] also wait."). A judgment may be returned against a defendant based on a showing not greater than a preponderance of the evidence. See *Ramsey v. UMW*, 401 U.S. 302, 307-11 (1971) (general rule of preponderance applies in treble damage antitrust suits against union, except as modified by Norris-LaGuardia Act (29 U.S.C. § 106) for question of authorization); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 778 (6th Cir. 1970) (preponderance), *cert. denied*, 402 U.S. 983 (1971). No reason exists to vary the time-tested practice under the antitrust statutes or to repudiate the developing practice under RICO. See generally IX J. WIGMORE, EVIDENCE § 2498, at 327 (3d ed. 1940) ("Policy suggests that the . . . [reasonable doubt standard] should be strictly confined to its original field."); *Steadman v. SEC*, 450 U.S. 91 (1981) (preponderance standard followed for fraud determination in administrative hearing); *SEC v. Joiner Corp.*, 320 U.S. 344, 350-51 (1943) (securities fraud; criminal proceedings beyond reasonable doubt; civil proceedings—preponderance of the evidence).

Professor (now Judge) Posner, in *ECONOMIC ANALYSIS OF LAW* § 21.2, at 432 (2d ed. 1977), argues, however, based on the diminishing marginal utility of money income, that a "somewhat higher standard of persuasion than mere preponderance" should be adopted in civil matters. Posner reads the preponderance standard as an evaluation of the probability (.5) that an undeserving plaintiff will win or that a deserving plaintiff will lose. Posner's view is mistaken; it assumes that only one issue is faced in litigation; it also assumes that plaintiffs and defendants are relatively equal in wealth—or at least wealth available for legal execution. In fact, there are four crucial areas in civil litigation: liability, causation, damages, and execution, and plaintiffs in certain classes of litigation may in fact not be relatively equal in wealth. To prevail, a plaintiff must win all—or most—of the issues in each area; if a preponderance of the evidence standard is applied to fact finding at each stage, the probability of winning for a deserving plaintiff is certainly not greater than .0625 (.5×.5×.5×.5). In addi-

everything that the distinguished senator from Arkansas . . . set

tion, RICO type litigation, particularly where mob-type organized crime is in fact present, will also not involve plaintiffs relatively equal in wealth to defendants, and it will pose an especially difficult problem at the point of execution. In 1963, for example, the McClellan Committee looked into the organized crime operations of Santo Trafficante, the Tampa Florida Mafia boss. Neil G. Brown, the Tampa Chief of Police, testified: "We know of no legitimate businesses that are owned or controlled by Santo Trafficante. He owns no real estate, nor any other property, real or personal. His house, automobile and all his other possessions are held in the name of others." *Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Senate Perm. Subcomm. on Investigations of the Comm. on Government Operations*, 88th Cong., 1st Sess. 519, 527-28 (1963) (testimony of Neil G. Brown). See also *Forfeiture of Narcotics Proceeds, Hearings Before the Senate Subcomm. on Criminal Justice, Comm. on the Judiciary*, 96th Cong., 2d Sess. 96-97, 114 (1980) (testimony of Irvin B. Nathan) (three problems: 1) ascertaining what the assets are, 2) reaching them if they are in the hands of third parties, and 3) preventing their dissipation before trial; problems compounded since "sophisticated criminals . . . have access to the best lawyers and accountants money can buy"); STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME: REPORT BY COMPTROLLER GENERAL OF THE UNITED STATES 31-34 (1981) (problems in criminal forfeiture: 1) uncertain status of assets, 2) third party holdings, and 3) dissipation prior to seizure); ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATING DRUG TRAFFICKING, REPORT OF COMPTROLLER GENERAL OF THE UNITED STATES 30-42 (1981) (same); J. CALIFANO, THE 1982 REPORT ON DRUG ABUSE AND ALCOHOLISM 97 (1982) ("greater use of federal statutes [like RICO] and [the Controlled Substances Act] should be amended to provide for the forfeiture of all profits of . . . enterprise"). It is not without significance, too, that Frank Diecidue, a Trafficante associate, has been prosecuted under RICO, albeit unsuccessfully, for murder in connection with the operation of a legitimate business. *United States v. Diecidue*, 603 F.2d 535, 553-55 (5th Cir. 1979), cert. denied, 445 U.S. 946 (1980). See also *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 682 (N.D. Ind. 1982) ("Nor is it fanciful to suggest that organized crime figures' assets may be held by nominees or corporate shells."); *Urban Indus. v. Thevis*, 670 F.2d 981 (11th Cir. 1982) (one million dollars in jewelry and cash seized from fugitive in *United States v. Thevis*, 665 F.2d 616 (5th Cir. 1982) (RICO murder) subject to IRS lien rather than claim by judgment creditor of estate of victim). Accordingly, the moral and economic considerations underlying the structure of civil RICO may be simply stated. A preponderance standard makes sense at the point of unlawful conduct, for society ought to be assured that it is more likely than not that the defendant has violated RICO's standards. Thereafter, as in the antitrust area, while proof of cause and the fact of damage ought to have to be made out, how a plaintiff meets its burden of proof as to the amount of damage ought to be ameliorated considerably. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("damage issues . . . rarely susceptible of the kind of concrete, detailed proof"); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697-701 (1962) (fact of injury from violation may be inferred from circumstantial evidence); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946) ("jury . . . [may] return a verdict . . . even though damages . . . [can] not be measured with exactness"; "just and reasonable estimate . . . based on relevant data"); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (uncertainty as to extent of damages distinguished from uncertainty as to fact of damage); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) ("damages are not rendered uncertain because they cannot be calculated with absolute exactness"). A theory of full compensation, too, warrants the award of multiple damages for victims of behavior that is also criminal. See note 89 *infra*. Finally, special precautions must be taken in the course of the litigation to assure that the defendant's assets, if they can be identified and found, will not be dissipated prior to judgment and execution. See note 217 *infra*.

forth.”<sup>60</sup> He did, however, want to “focus”<sup>61</sup> on the senator’s point about the infiltration of the legitimate economy.<sup>62</sup> Senator Hruska then indicated that S. 1622 had been drafted to “synthesize” the earlier legislation on which he and Congressman Poff had worked and on which the ABA had favorably commented.<sup>63</sup> The bill, he said,<sup>64</sup> attacked “the economic power” of organized crime “on two fronts—criminal and civil,” but that the “criminal provision . . . [was] intended primarily as an adjunct to the civil provision,” which he “consider[ed]. . . the more important feature” of the bill.<sup>65</sup> As introduced, S. 1623 in fact included express provisions for private equitable relief and treble damages.<sup>66</sup>

60 115 CONG. REC. 6993 (1969).

61 *Id.* Senator Hruska’s remarks, therefore, are illustrative, not exhaustive, of the purposes of the bill. *See* *United States v. Turkette*, 452 U.S. 576, 591 (1981) (negative inference impermissible).

62 Senator Hruska noted:

Not only will organized crime bring to a business venture all the techniques of violence and intimidation which it used in its illegal business, but it is also a foregone conclusion that those individuals who have made a career of cheating and stealing will continue to do so in their new roles. The consumer public will suffer from inflated prices, shoddy goods, and outright frauds.

In short, this entire matter of racketeer infiltration of legitimate business inevitably creates unfair competition. It is a situation made to order for the application of the Federal antitrust powers that have been in existence for many years.

115 CONG. REC. 6993 (1969). Here, too, Senator Hruska expresses a concern beyond those competitively injured.

63 *Id.* at 6993. The ABA Report was inserted in the Congressional Record. *Id.* at 6994. Senator Hruska explicitly said the redrafting to place the bills outside of the antitrust statutes had been undertaken at the ABA’s suggestion. *Id.*

64 *Id.*

65 *Id.* at 6993-94. Senator Hruska observed:

[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill. . . . I believe that the time has arrived for innovation in the organized crime fight. The bill is innovative in the sense that it vitalizes procedures which have been tried and proved in the antitrust field and applies them into the organized crime field where they have been seldom used before. Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great. For these reasons the bill is worthy of careful consideration.

*Id.* at 6993. Here, too, Senator Hruska manifested an intent to go beyond antitrust precedent.

66 *See id.* at 6995-96. Note, however, that its “criminal activity” definition did not at this time include mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), the interstate theft-fraud provisions (18 U.S.C. §§ 659, 2314-2315), or securities fraud. Only bankruptcy fraud was included. The express extension of RICO to other forms of fraud and the adoption of the liberal construction clause came later. The American Bar Association testified in support of S. 1623. *Senate Hearings, supra* note 28, at 268 (testimony of Rufus King) (“I . . . report that the American Bar Association favors the measures.”).

### E. *The Introduction of S. 1861*

On April 18, 1969, Senators McClellan and Hruska introduced S. 1861, the Corrupt Organizations Act.<sup>67</sup> Senator McClellan indicated that it was "in part a product of the testimony developed in four days of hearings on S. 30."<sup>68</sup> He also indicated that Congressman Poff had "been in contact with . . . [him] in reference to [the] bill."<sup>69</sup> As introduced, S. 1861 did not, however, expressly include provisions for private equitable relief or treble damages.<sup>70</sup> Its provisions only provided expressly for criminal sanctions and equitable relief sought in government suits.<sup>71</sup> Senator McClellan noted that S.

67 *Basic Concepts*, *supra* note 3, at 1017. As the focus of the bill was not limited to the investment of illegal funds, its title differed from that of S. 1623.

68 115 CONG. REC. 9567 (1969).

69 *Id.* Congressman Poff's status as a major sponsor of the legislation, therefore, continues to be clear. *See* note 50 *supra*.

70 Senator McClellan later indicated that this was not because of opposition to the concepts, but merely because "[d]etailed consideration was not given [at the time] to carrying the antitrust parallel out." 117 CONG. REC. 46,386 (1971).

71 It is likely, however, that a private cause of action would have been implied, as the bill contemplated not only "fine, imprisonment, criminal forfeiture, and civil divestiture dissolution [and] injunction" relief at the hand of the government, but also "other relief." STATEMENT OF FINDINGS AND STATEMENT OF POLICY OF S. 1861, 115 CONG. REC. 9568 (1969). *See* Cort v. Ash, 422 U.S. 66, 78 (1975). The findings of the bill, moreover, not only noted the wide scope of organized crime in the United States (the language parallels that which finally appeared before the entire bill as ultimately enacted), but that "innocent investors" were "harm[ed]." 115 CONG. REC. at 9568. That these findings prefaced S. 1861, too, undermines the argument that the findings before the text of the final Act cannot be used to interpret Title IX. *See Basic Concepts*, *supra* note 3, at 1026 n.91. *See also* note 28 *supra*. In addition, the legislation was termed "remedial," and its "liberal construction" was mandated. 115 CONG. REC. at 9571. Finally, nowhere in his remarks did Senator McClellan indicate that the *express* provision for suits by the government was designed to *exclude* private suits. *Compare* Passenger Corp. v. Passengers Ass'n, 414 U.S. 453, 458 (1974) (*expressio unius est exclusio alterius* plus unequivocal legislative history held to preclude not-expressed right), *with* Wyandotte Co. v. United States, 389 U.S. 191, 200 (1967) (specific not exclusive). The maxim is, in short, "by no means of universal conclusive application." H. BROOM, LEGAL MAXIMS 668 (7th Am. ed. 1874). The question always is "the intention of the legislature." *Id.* at 664; SEC v. Joiner Corp., 320 U.S. 344, 350-51 (1943) (*Ejusdem generis* and *expressio unius est exclusio alterius* gives way to intent and policy); United States v. Barnes, 222 U.S. 513, 519 (1912) ("a rule of construction, not of substantive law"). It depends on whether the intent is "general" or "restrictive." H. BROOM, LEGAL MAXIMS 668 (7th Am. ed. 1874). Usually, where a remedy is "cumulative" of others, the maxim is inapplicable. *Id.* Obviously, the proposed bill was "cumulative," as its application depended on the commission of "racketeering activity" already made criminal by independent federal and state offenses. The intent to add to existing criminal and civil remedies on the federal and state level is also manifest; it later became explicit in The Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 947 ("Nothing in . . . [RICO] shall supersede any provision of Federal, State or other law imposing criminal penalties or affording civil remedies."). Unless an overlap existed, it would not have been necessary to speak of an intent not "to supersede." Note, too, that the scope of the state offenses was wide: "any act involving . . . danger of violence to life, limb or property . . .

1861 drew "heavily upon the remedies developed in the field of anti-trust," but he added that as sponsor of the bill he had "no intention . . . of importing the great complexity of antitrust law enforcement into" the enforcement of S. 1861.<sup>72</sup> Nor did he intend to "limit the remedies available to those which have already been established."<sup>73</sup> He wanted, he said, to retain the "ability of our chancery courts to formulate a remedy to fit the wrong."<sup>74</sup> In addition, Senator McClellan expressed his hope that "provisions [of S. 1861] might well be incorporated by way of an amendment into S. 30 itself."<sup>75</sup>

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punishable by imprisonment for more than one year." 115 CONG. REC. at 9560. However, mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and securities fraud were not yet among its "racketeering acts." These statutes were only added later. *See generally* Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 50 U.S.L.W. 4457 (U.S. May 3, 1982) (implied cause of action for fraud found under Commodity Futures Exchange Act).

72 115 CONG. REC. 9567 (1969). Senator McClellan commented:

[S. 1861]. . . draws heavily upon the remedies developed in the field of antitrust. Nevertheless, Mr. President, I believe it necessary to make several clarifying remarks on the antitrust remedies this bill provides. The first is that the equitable remedies used in the field of antitrust always existed. Because the remedies have been effective in removing and preventing harmful behavior in the business segment of our economy, they show great promise as tools for attacking organized crime. There is, however, no intention here of importing the great complexity of antitrust law enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.

The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill. Nor do I mean to limit the remedies available to those which have already been established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice. This ability is not hindered by the bill.

*Id.* Under S. 1861, as now under RICO, federal district courts were given "jurisdiction to prevent and restrain *violations of Section 1962*" (emphasis added). Since the operative language on which government injunctions were premised is identical to the operative language on which private civil suits are now based, 18 U.S.C. § 1964(c) ("injured in . . . business or property by reason of a *violation of Section 1962*") (emphasis added), it is appropriate to cite Senator McClellan's general comments on § 1964 on the need not to circumscribe private civil actions. *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 680 (N.D. Ind. 1982). The final statute blends both types of actions in a common section; they should receive, therefore, a similar construction. As Mr. Justice Cardozo stated in *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 378 (1933): "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *See Perrine v. Chesapeake & Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.) ("an interpretation of [a] statute which . . . would render different sections inconsistent with each other cannot be the true one.").

73 115 CONG. REC. 9567 (1969).

74 *Id.*

75 *Id.* S. 1861, in fact, became Title IX of the Organized Crime Control Act. S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969), *reprinted in* 1970 U.S. CODE CONG. & AD. NEWS 4010.



The Department of Justice commented on S. 1861 on August 11, 1969.<sup>76</sup> A central concern of the Department was the breadth of predicate offenses.<sup>77</sup> It suggested that they were "too broad and would result in a large number of unintended applications, as well as tending toward a complete federalization of criminal justice."<sup>78</sup> A

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Senator McClellan also said that he saw in S. 1861 "hope" of removing the "profit potential" from certain kinds of crime, 115 CONG. REC. 9567 (1969), and he observed that the bill was "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." *Id.* at 9568. The purpose of the bill was, however, explicitly said to be "remedial rather than penal." *Id.* Compare the action of Judge Ross Sterling dismissing a RICO count in a criminal indictment, *NEWSWEEK*, Aug. 20, 1979, at 82 ("RICO was designed to keep racketeers out of business not to make racketeers out of businessmen"), which was reversed in *United States v. Uni Oil*, 646 F.2d 946, 953 (5th Cir. 1981) ("primarily enacted to combat organized crime, [but] nothing in [its legislative] history, or the language of the statute itself, expressly limits RICO's use to members of organized crime"), with *United States v. Aleman*, 609 F.2d 298, 306 (7th Cir. 1979) ("If a defendant qualifies as a racketeer able to accomplish the same illegal goals as organized crime he qualifies for the punishment.") and *Basic Concepts*, *supra* note 3, at 1029 n.91 ("There is nothing in RICO that says that if legitimate businessmen act like racketeers, they should not be treated like racketeers.").

76 *Senate Hearings*, *supra* note 28, at 404-07. S. 1861 recast S. 1623. "Criminal activity" was termed "racketeering activity." The scope of such activity was expanded to include a wide range of state offenses as well as certain federal offenses, including the interstate theft-fraud offenses (18 U.S.C. § 659 (theft from interstate shipments) and §§ 2314-2315 (transportation of stolen property)). "Person" was broadly defined ("any individual or entity capable of holding property"). The concept of "enterprise" was introduced; it was also broadly defined as "any individual, corporation, legal entity or other group of individuals." Similarly, "pattern of racketeering activity" was introduced; it was defined in the legislative history. 115 CONG. REC. 9567 (1969).

77 *Senate Hearings*, *supra* note 28, at 404-07. Hence, it is not correct to suggest that the impact of RICO on federal-state relations was not brought to Congress' attention. Congress, of course, after making certain modifications, went forward with the legislation. *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) ("existing law, state and federal, . . . not adequate to address the problem, which was of national dimensions").

78 *Senate Hearings*, *supra* note 28, at 404-07. It was because "state and federal [law] was not adequate" that Congress acted. *United States v. Turkette*, 452 U.S. 576, 587 (1981). It hardly sits well now to attempt to circumscribe RICO on a theory that state law is adequate. Compare *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981) (RICO not alternative or cumulative to other remedies), with *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 941, 947 (1970) (RICO "shall [not] supersede . . . state . . . civil remedies"). Unless RICO was "alternative" or "cumulative" no reason existed to be concerned about its preemption of other federal or state law. While the Department of Justice offered amendments, it also supported S. 1861, noting that its "principal utility . . . [might] well be found . . . in its civil remedies . . . with . . . [their] lesser standard of proof." *Senate Hearings*, *supra* note 28, at 406-07. Not all of the witnesses who appeared in the senate hearings, however, endorsed S. 1861. The American Civil Liberties Union objected to its breadth, commenting that it would be "applicable in areas far removed from that which we traditionally define as organized crime." *Senate Hearings*, *supra* note 28, at 475. It suggested that the bill be redrafted to "confine its reach to [the] limited aim" of restricting illegitimate investment. *Id.* Accordingly, those who now argue in court that an "organized crime" or "racketeering" type limitation be read into RICO are merely offering in a judicial forum an

more circumscribed definition of the predicate offenses was suggested, which would be narrower, but still "broad enough to include most state statutes customarily invoked against organized crime,"<sup>79</sup> a suggestion that was, at least in part, adopted by the Committee.<sup>80</sup>

#### F. *The Reporting of the Organized Crime Control Act In the Senate*

On December 18, 1969, Senator McClellan reported for the Judiciary Committee S. 30, the Organized Crime Control Act, amended to incorporate S. 1861 as Title IX.<sup>81</sup> The Committee Report described Title IX in language that paralleled the Senator's March 11th speech, giving special attention to the infiltration of businesses and the taking over of unions.<sup>82</sup> The report noted, for example, that the stock exchange had been subjected to thefts, busi-

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amendment that elected representatives declined to adopt in the legislative forum. On the "civil liberties" implications of this "civil liberties" objection, see text accompanying note 113 *infra*. The Supreme Court in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978) reversed the Sixth Circuit's effort to read a "racketeering" limitation into the text of 18 U.S.C. § 1951. It noted the absence of the limitation in the text of the statute and the vagueness problems that reading an undefined concept into the statute would pose "impel[led] the conclusion that Congress intended to make criminal *all* conduct within the reach of the statutory language." 435 U.S. at 380 (emphasis added).

79 *Senate Hearings*, *supra* note 28, at 405.

80 *See* 18 U.S.C. § 1961 (1) (1976 & Supp. 1980). The generic incorporation of state offenses was eliminated and a specific list of state offenses was included. The list of federal offenses, however, was expanded, principally by including fraud type offenses. *See* text accompanying notes 90-95 *infra*.

81 S. REP. NO. 617, 91st Cong., 1st Sess. 83 (1969). The Organized Crime Control Act in general and RICO in particular have been criticized as poorly drafted and ill-considered. *See* note 120 *infra*. On reporting the bill, Senator McClellan observed:

[This debate on the Organized Crime Control Act] is the culmination of a year of detailed study, hearings, and consultations, and a result of one of the most thoroughly gratifying bipartisan efforts in which I have participated since coming to the Senate.

116 CONG. REC. 585 (1970). The Senator then listed the groups whose opinions had been consulted and whose ideas and suggestions had been embodied in the bill, including:

[T]he President's Crime Commission, [T]he National Commission on Reform of Federal Criminal Laws, [T]he American Bar Association Project on Minimum Standards of Criminal Justice, [T]he Model Penal Code of the American Law Institute, [T]he Model Sentencing Act [of the] . . . National Council on Crime and Delinquency, [T]he Association of Federal Investigators, [T]he New York County Lawyers Association, [T]he American Civil Liberties Union, . . . [T]he National Association of Counties and [T]he New York State Bar Association. . . . The National Chamber of Commerce and the International Association of Chiefs of Police.

*Id.* The Supreme Court termed the Act in *Iannelli v. United States*, 420 U.S. 770, 789 (1975), a "carefully crafted piece of legislation."

82 S. REP. NO. 617, 91st Cong., 1st Sess. 76-78 (1969). The report quoted with approval the findings of a special committee of the American Bar Association which recognized "the depth of the penetration of the forces of organized crime into the fabric of our society and our commercial life." *Id.* at 76.

nesses had been liquidated by arsonists to collect insurance, bankruptcy fraud techniques had been employed, premium prices had been extracted from customers, and competitors had been eliminated.<sup>83</sup> Unions, the report continued, had been victimized by theft and used to extort, while profit had been gained by the manipulations of welfare and pension funds and insurance contracts.<sup>84</sup> Present laws were termed "inadequate to remove criminal influences from legitimate endeavors."<sup>85</sup> The Committee Report called for "[n]ew approaches that . . . [dealt] not only with individuals, but also with the economic base through which those individuals constitute[d] a serious threat to the economic well-being of the Nation,"<sup>86</sup> including "a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from *all* illicit activity."<sup>87</sup> While "it is necessary," the Report noted, "to free the channels of commerce from predatory activities, . . . there [was] no intent to visit punishment on any individual: the purpose [was] civil. Punishment as such [was] limited to the criminal remedies . . . ."<sup>88</sup> Ti-

83 *Id.* at 77. Here it is also clear that *direct* victims are included within the class to be protected by RICO.

84 *Id.* at 78.

85 *Id.*

86 *Id.* at 79. The committee report repeated Senator McClellan's earlier statement. *See* note 75 *supra*. Title IX, the report noted, was "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." S. REP. NO. 617, 91st Cong., 1st Sess. 82. The report also quoted the Department of Justice's comments on the value of the civil aspects of Title IX. The Department of Justice noted that Title IX's civil provisions would allow the government to intervene in situations which were "not susceptible to proof of a criminal violation." The Department also cited the "lesser standard of proof" required, the "greater potential than penal sanctions for actually removing the criminal figure from [the] organization," flexibility, and the fact that the civil remedies could be "effectively monitored by the court" as redeeming qualities of Title IX's civil provisions. *Id.*

87 S. REP. NO. 617, 91st Cong., 1st Sess. 79 (1969). The report also commented on 18 U.S.C. § 1964, noting that it "contain[ed] broad remedial provisions for reform. . . . Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons." *Id.* at 160. The report also noted that § 1964 was "remedial, not punitive." *Id.* This technical commentary that includes *no* words of limitation, but in fact expresses an intent *not* to limit the scope of § 1964, is of great weight in interpreting the section. *See* *S & E Contractors v. United States*, 406 U.S. 1, 13 n.9 (1972) ("In construing laws we have been extremely wary of testimony before committee hearings and of debates on the floor of Congress save for precise analysis of statutory phrases by sponsors of the proposed law."). It goes without saying that the Committee on the Judiciary's Report submitted by Senator McClellan is an example of such precise analysis of § 1964.

88 S. REP. NO. 617, 91st Cong., 1st Sess. 81 (1969). The Court in *United States v. Turkette*, 452 U.S. 576, 593 (1981) termed RICO "both preventive and remedial." Traditionally, of course, where a statute is both remedial and penal, there is no valid objection to giving it a liberal construction. *See, e.g., Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91

tle IX, "it [was] . . . emphasized, [was] remedial rather than penal."<sup>89</sup>

U.S. 29, 35 (1875) (statutory forfeiture of interest where usurious rate charged). Accordingly, the Criminal Justice Section of the American Bar Association's citation to *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954) for the proposition that when a statute carries civil and criminal sanctions strict construction must obtain, ABA, *supra* note 25, at 14 n.5, is misleading. The Section failed to note the traditional rule of *Farmers'* and those other cases prior to *American Broadcasting* that were inconsistent with the Court's sweeping dicta. *See, e.g.*, *SEC v. Joiner Corp.*, 320 U.S. 344, 350-51 (1943) (majority position of liberal construction of state Blue Sky laws having criminal and civil sanctions noted, but scope of "security" resolved by plain meaning rule; strict construction not adopted). Nor did it note that *American Broadcasting* is of questionable authority today on the additional ground that the Court declined to follow it in *Mourning v. Family Publications Serv. Inc.*, 411 U.S. 356, 374-75 (1973) (plain meaning, not strict construction applied, even though statute imposed criminal and civil penalties). The Section's unfortunate lack of candor in its use of precedent is lamentable. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-23 (1975) ("directly adverse authority" should be brought to the attention of "the tribunal"). It undermines the ABA's current position on RICO. *See* notes 25 *supra* and 150 *infra*.

89 S. REP. NO. 617, 91st Cong., 1st Sess. 82 (1969). *See* note 25 *supra*. When Congress clearly classifies a remedy as not "penal," courts will not lightly reexamine the question. *United States v. Ward*, 448 U.S. 242, 248-51 (1980) (civil penalty classified as such for all purposes, including self-incrimination). In addition, that classification overrides federal common law that may have pointed in the other direction. *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 204, 312-15 (1981) (statute controls over federal common law). Accordingly, RICO has been appropriately classified by the courts as "remedial," not penal. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 681, 683-85 (N.D. Ind. 1982) (RICO remedial for survivorship and statute of limitations in private treble damage action). These holdings reflect, too, the judgment of Congress since 1970. In reporting out S. 1630, the criminal code bill, the Senate Judiciary Committee described RICO in these terms:

[I]t is hoped the knowledge that a person will be subject to substantial civil damages will serve as an effective deterrent to the commission of . . . [a RICO] offense. [However,] [t]he purpose of the [treble damage civil recovery]. . . is remedial, not penal; adequate relief or compensation is the main goal.

S. REP. NO. 307, 97th Cong., 1st Sess. 1273 (1981). Here, the Committee cited *United States v. Bornstein*, 423 U.S. 303, 313-16 (1976), which articulated a theory of multiple compensation recovery under the False Claims Act. 31 U.S.C. §§ 231-233, 235 (1976). *See also* *Brady v. Daly*, 175 U.S. 148, 154-58 (1899) ("certain sum" damages not "penal" or "penalty or forfeiture provision," theory of "full compensation" adopted; "remedial" provision; discussion of analogous multiple damage statutes as "remedial"); *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 125-26 (1927) (exemplary damages not penal for rule that penal provision not enforced by another jurisdiction); *Sicolo v. Prudential Savings Bank of Brooklyn*, 5 N.Y.2d 254, 157 N.E.2d 284, 184 N.Y.S.2d 100 (1959) (treble damage not penalty or forfeiture for immunity statute). *See* *United States v. Kenny*, 462 F.2d 1205 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972); *Manning Engineering Inc. v. Hudson County Park Comm'n*, 74 N.J. 113, 376 A.2d 1194 (1977).

It has been suggested that the opinion in *Cappetto* is "unable to withstand careful scrutiny." *United States v. Altese*, 542 F.2d 104, 110 (2d Cir. 1976) (Van Graafeiland, J., dissenting). In making his criticism of *Cappetto*, Judge Van Graafeiland, however, relied on a student work, Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for Criminal Activity*, 124 U. PA. L. REV. 192, 202-03 (1975), which argued that it was improper for *Cappetto*, 502 F.2d at 1358, to rely on a portion of the senate report that discussed Title

The text of S. 30 as reported expanded its statement of findings and purpose, a blend of S. 30 and S. 1861, to note, *inter alia*, "fraud" as one of the activities of "organized crime";<sup>90</sup> the original findings of S. 1861 had included "harm[ing] innocent investors and competing organizations" without relating the harm to "fraud."<sup>91</sup> In addition, the list of "racketeering activities" in Title IX was narrowed as the Department of Justice suggested, but it was also expanded to include mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343) and securities fraud. These fraud offenses complemented bankruptcy fraud, which was in S. 1623, and theft from interstate shipments (18 U.S.C. § 659) and transportation of property taken by theft or fraud (18 U.S.C. §§ 2314-2315), which were in S. 1861. Offenses relating to union corruption included embezzlement (18 U.S.C. § 664; 29 U.S.C. § 501(c)), corrupt welfare fund payments (18 U.S.C. § 1954), and the Taft-Hartley Act (29 U.S.C. § 186). Government corruption was attacked, *inter alia*, by the state offenses<sup>92</sup> of bribery and extortion and the federal offenses, not only of fraud, but also of bribery (18 U.S.C. § 201), obstruction of justice (18 U.S.C. § 1510), and extortion (18 U.S.C. § 1951).<sup>93</sup> While the Judiciary Committee favorably

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VII, rather than Title IX, of the Organized Crime Control Act. In fact, it was proper, because 18 U.S.C. § 1955, which was enacted in Title VII, was incorporated into Title IX as a predicate offense. *Cappello* was, moreover, not only correct when decided, but it has since been vindicated in *United States v. Turkette*, 452 U.S. 576 (1981). Compare the remarks of Senator Hruska on Title IX, found in 116 CONG. REC. 602 (1970), in which he recognized the relation between Title IX's "antitrust provision" and a "concentrated effort to strangle the narcotics traffic . . . [and] raid . . . the cartels of gambling." It is the student's work and not the opinion in *Cappello* that is "unable to withstand careful scrutiny." Professor Bradley fell into the same error as the student. Bradley, *supra* note 25, at 851-58.

90 Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 921-22 (1970).

91 See 115 CONG. REC. 9568 (1969).

92 Title IX also now included a section making it explicit that it was intended to *supplement*, not *supplant*, existing criminal and civil remedies. See Organized Crime Control Act of 1970, § 904(b), Pub. L. No. 91-452, 84 Stat. 947 (1970). In *United States v. Turkette*, 452 U.S. 576, 586 n.9 (1981), the Supreme Court responded to objections that RICO invaded local law enforcement by noting that it "imposes no restriction upon the criminal justice systems of the states. . . . That some of . . . [its predicate] crimes may also constitute . . . acts of racketeering under RICO is no restriction on the separate administration of criminal justice by the States." Similarly, that an action for common law fraud could be brought in a state court ought not be a ground for restricting the scope of civil RICO out of a professed concern for federalism. Accordingly, cases like *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981) are wrongly decided.

93 RICO's attacks on governmental corruption have provoked controversy, which has centered around extending the concept "enterprise" to governmental units. Until *United States v. Thompson*, 669 F.2d 1143 (6th Cir.), *reversed en banc*, 685 F.2d 993 (6th Cir. 1982) (plain meaning of "enterprise" includes governmental units), the courts of appeal were unanimous in holding that governmental units could be "enterprises." *United States v. Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981); *United States v. Grant*, 622 F.2d 308, 313 (8th Cir. 1980);

reported S. 30, Senators Philip A. Hart and Edward M. Kennedy

United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980) (rejecting United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976)); United States v. Bacheler, 611 F.2d 443, 450 (3d Cir. 1979); United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); United States v. Frumento, 563 F.2d 1083, 1089-92 (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. Ohlson, 552 F.2d 1347, 1348 (9th Cir. 1977) (sub silentio). Dissenting voices, however, were heard. *Angelilli*, 660 F.2d at 43 (Friendly, J., concurring); *Grzywacz*, 603 F.2d at 690 (Swygert, J., dissenting); Bradley, *supra* note 25, at 858-61; Tarlow, *supra* note 25, at 205-08. *But see* United States v. Lee Staller Enters., 652 F.2d 1313, 1316-19, 1322 (7th Cir. 1981) (en banc approval of *Grzywacz*) (Swygert, J., recanting dissent in light of *Turkette*), *cert. denied*, 102 S. Ct. 636 (1981). Their argument was that the absence of explicit legislative history and the assumed inapplicability of the civil remedies to governmental units precluded governmental units from being "enterprises." *But see* United States v. Turkette, 452 U.S. 576, 585 (1981) ("Even if one or more of the civil remedies might be inapplicable to a particular illegitimate enterprise, this fact would not serve to limit the enterprise concept."); *Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction that might arise."). In addition, the concerns expressed about the inapplicability of the civil remedies were rooted in constitutional considerations. *See* National League of Cities v. Usery, 426 U.S. 833, 842-52 (1976) (commerce clause does not authorize Congress to force upon states essential choices regarding integral governmental functions); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-08 (1860) (Congress cannot force state to return fugitive under Art. IV, § 2). *But see* *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) (Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201 (1976) upheld under commerce clause against tenth amendment considerations). Detailed comment on the absence of legislative history is unnecessary. "[I]t is only the words of the bill that have presidential approval." *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). "The language of the statute . . . [i]s the most reliable evidence of its intent." *Turkette*, 453 U.S. at 593. The application of the plain meaning rule ought to resolve the governmental-unit-as-enterprise issue, and it has. *See* note 150 *infra*. The other concerns, too, seem misplaced. Antitrust statutes apply to municipalities and state-owned corporations. *Community Commun. Co. v. City of Boulder*, 102 S. Ct. 835 (1982); *City of LaFayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). There, the Court has recognized "that remedies appropriate to redress violations by private corporations [might not] . . . be equally appropriate for municipalities." *LaFayette*, 435 U.S. at 401. Moreover, civil remedies, including injunctions, may be directed at governmental units, at least where constitutional rights are at stake. *See, e.g.*; *Monelli v. Department of Social Services*, 436 U.S. 658, 690-91 (1978) (pregnant employee leave policy). Those governmental units may also include state legislatures, the seat of state sovereignty in a democratic society. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962) (reapportionment of legislature). Here, corruption is at stake. While the Congress did not explicitly premise the corruption aspects of the Organized Crime Control Act on the guaranty clause (Art. 10, § 4: "The United States shall guarantee to every state . . . a Republican Form of Government."), it followed the "tested and proven" path, as "there . . . [was] a lack of precedent . . . to indicate whether legislation . . . [could] be predicated upon it," *House Hearings, supra* note 25, at 676 (letter of Assistant Attorney General Wilson), Congress may well have had that option. STUDY DRAFT OF NEW FEDERAL CRIMINAL CODE, THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW 133 (1970) ("Broad federal jurisdiction in . . . [the area of local and state corruption] might be rested on . . . [the clause].") The guaranty clause could be construed as a power to preserve these states from "any intrusion of nonpolitical pecuniary influences into government." *See generally The Constitution of the United States of America: Analysis and Interpretation*, S. DOC. NO. 82, 92d Cong., 2d Sess. 851-52 (1973) ("[T]he

filed individual views expressing concern that "the reach of [the] . . . bill . . . [went] beyond organized criminal activity."<sup>94</sup> Reflecting the view of the American Civil Liberties Union, they thought that if it were amended "to restrict its scope solely to organized criminal activity," it would contribute "important and useful means of eradicating organized crime."<sup>95</sup>

### G. *Senate Debate on the Organized Crime Control Act*

On January 20, 1970, Senator McClellan called up S. 30, as reported.<sup>96</sup> Noting that the bill "incorporated," *inter alia*, the recommendations of the ABA, he reviewed for the Senate, as he had done on March 11, the scope and impact of organized crime in the United States<sup>97</sup> and discussed the various titles of the bill, concentrating on Title IX, now entitled "Racketeer Influenced and Corrupt Organizations (RICO)," on the infiltration of businesses and unions, and specifically noting such activities as bankruptcy fraud, the theft of securities and their fraudulent pledging, and the counterfeiting of hit records.<sup>98</sup> The legitimate endeavors in which organized crime had been active were noted; the list included "accounting, banking, charities, construction, insurance, real estate, and stock and bonds."<sup>99</sup>

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object of the clause seems clearly to have been more than an authorization . . . to protect . . . against foreign invasion or internal insurrection. . . . [T]he authority contained within . . . the clause has been largely unexplored."); W. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* (1972). Questions under it are matters for "Congress to decide." *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849). *Cf.* *J.E. Riley Co. v. Commissioner*, 311 U.S. 55, 59 (1940) (affirmed even if wrong reason given below). No court ought now hold that it is beyond the power of Congress directly to attack corruption wherever it finds it, for where the government itself is tainted, no other rights may be said to exist.

94 S. REP. NO. 617, 91st Cong., 1st Sess. 215 (1969).

95 *Id.* Accordingly, Congress' intent to protect more than legitimate business from infiltration and unlawful competition by "organized crime" or "racketeers" in the popular sense seems clear, not only from the words of the statute, but also the comments of senators who did *not* fully support the bill. Cases like *Barr v. WUI/TAS Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975) (failure to allege "organized crime" fatal to civil suit) have been, therefore, wrongly decided. *See* note 130 *infra*. Note, too, that this expansion of the list of predicate offenses took place into the teeth of the objections of the Department of Justice that the statute was "too broad" and would tend "to federalize" matters of state concern. *See* text accompanying notes 76-80 *supra*. This concern was responded to by the addition of § 904(b). *See* note 92 *supra*.

96 116 CONG. REC. 585 (1970).

97 *Id.* The use of the March 11 speech to understand the intended scope of Title IX, not then drafted, is therefore appropriate.

98 *Id.* at 591-92. Here, too, the class to be protected by the bill is hardly limited to competitors; direct victims are clearly contemplated. Senator McClellan also included in the Congressional Record a list of businesses and industries corrupted; it included accounting, banking, insurance, and stocks and bonds. *Id.* at 92.

99 *Id.* *See* note 56 *supra*.

Senator Hruska also spoke on the importance of Title IX, calling it "rather novel" and "a most promising and ingenious proposal"<sup>100</sup> and repeating that its "principal value . . . may well be found to exist in its civil provisions."<sup>101</sup> Senator Robert C. Byrd, too, spoke in favor of Title IX, noting how "arson" had been used by organized crime to put pressure on the A & P to purchase mob-manufactured detergent.<sup>102</sup> S. 30 was passed by the Senate, almost unanimously, on January 23, 1970.<sup>103</sup>

#### H. *House Consideration of the Organized Crime Control Act*

In the House, S. 30 was referred to the Committee on the Judiciary on January 26, 1970.<sup>104</sup> On March 10, 1970, Congressman Poff<sup>105</sup> took the House floor to comment on it, and in particular on Title IX. He brought to the attention of the floor a "thoughtful and accurate" analysis of S. 30 prepared by the United States Chamber of Commerce, which included "several specific hypothetical examples, which aid[ed] the reader in understanding concretely the provisions of S. 30."<sup>106</sup> The Chamber of Commerce report included a

100 116 CONG. REC. at 602.

101 *Id.* Senator Hruska described Title IX as prohibiting "*any person* employed by or associated with [an enterprise engaged in interstate commerce]. . . from conducting the enterprise's affairs by a pattern of racketeering activity." *Id.* (emphasis added). Here, too, note the absence of words of limitation. Not all senators, however, shared Senator Hruska's support for Title IX. Senator Stephen M. Young, reflecting the ACLU position, objected that the bill's provisions "do not restrict themselves solely to organized criminal activities." *Id.* at 852. The ACLU statement, which Senator Young inserted in the Congressional Record, also objected to the possible scope of Title IX as it incorporated "bankruptcy fraud" and "mail fraud." *Id.* The statement was also the subject of testimony in the House hearings, *House Hearings, supra* note 25, at 490, and was inserted in the record of the committee. *Id.* at 499.

102 116 CONG. REC. at 607. This illustration, also noted by Senator McClellan, *id.* at 592, brings out the incongruity of the "competitive" injury limitation. It is, of course, clear that other detergent companies ought to be able to sue the mob-dominated company for the injuries to their "businesses." But what of the "property" injuries to A & P and its insurance company? Other food stores—the competitors of A & P—are in fact *helped* by the arson. A & P and its insurance company are injured. Should RICO relief be denied to them?

103 The vote was 73 to 1. 116 CONG. REC. 972 (1970). Subsequently, twenty-two additional senators, not voting on final passage, announced that if present they would have voted for the bill. 116 CONG. REC. 25,192 (1970).

104 116 CONG. REC. 1103 (1970).

105 In light of Congressman Poff's relation with Senators McClellan and Hruska, *see* notes 50 and 69 *supra*, it is appropriate to consider him one of RICO's sponsors. The Supreme Court in *United States v. Turkette*, 452 U.S. 576, 593 (1981) recognized his status, terming him "a manager of the bill." As such, his comments are entitled to "weight." *Lewis v. United States*, 445 U.S. 55, 63 (1980). When a sponsor inserts a memorandum in the Congressional Record under these conditions, it becomes a "weighty gloss" on the statute. *Galvan v. Press*, 347 U.S. 522, 527 (1954).

106 116 CONG. REC. 6708 (1970).



detailed analysis of how the Senate bill would operate to attack a Mafia boss's takeover of a juke box corporation.<sup>107</sup> Congressman Poff also inserted in the House hearings a copy of the ABA Report.<sup>108</sup>

The House hearings began on May 20, 1970. The Association of the Bar of the City of New York appeared on June 10, 1970, represented by Sheldon H. Elsen.<sup>109</sup> The Association's written statement suggested that Title IX went much too far,<sup>110</sup> as its reach extended beyond organized crime. In particular, the Association criticized the scope of "racketeering activity."<sup>111</sup> The point was repeated in oral

107 The report commented:

A Mafia boss accepts all the shares in a juke box corporation in payment for an illegal gambling debt. Then he expands the number of cafes in which his machines are placed by having the cafe owners threatened and beaten. Soon, he dominates the music machine business in his city, has ruined his competitors, and raises the share of the machine income which he demands that the cafes pay him.

Under present law, the government may be able to obtain a criminal conviction, imprisonment and fine.

The trouble is that while the Mafia boss serves his prison term, other members of the syndicate run the business for him, and upon his release he resumes his brutal and monopolistic methods.

Thus, in the illustration used above, a criminal prosecution (under Title IX as passed in the Senate) of the Mafia boss could also result in forfeiture to the government of his interest in the business, or a civil proceeding that could result in an order that he divest himself of the business and refrain from re-entering that line directly or indirectly. In either case, the court could supervise the sale of the business to see that it wound up in clean hands. A legitimate industry could be returned to lawful operation in a free enterprise system.

*Id.* at 6709-10. Here, too, it is appropriate to ask who should be able to sue. Only the other juke box companies? Why not the company taken over? Why not the cafe owners? The expansion of Title IX to include treble damage relief in the House, *see* text accompanying notes 114-15 *infra*, must be understood to have contemplated relief for *all* victims.

108 *House Hearings, supra* note 25, at 147-49 (letter from Frederick M. Rowe, Chairman, Section of Antitrust Law, American Bar Association, to Congressman Poff, containing American Bar Association—Report No. 2 of the Section of Antitrust Law).

109 *Id.* at 369.

110 *Id.* at 294 ("sweep far beyond the field of organized crime").

111 *Id.* at 329. The report stated:

[T]he crimes listed as "racketeering activity" include several categories which are plainly beyond the intention of the Senate Committee, as expressed in the Report, and which should not, in our view, be subjected to the severe penalties of Title IX. The Senate Report states: "'Racketeering activity' is defined in terms of specific State and Federal criminal statutes now characteristically violated by members of organized crime." Senate Report 34. This statement is not supported, however, by the language of the statute, which includes as racketeering activity such things as theft from an interstate shipment regardless of the value of the property stolen (18 U.S.C. § 659), unlawful use of a stolen telephone credit card (18 U.S.C. § 1343), the "mom and pop" variety of illegal gambling business which, as we point out above, would be covered by Title VIII (proposed 18 U.S.C. § 1955), [and] any securities fraud case . . . .

testimony.<sup>112</sup> It provoked a detailed response from Senator McClellan on the Senate floor, the thrust of which was that the statute may well have been drafted in response to organized crime, but that as a legislature, Congress had a duty to enact comprehensive programs that need not be so circumscribed. Accordingly, it was not a valid objection to point out that the bill's scope was not limited to the problem that gave rise to it. In addition, he made a telling rejoinder to the ACLU's complaints about the scope of the bill beyond organized crime. There ought not be, he said, a double standard of civil liberties. Organized crime members, too, had rights, and if the bill was not objectionable as applied to them, it was not objectionable applied beyond them.<sup>113</sup>

*Id.* (citations omitted).

112 *Id.* at 370. It is not, therefore, merely written testimony "less likely to have been seen by or to have had impact on committee members." *Guessefeldt v. McGrath*, 342 U.S. 308, 317 (1952). Indeed, Congressman Celler, the Chairman of the House Judiciary Committee, engaged in this dialogue with Mr. Elsen about Title X of S. 30:

The CHAIRMAN: In other words, this section 10, title X, applies to all crimes?  
Mr. ELSEN. Yes.

The CHAIRMAN. It is not limited to so-called organized crime offenders?

Mr. ELSEN. That is right. The underlying, triggering offense is not by any means limited to organized crime cases.

*House Hearings*, *supra* note 25, at 371.

Subsequently, Chairman Celler had another dialogue with the Attorney General, who appeared and spoke in behalf of S. 30:

The CHAIRMAN: . . . I would like to turn to title X. . . . My question is this: Is this special sentencing provision limited to so-called "organized crime" offenders . . . ?

ATTORNEY GENERAL MITCHELL. It is not so limited, Mr. Chairman. . . .

The CHAIRMAN. Of course, S. 30 is called the "organized crime" bill. . . . Maybe we should call it something else. I think it probably gives a misapprehension.

*Id.* at 185. *See* *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982) (not limited to organized crime). The scope of S. 30 beyond "organized crime" was, therefore, well-known to the Judiciary Committee in the House. Its application to commercial fraud, too, was not inadvertant. *See House Hearings*, *supra* note 25, at 401 (Report of the New York County Lawyer Association) (Since "fraud in sale of securities" would include "underwriters" in rule 10(b)(5) litigation, Title IX was thought to go beyond "its stated objective.>"). The Association observed: "Fraud in the sale of securities is simply not synonymous with racketeering."

*Id.* Despite this testimony, Title IX was not only reported out, but the treble damage clause was *added*. Accordingly, those who seek to have the courts restrict the scope of the statute to curtail its application to fraud are refighting in the judicial forum a battle they lost in the legislative arena; they have sometimes won, where a court misreads the text and legislative history of RICO. *See, e.g., Harper v. New Japan Sec.*, 545 F. Supp. 1002 (D.C. Cal. 1982). *Harper* was wrongly decided. *See* note 134 *infra*.

113 Senator McClellan observed:

[T]he curious objection has been raised to S. 30 as a whole, and to several of its provisions in particular, that they are not somehow limited to organized crime itself . . . as if organized crime were a precise and operative legal concept, like murder,

While S. 30 was pending in the House, the ABA formally en-

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rape, or robbery. Actually, of course, it is a functional concept like white collar crime, serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances. The danger posed by organized crime-type offenses to our society has, of course, provided the occasion for our examination of the working of our system of criminal justice. But should it follow, as the [ACLU] and the New York City bar committee suggest, that any proposals for action stemming from that examination be limited to organized crime?

Mr. President, this line of analysis has a certain superficial plausibility, yet on closer examination we see that it is seriously defective in several regards. Initially, it confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination. For example, our examination of how organized crime figures have achieved immunity from legal accountability led us to examine the sentencing practices and powers of our Federal courts [ultimately dealt with in Title X]. There we found that now our Federal judges, unlike many State judges, have no statutory power to deal with organized crime leaders as habitual offenders and give them extended prison terms. Having noted the lack of habitual offender provisions by considering one class of cases, we obviously learned that it was lacking in other classes, too. Is there any good reason why we should not move to meet that need across the board?

In addition, the objection confuses the role of the Congress with the role of a court. Out of a proper sense of their limited lawmaking function, courts ought to confine their judgments to the facts of the cases before them. But the Congress in fulfilling its proper legislative role must examine not only individual instances, but whole problems. In that connection, it has a duty not to engage in piecemeal legislation. Whatever the limited occasion for the identification of a problem, the Congress has the duty of enacting a principled solution to the entire problem. Comprehensive solutions to identified problems must be translated into well integrated legislative programs.

116 CONG. REC. 18,913-14 (1970). Senator McClellan later observed:

Nevertheless, the city bar committee attacks title IX and the statement in the Senate Report—at 34—that the list of crimes the commission of which constitute one element of the prohibitions in title IX is a list of “specific State and Federal criminal statutes now characteristically violated by members of organized crime”—ABCNY at 41. The bar committee complains that the list is too inclusive, since it includes offenses which often are committed by persons not engaged in organized crime. The Senate report does not claim, however, that the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial exploitation, unlike some other offenses such as rape, and experience has shown that they commonly are committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit. It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.

*Id.* at 18,940. The point that S. 30's scope went beyond “organized crime” was also noted in the statement of Lawrence Speiser for the American Civil Liberties Union: “The offenses

dorsed it on July 15, 1970, although several amendments, including a private treble damage action, were suggested. Senator McClellan commented on the endorsement on the Senate floor, noting that the ABA's suggestion for the addition of treble damage relief was a "constructive contribution."<sup>114</sup> On July 23, 1970, Edward L. Wright, the President-elect of the ABA, testified before the House on S. 30, and presented to it the suggestion for the treble damage action amendment.<sup>115</sup>

On September 30, 1970, S. 30 was favorably reported from the House Judiciary Committee.<sup>116</sup> When the bill was brought up for

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included [in 'racketeering activity'] go well beyond those associated with racketeering." *House Hearings, supra* note 25, at 499. It is, of course, a familiar rule that remarks "made in the course of legislative debate or hearings other than by persons responsible for the preparation or the drafting of a bill are entitled to little weight. . . . This is especially so with regard to the statements of legislative opponents who '(i)n their zeal to defeat a bill . . . understandably tend to overstate its reach.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203-04 n.24 (1976) (citations omitted). Here, however, the point at issue was conceded to be correct, and it was defended as proper by the bill's principal sponsor.

114 Senator McClellan observed:

In recommending the passage of S. 30, the bar association also urged that the Congress give prompt consideration to seven specific amendments to the bill as it passed the Senate. In the main, I find these amendments generally acceptable. Indeed, they may be characterized as constructive contributions to the legislative process. For example, amendment No. 6 suggests that title IX of S. 30, dealing with racketeer-influenced and corrupt organizations, be amended to authorize private civil damage suits . . . .

116 CONG. REC. 25,190 (1970). If the treble damage amendment was to be "constructive," how could it be read to be more narrow than the equitable action already in the bill?

115 His prepared statement observed:

In the portion seeking to add a proposed Section 1964, "Civil Remedies," we would recommend an amendment to include the *additional* civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act. Section 4 provides as follows:

*Suits by persons injured; amount of recovery.*—Any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

*House Hearings, supra* note 25, at 543-44 (emphasis added). As underscored, President Wright's statement reflects a belief that private equitable suits were already contemplated by the bill.

116 H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970). The report commented on § 1964:

Subsection (a) contains broad provision to allow for reform of corrupted organizations. Although certain remedies are set out, the list is not meant to be exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provision for the rights of innocent persons.

Subsection (c) provides for the recovery of treble damages by any person injured in his business or property by reason of the violation of section 1962.

*Id.* at 57-58. Note here, as in the Senate, *see* note 87 *supra*, no words of limitation were in-

consideration, Judiciary Committee Chairman Emanuel Celler—without expressing any words of limitation—described Title IX as, *inter alia*, authorizing “treble damage suits on the part of private parties who are injured.”<sup>117</sup> During the debate, however, Congressman Abner J. Mikva, an opponent of the bill, objected, as he had in the Committee Report, to the reach of S. 30 beyond organized crime: “I ask my colleague from Virginia (Mr. Poff) this rhetorical question: where in the bill does one find a definition of organized crime?”<sup>118</sup> Congressman Poff responded that there was none, but that Congressman Mikva himself would probably have been among the first to object if the bill had been status-based legislation.<sup>119</sup> In addition,

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cluded to restrict either equitable relief *or* treble damage suits in any fashion. In fact, as in the Senate, the language is expressly *not* restrictive. Note, however, that Congressmen William F. Ryan, John Conyers, Jr., and Abner J. Mikva, like Senators Hart and Kennedy, objected to the bill as it was “a tool to be employed for all.” H. R. REP. NO. 1549, 91st Cong., 2d Sess. 187 (1970). It did not, they noted, “make [a] discrete segregation of mobsters.” *Id.* In addition, they noted that the treble damage action “provide[d] invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce.” *Id.* They also raised, quoting Chief Justice Burger, the “burden the courts face” in terms “of case loads.” *Id.* Their plea that Title IX “should not be adopted,” *id.* at 189, was not accepted. Similar fears expressed now in a judicial forum should similarly be found wanting. *See* note 172 *infra*.

117 116 CONG. REC. 35,196 (1970). Chairman Celler observed:

Title IX is designed to inhibit the infiltration of legitimate business by organized crime. In addition to creating new Federal offenses punishable by traditional criminal sanctions of a fine of not more than \$25,000 or a prison term up to 20 years, or both, title IX also creates civil remedies modeled on those found in the antitrust field. These include orders of divestment, prohibition against business activity and orders of dissolution or reorganization, and treble damage suits on the part of private parties who are injured. The title also authorizes forfeiture of any interest which has been attained in violation of the criminal provision.

*Id.*

118 *Id.* at 35,204. *See* note 113 *supra*.

119 Congressman Poff observed:

The gentleman inquired rhetorically as to why no effort was made to define organized crime in this bill. It is true that there is no organized crime definition in many parts of the bill. This is, in part, because it is probably impossible precisely and definitively to define organized crime. But if it were possible, I ask my friend, would he not be the first to object that in criminal law we establish procedures which would be applicable only to a certain type of defendant? Would he not be the first to object to such a system?

116 CONG. REC. 35,204 (1970). Congressman Poff had earlier described the classes of victims for whom Title IX was drafted, focusing on the infiltration of legitimate business by organized crime:

Whether the technique of infiltration is intimidation and violence or simply public purchase, the consequences of mob ownership of business concerns are always evil. Business competitors suffer unfair competition. Workers are victims of sweetheart labor contracts. And consumers are victims of inferior products and services, price fixing and most of the predatory practices of monopolies. Title IX mobilizes both

Congressman Mikva objected to the scope of "racketeering activity" on the ground of federalism, but his plea to narrow the scope of Title IX came to no avail.<sup>120</sup>

the criminal and civil mechanisms of the Sherman Act and other antitrust statutes against the barons of organized crime.

116 CONG. REC. 35,201 (1970). A "competitive" or "commercial" injury limitation would limit recovery to "business competitors." Ignored would be Congressman Poff's "workers" and "consumers." Accordingly, such a limitation can hardly be squared with the language of Title IX or the expressed intent of one of its principal sponsors.

Congressman Poff had earlier responded to the critics of the bill, who suggested it was ill-drafted or thought-out, when he observed that in his

experience, no single measure [had] received more thorough consideration by a legislative committee than this bill. On numerous occasions, it required lengthy discussions in order to arrive at a consensus or compromise . . . . Precedents as contained in numerous court decisions were reviewed and weighed—and every effort was made to produce a strong and effective tool with which to combat organized crime—and at the same time deal fairly with *all* who might be affected by this legislation—whether part of the crime syndicate or not.

*Id.* at 35,204 (emphasis added). Accordingly, no court ought now reweigh the "balance" between "opposing policy arguments," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978), strike a new "compromise," *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) or make an effort to rewrite this "carefully crafted piece of legislation," *Iannelli v. United States*, 420 U.S. 770, 789 (1975). Congress has "announce[d its] . . . considered judgment." *City of Milwaukee v. Illinois*, 451 U.S. 304, 315 (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)). That ought to end the matter, absent constitutional considerations, which are not implicated. *United States v. Turkette*, 452 U.S. 576, 587 (1981) ("There is no argument that Congress acted beyond its power . . . . That being the case, the courts are without authority to restrict the application of the statute.").

120 Congressman Mikva observed:

I would point out to my colleagues a definition of racketeering activities, which brings into play the whole title IX and all kinds of things we have not yet talked about. This definition states that "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" becomes an act of racketeering under this statute. What we have done in one fell swoop—and the States-righters who may be in this room should listen—is to incorporate as a part of the Federal law all of the offenses which heretofore have traditionally been treated as under State and local jurisdictions.

116 CONG. REC. 35,205 (1970). Here, too, the scope of RICO, as touching on state jurisprudence, was expressly recognized. In addition, fearing that treble damage suits might be used to injure legitimate businessmen, Congressman Mikva proposed an amendment establishing penalties for their "malicious" use. It failed. 116 CONG. REC. 35,332 (1970).

Remedies for malicious suits were left to the normal rules and procedures. *See, e.g.*, FED. R. CIV. P. 9(b) (fraud must be pleaded with particularity); FED. R. CIV. P. 12(f) (court may strike scandalous matter); FED. R. CIV. P. 50(a)(b) (directed verdict and judgments not withstanding the verdicts); FED. R. CIV. P. 56 (summary judgment). *See* *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978) (award of fees to defendant permitted for actions frivolous, unreasonable, or without foundation). Discovery, too, may be regulated in light of the nature of the complaint. Other remedies for abuse would include ethical standards, *see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-4 (1980) ("a lawyer is not justified in asserting a position in litigation that is frivolous"); or traditional tort law, *see* W. PROSSER, TORTS §§ 119-21 (4th ed. 1971) (dealing with malicious prosecution, wrongful civil proceed-

On October 7, 1970, the House returned to S. 30. Congressman Poff, as had Congressman Celler, used no words of limitation in outlining the broad equitable powers given the courts by Title IX and the scope of the new treble damage relief.<sup>121</sup> Debate, however, again

ing, abuse of process). These normal rules of practice and procedure, as well as state and local remedies, at least, were thought adequate to guard against unwarranted RICO claims. See note 199 *infra* for a discussion of *Reiter v. Sonotone*, 442 U.S. 330 (1979), where similar fears were raised, but not thought of as sufficient to affect the outcome in the face of the plain language of a statute. They also speak to the "floodgate" concern that RICO fraud actions, frivolous or otherwise, might overwhelm the federal courts.

Indeed, the Boston Bar Association and the Massachusetts Association of Criminal Defense Lawyers argued to the Supreme Court as amici in *United States v. Turkette*, 452 U.S. 576 (1981), that "routine securities cases [can be] painted with the RICO brush, . . . the predicate acts being securities fraud, mail fraud or wire fraud." *Civil RICO*, *supra* note 52, at 673 n.137. The Government accepted "amici's illustration," but found such a construction of RICO "eminently reasonable." *Id.* In addition, the amici posited the fear that "the federal judicial system [would] . . . be faced with an invasion of garden variety commercial disputes masquerading as civil RICO claims. . . . The reputations of companies and individuals having no conceivable connection to organized crime . . . [would] be sullied." *Id.* at 673. The Supreme Court was unmoved. Accordingly, arguments to a court that RICO should be rewritten judicially fly in the face not only of the jurisprudence of the Supreme Court, but also of our society's deepest traditions of the separation of powers and the primacy of legislative law making. See 452 U.S. at 587 ("In the face of . . . objections [dealing with federal and state relations] Congress nonetheless proceeded to enact [Title IX] . . . . There is no argument that Congress acted beyond its power in doing so. That being the case, the Courts are without authority to restrict the application of the statute."). It may be observed, too, that the protestations of the Bar Associations *against* litigation are a bit much. See THE FEDERALIST No. 1. at 35 (A. Hamilton) (W. Kendall and G. Carey edition) (" . . . a dangerous ambition more often lurks behind the specious mark of zeal for the rights of the people than under the forbidding appearance of zeal for the firmness and efficiency of government."); G. HEGEL, PHILOSOPHY OF HISTORY, Part IV, § 3, ch. 2, at 537 (American Dome Library 1902) ("when liberty is mentioned, we must always be careful to observe whether it is not really the assertion of private interest which is clearly designated."). See note 172 *infra*.

121 Congressman Poff observed:

Title IX represents, in large measure, an adaptation of the machinery used in the antitrust field to redress violations of the Sherman Act and other antitrust legislation. I would not attempt to say who was first to suggest the re-tooling of the antitrust machinery to combat organized crime, but one of the earliest and stoutest proponents of such an approach was the American Bar Association. The Department of Justice has been consulted, of course, in drafting the legislation and fully supports Title IX.

. . . .

Courts are given broad powers under the title to proceed civilly, using essentially their equitable powers, to reform corrupted organizations, for example, by prohibiting the racketeers to participate any longer in the enterprise, by ordering divestitures, and even by ordering dissolution or reorganization of the enterprise. In addition, at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.

focused on "organized crime." Congressman Mario Biaggi offered an amendment that would have explicitly prohibited membership in the Mafia.<sup>122</sup> Congressman Poff argued against it on constitutional grounds,<sup>123</sup> noting in language virtually identical to Senator McClellan's<sup>124</sup> that there was no need to try to confine S. 30 to "organized crime," as it might properly be applied to others as well. Eventually, the House passed the bill by a vote of 431 to 26.<sup>125</sup>

### I. *Senate Consideration of the House-Amended Bill*

The Senate took up the House-amended bill on October 12,

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116 CONG. REC. 35,295 (1970) (remarks of Rep. Poff). Congressman Sam Steiger, neither a member of the Judiciary Committee nor a lawyer, had previously suggested that the Committee adopt a number of amendments to strengthen Title IX. *See House Hearings, supra* note 25, at 518. Congressman Steiger's statement applauded the "innovative . . . civil procedures and remedies [of Title IX, with their proof] by a preponderance of the evidence." *Id.* at 519-20. He called them "far more effective than existing" law. *Id.* He also called for the adoption of a private treble damage suit. *Id.* Following the ABA recommendations, Congressman Steiger announced his intention to offer a floor amendment to S. 30 to implement his suggestions. 116 CONG. REC. 35,227-28 (1970). At that time, he expressed his view that Title IX, as reported, did not authorize private equitable relief, despite its plain language ("to sue . . . and shall recover"). As he was not in charge of the bill, his opinion is "without weight in the interpretation of" the bill. *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 494 (1931). In any event, he later conceded that the Committee version might well have been properly drafted. When he offered his amendment on the floor, he noted that he felt "presumptuous." 116 CONG. REC. 35,346 (1970). Chairman Celler, moreover, had just made a point of order, which was rejected, that the Committee members had not been served with a copy of the amendment. *Id.* Congressman Steiger conceded that he did "not claim specific expertise." *Id.* Congressman Poff then suggested that the amendment be withdrawn. *Id.* Congressman Steiger observed that he did "not have to be run over by a tank to get the word." *Id.* He added that under "the bill as it now stands . . . [innocent victims] may have . . . [the] option" to obtain "proper redress" (emphasis added). *Id.* Rather than "risk . . . defeat in the heat of parochial pride as regards . . . authorship," he withdrew the amendment. *Id.* Even had it been defeated, it would not have affected the plain language of the statute. *See, e.g.*, *Bryant v. Yetter*, 447 U.S. 352, 376 (1980) ("failure to enact suggested amendment . . . not . . . most reliable indication of congressional intention"); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969); *Fogarty v. United States*, 340 U.S. 8, 13-14 (1950); *United States v. UMW*, 330 U.S. 258, 277 (1947). In addition, subsequent efforts to clarify the confusion created by Congressman Steiger's floor comments about private equitable relief cannot change the meaning of what was in fact passed. *See Basic Concepts, supra* note 3, at 1020 n. 67; *United States v. Wise*, 370 U.S. 405, 411 (1962) ("[S]tatutes are construed by the courts with reference to the circumstances existing at the time of passage." Subsequent efforts at amendment are of "no persuasive significance.").

122 116 CONG. REC. 35,343 (1970) (remarks of Rep. Biaggi). Congressman Biaggi's commitment to organized crime control efforts is not unalloyed. *See N.Y. Times*, Nov. 6, 1982, at 11, col. 1 (petition by congressman to court to suspend sentence resulting from a RICO conviction).

123 116 CONG. REC. 35,344 (1970) (remarks of Rep. Poff).

124 *See* note 113 *supra*.

125 116 CONG. REC. 35,363 (1970).



1970.<sup>126</sup> Senator McClellan regarded most of the House amendments as largely minor changes or of "clarifying and strengthening"<sup>127</sup> effect. He suggested that a conference was not necessary. Senator Hruska, too, noted that the House changes "were not of major significance," and he agreed that a conference was not required. The Senate agreed to the motion to accept the House amendments by a voice vote.<sup>128</sup>

The President signed the legislation on October 15, 1970.<sup>129</sup>

### J. *Analysis of Legislative History*

This review of the legislative history of S. 30 in general, and Title IX in particular, establishes the following points beyond serious question:

(1) Congress fully intended, after specific debate, to have RICO apply *beyond* any limiting concept like "organized crime" or "racketeering";

(2) Congress deliberately redrafted RICO outside of the anti-trust statutes, so that it would *not* be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;

(3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and

(5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud.

Accordingly, neither the text nor the legislative history of RICO stood in the way of recovery by the plaintiffs in *Bennett*. It is appropriate, therefore, to turn to the jurisprudence under the statute.

## V. The Jurisprudence Under RICO

Only a handful of civil actions have been brought under RICO. As such, its jurisprudence could hardly be said to have been authori-

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126 116 CONG. REC. 36,280 (1970).

127 *Id.* at 36,293.

128 *Id.* at 36,296.

129 *Id.* at 37,264. The President had indicated his support for civil remedies, including treble damage actions, when he originally endorsed S. 30 in his message on organized crime. See *Senate Hearings, supra* note 28, at 449-50.

tatively determined before *Bennett*. Several actions had in fact been dismissed on a variety of grounds, including a failure to allege an "organized crime" or a "racketeering" connection,<sup>130</sup> the failure to allege a predicate offense,<sup>131</sup> the novel character of the theory of the violation of the predicate offense alleged,<sup>132</sup> the failure to allege a "pattern" of racketeering activity,<sup>133</sup> the failure to allege a "competitive" or "racketeering enterprise" injury,<sup>134</sup> and the failure to distin-

130 *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109 (S.D.N.Y. 1975) (failure to allege "organized crime"). *Barr* had been followed in other cases. *See Waterman S.S. Corp. v. Avondale Shipyards*, 527 F. Supp. 256, 260 (E.D. La. 1981) (organized crime "not alternative or cumulative to other remedies"). *Adair v. Hunt Intern Resources Corp.*, 526 F. Supp. 736, 746-48 (N.D. Ill. 1981). *See also Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (dismissal unless "organized crime control over business"); *Pepsi Cola Bottling Co. v. LeBlanc*, No. 80-15,835, slip op. (D.S.C. 1982) ("association with organized crime" essential element — *Barr* "better reasoned"); *City of Atlanta v. Ashland Warren*, 1982-1 Trade Cas. (CCH) ¶ 64,527 (N.D. Ga., Aug. 20, 1982) (*Barr* followed in civil suits, even though limitation rejected in criminal prosecutions). *See also Johnsen v. Rogers*, 551 F. Supp. 281, 284-86 (D.C. Cal. 1982) (not additional remedy—"racketeering enterprise injury" required); *Salisbury v. Chapman*, 527 F. Supp. 577, 580-81 nn.4 & 6 (N.D. Ill. 1981). *But see Note, Judicial Restrictions, supra* note 52, at 1106-09.

131 *Grayson v. Wooden*, No. 80-5460, slip. op. (6th Cir. 1982) ("bribery" under Ky. REV. STAT. § 521.020(1)(2), "extortion" under 18 U.S.C. § 1951, and "mail fraud" under 18 U.S.C. § 1341 in efforts by board of education to remove superintendent of schools).

132 *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981) (artificially high prime rate not recognized form of criminal conduct under 18 U.S.C. § 1341). *But see Parr v. United States*, 363 U.S. 370, 391 (1960) ("reported decision involving similar factual circumstances or legal theories is not determinative"). *Kleiner* was wrongly decided.

133 *Teleprompter v. City of Erie*, No. 81-17, slip op. (W.D. Pa. 1981).

134 *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208 (E.D. Mich. 1981) ("racketeering enterprise injury" required); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980) ("competitive injury" required). *See also Johnsen v. Rogers*, 551 F. Supp. 281, 284-86 (D.C. Cal. 1982) (not additional remedy—"racketeering enterprise injury" required); *Harper v. New Japan Sec.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982) ("not only . . . predicate . . . , but injury of the type RICO was intended to prevent"); *Alton v. Alton*, No. 82 Civ. O795 (S.D.N.Y. 1982) (racketeering enterprise limitation); *Erlbaum v. Erlbaum*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982). A variation of the "competitive" injury limitation was adopted in *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125, 1137 (D. Mass. 1982) (injury must be "commercial"). *Van Schaick* is carefully analyzed and rejected in *Civil RICO, supra* note 52, at 705-07. *See note 147 infra* for a discussion of *Van Schaick*. Rejected, too, is the "competitive" injury limitation. *Civil RICO, supra* note 52, at 705-07; *Note, Judicial Restriction, supra* note 52, at 1109-14. *But see Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020 (S.D. Ohio 1982) (fraud in failure to disclose financing option).

The "racketeering enterprise" limitation is questioned in *Note, Judicial Restriction, supra* note 52, at 1110 n.51 (undefined—hard to distinguish from competitive). *See also Meinkeke Discount Muffler Shops v. Noto*, 548 F. Supp. 352, 354 (E.D.N.Y. 1982) (organized crime and racketeering enterprise injury rejected) (*Basic Concepts, supra* note 3, followed); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, No. C-81-4099 SC (N.D. Cal. 1982) ("misconduct typical of organized crime," "injury distinct from predicate act," "anti-competitive injury" limitations rejected as inconsistent with statute and "unworkable"); *Lode v. Leonardo*, No. 82 C 4122 (N.D. Ill. Oct. 12, 1982) ("Congress may not have envisioned that the civil remedies . . .

guish in the complaint between the "person" and the "enterprise."<sup>135</sup> On the other hand, a majority of civil cases under RICO had either expressly<sup>136</sup> or impliedly<sup>137</sup> rejected a number of these contentions or

would find . . . widespread use . . . . And such use . . . may well be somewhat undesirable. But . . . it is not the function of . . . [a] court to reject [a] claim on the ground that Congress must have meant something other than what it said."). The "racketeering enterprise" limitation, too, confuses criminal and civil responsibility. The concept "enterprise" is, of course, related to, but not identical with, the concept of "conspiracy." *United States v. Griffin*, 660 F.2d 996, 1000 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1029 (1982). Accordingly, while the "gist" of criminal responsibility is "conspiracy," *Iannelli v. United States*, 420 U.S. 770, 777 (1975), it is an *act* performed in furtherance of the conspiracy from which damages flow that forms the basis for *civil* responsibility. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321, 338 (1971); *Blackwelder v. Millman*, 522 F.2d 766, 776 n.31 (4th Cir. 1975) (conspiracy to defraud not actionable until act results in damage). An "enterprise," as such, does not, therefore, give rise to civil liability under RICO; it is a "racketeering act" committed by an enterprise subsequently causing damage that constitutes the basis of civil responsibility. Defining a "racketeering enterprise injury" is, therefore, difficult. Similar comments may be made about the "by reason of" limitation. *See Harper v. New Japan Sec.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982). Accordingly, they should be rejected.

In addition, district courts have dismissed or limited RICO claims simply because they "were not contemplated" by Congress or the injury was not "imminent infiltration." *See, e.g., Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981) (complaint in securities fraud act involving coal leasing investments fell outside RICO's express purpose "to deal with organized crime's control over business enterprises"); *Spencer Cos. v. Agency Rent-A-Car*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981). *Spencer* is rejected in Note, *Judicial Restriction*, *supra* note 52, at 1114. *See also Hanna Mining Co. v. Norcen Energy Resources*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,742 (N.D. Ohio June 11, 1982) (no "organized crime," "racketeering," "competitive" injury, or "imminent infiltration" showing required). Finally, one district court threw out a RICO count because it was a cloning of a prior suit on which a summary judgment had been granted. *Kirtz v. Wiggin*, 538 F. Supp. 1218, 1220 (E.D. Mo. 1982). *See also Gordon v. Terry*, 684 F.2d 736, 739 (11th Cir. 1982) (late RICO amendment denied since unduly delayed and in bad faith).

135 *Parnes v. Heinold Commodities, Inc.*, 548 F. Supp. 20, 23-24 (N.D. Ill. 1982); *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020, 1023-24 (S.D. Ohio 1982); *Fields v. National Bank*, 546 F. Supp. 123 (N.D. Ill. 1982).

136 The "organized crime" or "racketeering" limitation had been rejected in the following civil cases: *Spencer Cos. v. Agency Rent-A-Car*, [Current Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981); *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 209 (E.D. Mich. 1981) ("racketeering enterprise injury" required; the court adding that not "only victims of organized crime, as that phrase is used in the colloquial sense, have RICO civil claims"); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981); *Engl v. Berg*, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); *Heinold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313 (N.D. Ill. 1979); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 646 (N.D. Ill. 1980); *Hoopingarner v. B.F. Saul Real Estate Inv. Trust*, No. 79-827-A (E.D. Va. 1980); *Hernsarling v. Conti Commodities, Inc.*, No. 79 C 312 (N.D. Ill. 1979). For subsequent cases rejecting the organized crime limitation, see *Gunther v. Dinger*, 547 F. Supp. 25, 27 (S.D.N.Y. 1982); *Mauriber v. Shearson/American Express Inc.*, 546 F. Supp. 391, 396 (S.D.N.Y. 1982); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, No. C-81-4099 SC (N.D. Cal. 1982); *Lode v. Leonardo*, No. 82 C 4122 (N.D. Ill. 1982). The organized crime limitation on RICO has also been rejected by the following circuits in criminal prosecutions: *United States v. Thordarson*, 646 F.2d 1323, 1328-29 n.10 (9th Cir.), *cert. denied*, 102 S.Ct. 601

were easily distinguishable.<sup>138</sup> The court in *Bennett*, therefore, wrote on a relatively clean slate, where it was free to reason on the merits and not unduly bound by precedent.<sup>139</sup>

(1981); *United States v. Union Oil, Inc.*, 646 F.2d 946, 953 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1254 (1982); *United States v. Grande*, 620 F.2d 1026, 1030 (4th Cir.), *cert. denied*, 101 S.Ct. 98 (1980); *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Forsythe*, 560 F.2d 1127, 1136 (3rd Cir. 1977). An "organized crime" limitation had been rejected by the Ninth Circuit under 18 U.S.C. § 1952. *United States v. Roselli*, 432 F.2d 879, 885 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971). The "racketeering" limitation had also been rejected in prosecutions under 18 U.S.C. § 1951, a statute that had a legislative history similar to RICO. *See United States v. Culbert*, 436 U.S. 371 (1978). *See also Perrin v. United States*, 444 U.S. 37, 49 (1979) (narrow construction of "bribery" under § 1952 rejected); *United States v. Nardello*, 393 U.S. 286, 292-93 (1969) (narrow construction of "extortion" under § 1952 rejected).

137 In *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 676-77 (N.D. Ind. 1982) (arson fraud); *Maryland v. Buzz Berg Wrecking Co.*, 496 F. Supp. 245, 247-48 (D. Md. 1980) (fraud on government involving defendant in *United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980)); *Farmers Bank v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1281-82 (D. Del. 1978) (fraud on private party); and *City of Milwaukee v. Hanson*, No. 77-C-246 (E.D. Wis. 1981) (injury from arson on city fire department), no showing of "organized crime," "competitive," "by reason of," or other special injury was alleged or required.

138 As there is little question that mail fraud is a "racketeering activity," or that it can go to make up a "pattern," no further discussion will be made of *Grayson v. Wooden*, *Kleiner v. First Nat'l Bank*, or *Teleprompter of Erie v. City of Erie*.

139 A more extended discussion of the Seventh Circuit's decision in *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449 (7th Cir.), *cert. denied*, 103 S. Ct. 177 (1982) is warranted, although it was in fact not inconsistent with the *Bennett* plaintiffs' basic RICO claim. *Cenco* involved litigation between the successor management of Cenco and an accounting firm, Seidman and Seidman, over Seidman's alleged failure to detect fraud in the operation of the corporation by the prior management. The successor management sued the firm; the firm counterclaimed under RICO, as a victim of the fraudulent scheme by which the corporation was previously managed. Writing for the court, Judge Posner observed:

Seidman alleges that Cenco's corporate acquisitions with stock whose price had been inflated through violations of various federal criminal securities statutes violated RICO. The District Court dismissed Seidman's RICO claim, without reaching the merits, on the ground that Seidman lacked standing to maintain it.

The question whether Congress intended to grant a treble-damages remedy to people or firms injured in the way Seidman was injured, that is, as a consequence of being used as a tool of the criminal enterprise, is apparently one of first impression. The language of section 1964(c) provides no answer, analogies to section 4 of the Clayton Act are forced, and there is no useful legislative history relating to the provision. We therefore ask whether a treble-damages action by auditors of criminal enterprises would contribute to the compensatory and deterrent objectives of RICO. We think it would not, though not because the draftsmen of RICO were concerned with the penetration of lawful enterprises by "organized crime," a euphemism for what used to be called the Mafia, and there was nothing of that sort here. This Court has interpreted the RICO statute, in light of the long list of criminal offenses in section 1962, to forbid penetration of business enterprises by any "pattern of racketeering activity" embraced by that section, whether or not "organized crime" is involved. . . . What is critical here, rather, is that "the primary purpose of RICO is to cope with the infiltration of legitimate businesses." . . . It is presumably on behalf of the owners, perhaps also the customers and competitors, of

## VI. The Opinion in *Bennett v. Berg*

### A. *The Question of Organized Crime*

The court in *Bennett* did not devote much time to the challenge to the complaint on the ground that no allegation had been made of a connection between organized crime and the defendants. Writing for the court, Judge Henley noted that the contention had "some degree of support" from courts "swayed by Congress's evident concern with organized crime in the passage of RICO."<sup>140</sup> Nevertheless, the court was, Judge Henley wrote, "convinced that the better reasoned approach" rejected any attempt "to interpret RICO as creating a status offense."<sup>141</sup> The court relied on the legislative history of

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such businesses that the civil damages remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO. It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator. The RICO claim was correctly dismissed.

686 F.2d at 457 (citations omitted).

First, it is difficult to accept Judge Posner's comment that the language of RICO provided no answer. RICO says, after all, that "any person injured" may sue. 18 U.S.C. § 1964(c). In fact, the language of the statute contains *no* limitation. Second, it was appropriate to comment that "analogies to section 4" are "forced," but it would have been more appropriate to note the "direct-indirect" type limitation followed under § 4 *specifically* rejected by the Congress in adopting RICO. Third, Judge Posner's comment that there was no "useful" legislative history is mistaken, as the legislative history shows. *See* notes 34-139 *supra* and accompanying text. Fourth, it is difficult to accept Judge Posner's comment that no "compensatory" or "deterrent" objective of RICO would be served by a finding of liability. If Seidman was in fact "injured" in its "business" or "property," it was entitled to "compensation." Why else would Congress have drafted RICO? *See* text accompanying notes 197-206 *infra*. For another view of the matter by Judge (then Professor) Posner, see note 246 *infra*. The knowledge that RICO promised damage recovery to injured persons like Seidman would also constitute "an ever-present threat to . . . anyone contemplating . . . behavior in violation" of it. *Perma Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968) (apropos of § 4 of the Clayton Act). Finally, however, it is sufficient for present purposes to note that *Cenco* explicitly rejected an "organized crime" or "racketeering" type limitation, while it held that only those *indirectly* injured by fraud were excluded from RICO's coverage. In *Bennett*, of course, the plaintiffs had alleged a *direct* injury. Consequently, even under *Cenco*'s parsimonious reading of the statute—a clear violation of the liberal construction directive—plaintiffs should have been able to claim full relief under RICO. *See* notes 25 *supra* and 150 *infra*. That *Cenco* was correctly decided—considered on its own merits—can hardly be seriously maintained, and the other circuit courts of appeal should not follow it.

140 685 F.2d 1053, 1063 (8th Cir. 1982).

141 The court observed:

We are convinced that the better reasoned approach . . . rejects any attempt to interpret [civil] RICO as creating a status offense aimed only at organized crime in any colloquial sense of that phrase. . . . We join an increasing number of courts and commentators in concluding that RICO suits are not limited to contexts in

the statute, the opinions of its sister circuits in the criminal area, the majority trend in lower court opinions in the civil area, and the unanimous opinion of the commentators. Recognizing that its conclusion might, however, "tend to extend the net of the RICO Act to situations which otherwise might find a remedy only in the state courts," the court noted that "some federalization of state claims was not unanticipated by Congress."<sup>142</sup> As such, under the prevailing jurisprudence of the Supreme Court, Judge Henley observed, the court lacked "authority to restrict the reach of the statute."<sup>143</sup> Nor did the court see an opening of "the flood gates for federal adjudication of every common law fraud claim," for RICO claims had to involve "an enterprise which engages in or affects interstate commerce."<sup>144</sup>

The court spent little time with the organized crime challenge. Similarly, little comment is warranted on its reasoning. No serious exception can be—or ought to be—raised to it. Indeed, it is difficult to see how the challenge could have been taken so seriously by the lower courts, not only in light of the text of the statute itself, but also its explicit legislative history. The blunt truth is that some lower courts have been more intent on redrafting than reading RICO.<sup>145</sup>

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which a tie to organized crime is alleged. . . . We recognize that this conclusion may tend to extend the net of the RICO Act to situations which otherwise might find a remedy only in the state courts. In the present context, for example, appellants are able to avail themselves of a federal cause of action for treble damages under RICO where common law fraud is an alternative claim. However, at least some federalization of state claims was not unanticipated by Congress. . . . Insofar as the door of the federal courthouse is . . . opened by RICO in a civil context, we are cautioned by the Supreme Court that broad Congressional action should not be restricted by the courts in the name of federalism. . . . It is beyond our authority to restrict the reach of the statute.

*Id.* at 1063-64 (citations omitted).

142 *Id.*

143 *Id.*

144 *Id.*

145 The defendants in *Bennett*, in effect, asked the court to redraft § 1964(c) as follows:  
Any person [*injured by organized crime*] in his business or property . . . may sue therefore . . . .

The italicized words, of course, do not appear in the statute as drafted by the Congress. See 18 U.S.C. § 1964(c) (1976). Mr. Justice Frankfurter aptly wrote on the proper role of "statutory interpretation":

A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must read out except to avoid patent nonsense or internal contradiction. . . . [T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 533, 535 (1947).

B. *The Question of Culpable "Person" Separate From the Charged "Enterprise"*

Although here, too, the court devoted little time to the issue, the distinct person-enterprise challenge presented a far more complex question. Count I of the complaint sought treble damage relief from all defendants, except John Knox Village, leaving the Village in the role of the "enterprise" operated by the other defendants' allegedly illegal acts. Count II of the complaint, however, sought equitable relief from the Village, so it cast the Village in the role of "person." The court thought this made the "residential community"—viewed as an association in fact—the "enterprise." Prudential argued, therefore, that no "enterprise . . . [had been] alleged apart from the 'person' who 'associated with' an enterprise for purpose of racketeering."<sup>146</sup> Because the complaint had not "clearly set forth" its theories in separate counts, shifting the role of the Village from Count I (person) to Count II (enterprise), the court held that the RICO claim against the Village in Count II could not stand.<sup>147</sup> Nev-

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*See* L. HAND, *THE SPIRIT OF LIBERTY* 164 (Irving Dillard Vintage ed. 1959). Judge Hand writes:

Let the judge go as far afield as he will, in seeking the meaning of an enactment, if he is honest, he will never substitute his personal appraisal of the interest at stake, or his personal preference between them. . . . He must hesitate long before cutting down [a law's]. . . literal effect, remembering that the authors presumably said no more than they wanted.

146 685 F.2d at 1061.

147 *Id.* The *Bennett* court relied on *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125 (D. Mass. 1982), a bizarre case, in which a woman sued the Church of Scientology under a RICO fraud theory. Offering no analysis, reasons, or citation of authority, the *Van Schaick* court held that the church could "not, at once, be both the associated person and the enterprise." 535 F. Supp. at 1136. In addition, the court expressed reservations about recognizing as a federal cause of action a matter that had traditionally been left to the states, and it then imposed a "commercial" injury limitation on RICO civil suits, *id.* at 1136-37, a result not only inconsistent with the court of appeals decision in *Bennett*, but also the Supreme Court's jurisprudence under § 4 of the Clayton Act. Apparently, the *Van Schaick* court was unaware of this jurisprudence, because while it recognized the parallel statutory interpretation problems, *id.* at 1137 ("injured in his business or property"), it resolved the issue contrary to *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) (the Court read "business or property" disjunctively and required no commercial-type injury). See note 199 *infra* for a detailed discussion of *Reiter*. *Van Schaick* is, in short, hardly a persuasive authority on the interpretation of RICO.

The *Bennett* court, moreover, was either unaware of or chose not to rely on *Bays v. Hunter Sav. Ass'n*, 539 F. Supp. 1020 (S.D. Ohio 1982); *Parnes v. Heinold Commodities*, 548 F. Supp. 20 (N.D. Ill. 1982); or *Fields v. National Republic Bank of Chicago*, 546 F. Supp. 123 (N.D. Ill. 1982). In *Bays*, the court noted that it had "found" no cases in which the "person" and "enterprise" had been identical; the *Bays* court, therefore, denied a motion of the plaintiffs to amend their complaint to add a RICO count charging a savings association as both "person" and "enterprise" in a suit basically rooted in consumer fraud. The court apparently did not consider the alternative approved in *Bennett* of pleading the basic allega-

ertheless, the court suggested that on remand the plaintiffs be permitted to amend their complaint so that "justice" might be done and a decision reached on the merits, not merely the pleadings.

To be sure, the text of RICO requires the showing of two separate elements: "person" and "enterprise." But nothing in the statute

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tion in two counts. Nor did the *Bays* court evidently "find" those RICO prosecutions where individuals were charged as "persons," but collectively as an "enterprise" under the authoritatively established association in fact theory. *See, e.g.*, *United States v. Turkette*, 452 U.S. 576, 578-84 (1981); *United States v. Winter*, 663 F.2d 1120, 1124-25 (1st Cir. 1981); *United States v. Griffin*, 660 F.2d 996, 997 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 1029 (1982); *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). *See also* *United States v. Thevis*, 665 F.2d 616, 625-26 (5th Cir.), *cert. denied*, 102 S. Ct. 3489 (1982) (corporation and individuals convicted as "persons" where "enterprise" was an "association in fact" composed of them). In these cases, the "persons" involved constituted the "enterprise," even though "each" was a "separate element," which had to be independently proven. *See* *United States v. Turkette*, 452 U.S. 576, 576 (1981). *See also* *United States v. Uni Oil Inc.*, 646 F.2d 946, 948 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1254 (1982) (corporation and individuals indicted as "persons" for operation of corporations as "enterprise" by pattern of fraud); *United States v. Marubeni America Corp.*, 611 F.2d 763, 764 (9th Cir. 1980) (two corporations and their employees charged as "persons" in operation of "enterprise's" affairs by fraud); *Hellenic Lines Ltd. v. O'Hearn*, 523 F. Supp. 245, 247 (S.D.N.Y. 1981) ("Under clear language of the statute" corporation may be "person" responsible for kickbacks paid by president in operation of corporations as "enterprise"); *Engl v. Berg*, 511 F. Supp. 1146, 1154-55 (E.D. Pa. 1981) (limited partnerships and corporations may be "persons" responsible for fraudulent transactions consummated by officer in operation of partnership and corporations as "enterprise"). *Bays*, too, would hardly seem persuasive precedent for interpreting RICO.

In *Parnes*, the court dismissed a complaint filed under RICO against a commodities brokerage firm for the allegedly fraudulent conduct of two of its employee brokers concededly "conducting themselves within the scope of their authority for common-law purposes." 539 F. Supp. at 202. Noting that its "text analysis owe[d] nothing to the litigants," and reflecting "intuitive unease" at the "unanticipated" application of RICO to a "garden-variety fraud," the court held that "the civil plaintiff can sue only the 'person' and not the 'enterprise' for damages suffered from . . . 'racketeering activity.'" 548 F. Supp. at 223-24. The court apparently did not have the benefit of a full briefing on the legislative history of RICO, which stands squarely against the court's judgment. Nor is its textual analysis compelling; RICO does not say that "person" and "enterprise" are mutually exclusive; it only separately defines them. *See* note 181 *infra*. On the "garden-variety" character of commodity fraud, see text accompanying notes 230-31 *infra*. *Parnes*, like *Bays*, is hardly a persuasive authority for interpreting RICO.

Finally, in *Fields*, the court faced a motion to dismiss a RICO claim brought against a bank for the fraudulent handling of a note; the court followed *Parnes* and dismissed the claim because no "person" separate from the "enterprise" had been identified. The court also distinguished *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982) as a criminal prosecution. Similarly, the court in *Bennett* noted that *Hartley* had reached "a some-what different result in [a] unique context in a criminal case." 685 F.2d at 1062. *See* note 181 *infra*. *Fields*, too, is a better example of a decision by a "result-oriented" "hostile judiciary" than a court faithfully following congressional will. *See* Tarlow, *Using the RICO Statute in Civil Litigation*, *The National Law Journal*, May 24, 1982, at 1, col. 4. *See also* *Fedorenko v. United States*, 449 U.S. 513 (1981) ("We are not at liberty to imply a condition which is opposed to the explicit terms of the statute. . . . To [so] hold . . . is not to construe the Act but to amend it.") (quoting *Detroit Trust Co. v. The Thomas Barlow*, 293 U.S. 21, 38 (1934)).



compels the conclusion that the elements are mutually exclusive.<sup>148</sup> Nothing on the face of the statute, on the other hand, compels the conclusion that they are *not* mutually exclusive. Either reading of the statute would be consistent with its unadorned text. The resolution of the issue, however, ought to turn on which statutory construction is most consistent with Congress' expressed purpose to provide "enhanced sanctions and new remedies."<sup>149</sup> Obviously, too, Congress' characterization of RICO as "remedial" and its directive that RICO be "liberally construed" to implement that characterization ought to be brought into play.<sup>150</sup> Following that approach, the proper result

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148 The notion that individual elements in RICO are mutually exclusive stems from the now discredited *Sutton, Anderson, Turkette* line of decisions in the courts of appeals. *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979), *vacated on rehearing*, 642 F.2d 1001 (6th Cir. 1980), *cert. denied*, 463 U.S. 912 (1981); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 570 (1981). In *Sutton*, Judge Merritt argued, *inter alia*, that "enterprise" could not include "illicit associations," since then the concept of "pattern of racketeering" would merge with "enterprise." 605 F.2d at 266. Similar reasoning was followed in *Anderson*, 626 F.2d at 1365, and *Turkette*, 632 F.2d at 899; it was also advanced by Tarlow, *supra* note 3, at 191-99 ("more soundly reasoned") and Bradley, *supra* note 25, at 851-58 ("beyond Congressional intent"). In *Turkette*, the Supreme Court flatly rejected that type of reasoning. "While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." 452 U.S. at 583. As long as each element "remain[ed] a separate element which must be proved," RICO was satisfied. *Id.* The Court found its judgment supported by the unambiguous language of the statute and its legislative history. 452 U.S. at 587 n.10, 589-93. For a detailed look at *Sutton, Anderson*, and *Turkette* that preceded the Supreme Court's opinion, but anticipated its result, see *Basic Concepts*, *supra* note 3, at 1025 n.91. See also *United States v. Jacobson*, 691 F.2d 110, 113 (2d Cir. 1982) ("interest" and "property right" not mutually exclusive in § 1963(a)(2)).

149 Organized Crime Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970). *But see* *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982). See note 181 *infra* for a discussion of *Computer Sciences*.

150 Chief Justice Marshall, in *The Paulina v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812), stated the basic rule for statutory interpretation: "[T]he duty of the court [is] to effect the intention of the legislature . . . [which is] to be searched for in the words which the legislature has employed." See *Brown v. Barry* 3 U.S. (3 Dall.) 365, 367 (1797). The legislature's words must be "taken in their natural and usual sense, [and where] the meaning of the legislature be plain, . . . it must be obeyed." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 385-86 (1805) (Marshall, C.J.). Mr. Justice Story wrote in 1831: "The fundamental maxim of the common law, in the interpretation of statutes, or positive laws, is, that the intention of the legislature is to be followed. This intention is to be gathered from the words, the context, the subject matter, the effects and consequences, and the spirit or reason of the laws. But the spirit and reason are to be ascertained not from vague conjecture, but from the motives and the language apparent on the face of the law." *Law, Legislation and Codes*, VII ENCYCLOPEDIA AMERICANA App. 357 (1831), *reprinted in* J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 360-62 (1971). While he noted that a rule of strict construction applied to certain statutes (but not "to be construed so as to evade . . . fair operation"), he also commented that in "the nature of things, there is not any indispensable reason why the same rule [of construction] should be uniformly applied in the interpretation of all . . . sorts of laws." *Id.* The approach of Marshall and Story obtains today. See *United States v. Turkette*, 452

should depend on the particular relationship between the "person,"

U.S. 576, 580 (1981) (unambiguous statutory language must ordinarily be regarded as conclusive) (quoting *Consumer Product Safety Comm. v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980)).

A statute so vague "that men of common intelligence must necessarily guess at its meaning" is unconstitutional. *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). No statute is valid where it is "impossib[le]. . . to ascertain . . . by any reasonable test, that the legislature meant one thing rather than another." *Id.* at 394. Vague statutes, in short, are void, because legislative intent cannot be ascertained. *United States v. Reese*, 92 U.S. 214, 221 (1875) ("The courts enforce the legislative will when ascertained [but to enforce a vague statute] would be to make a new law, not to enforce an old one."); *James v. Bowman*, 190 U.S. 127, 142 (1903) ("courts are not at liberty to take a . . . [vague] statute . . . and change it to fit [it to apply to a] transaction which Congress might have legislated for if it had seen fit"). Vagueness may go to the persons within the statute, *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), the conduct which is made unlawful, *Winters v. New York*, 333 U.S. 507 (1948), or the sanction to be imposed, *United States v. Evans*, 333 U.S. 435 (1948).

Vagueness, however, is a question of degree. "[T]he Constitution does not require impossible standards." *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947) (persons in excess of the "number of employees needed" held not vague); *Nash v. United States*, 229 U.S. 373, 377 (1931) (Holmes, J.) ("[T]he law is full of instances where a man's fate depends on . . . some matter of degree."); *United States v. Wurzbach*, 280 U.S. 396, 399 (1933) (Holmes, J.) ("Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so, it is familiar to the criminal law to make him take the risk."). Vagueness must also be distinguished from ambiguity. Ambiguity exists when it is in fact possible to ascertain one or more alternative meanings. Vagueness, therefore, means "no meaning," while ambiguity means "more than one meaning." Ambiguities are, of course, inherent in the use of words. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 374 (1816) ("Language is essentially defective in precision, more so than those are aware of who are not in the habit of subjecting it to philological analysis."). "No doubt there is no exact borderline . . . between a statute which is merely ambiguous and . . . which is unconstitutionally vague." *W. LAFAVE & A. SCOTT, CRIMINAL LAW* § 10, at 74 (1972). Here, too, it is a question of degree. Similarly, "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language." *Turkette*, 452 U.S. at 580. Nevertheless, rules of construction are designed to resolve, not create ambiguities. *Id.* at 587 n.10. "Where there is no ambiguity . . . , there is no room for construction." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76 (1820). Where ambiguities exist, it is appropriate to resort to legislative history. *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980). But only "clearly expressed legislative intent" can set aside clear statutory language. *Turkette*, 452 U.S. at 580. *See also* *Bread Political Action Committee v. Federal Election Committee*, 50 U.S.L.W. 4291, 4292 (U.S. March 19, 1982) ("plain language" controls "at least in absence of 'clear evidence'. . . of a 'clearly expressed legislative intent to the contrary.'"). Traditionally, statutes imposing criminal or penal sanctions have been given a strict construction. *See generally* Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV 748 (1935) (tracing the history and rationale of the rule of strictly construing criminal statutes and legislative efforts to modify it); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 143-44 (1930). Nevertheless, the "canon . . . [has never been] an inexorable command to override common sense and evident statutory purpose. . . . Nor does it demand that a statute be given the 'narrowest meaning.'" *Turkette*, 452 U.S. at 587-88 n.10 (quoting *United States v. Moore*, 423 U.S. 122, 145 (1975) and *Brown v. United States*, 333 U.S. 18, 25-26 (1948)). In addition, apart from first amendment considerations, *see, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow speci-

“enterprise,” and “pattern of racketeering activity” that is involved in the violation of each of RICO’s basic standards. In some situations, no objection ought to be raised to attributing to the “enterprise” civil liability or criminal responsibility for the conduct of the “person.” In other situations, such an attribution would be perverse.

“Person” may, of course, include “any individual or entity capable of holding a legal or beneficial interest in property.”<sup>151</sup> The con-

city”), the rule of strict construction has never been accorded independent constitutional status; it has never been described by the Supreme Court as more than a “principle of statutory construction,” *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *United States v. Batchelder*, 442 U.S. 114, 121 (1979), “long-established practice,” *Dunn v. United States*, 442 U.S. 100, 112 (1979), or a “maxim of construction,” *United States v. Culbert*, 435 U.S. 371, 379 (1978). As such, it is “the intention of the law maker [that] must govern in the construction of penal, as well as other statutes.” *Willberger*, 18 U.S. (5 Wheat.) at 95. The judicial creation of crimes by analogy is, of course, beyond the pale. *Id.* at 96. Due process values are at stake in the construction of a statute, but they are met when liberal construction is mandated by the legislature. *See* note 25 *supra*. Thus, the Criminal Justice Section of the American Bar Association is mistaken when it suggests that the strict construction rule is of constitutional dimension. ABA REPORT, *supra* note 42, at 13 (“If the liberal construction clause is applicable to determine the scope of criminal liability . . . the provision is unconstitutional.”). Judge Swygert took the view that the strict construction rule was of constitutional dimension in dissent in *United States v. Grzywacz*, 603 F.2d 682, 690 (7th Cir. 1979), and Judge Murray took it in *United States v. Mandel*, 415 F. Supp. 997, 1022 (D. Md. 1976). Both judges relied on *United States v. Rewis*, 401 U.S. 808, 812 (1971), but this reliance was misplaced because the *Rewis* court explicitly noted that “no issue of constitutional dimension [was] . . . presented.” *Id.* at 811 n.5. Professor Hall rightly observed:

New categories of crimes and criminals cannot always be accurately defined on the first attempt. Shall the new machinery be nullified from the start under the guise of ‘strict construction,’ or shall it be carried out liberally in the spirit in which it is conceived? Merely to state the issue is to answer it.

Hall, *Strict or Liberal Construction of Criminal Statutes*, 48 HARV. L. REV. 748, 761 (1935).

There is no “conflict,” moreover, between the rule of strict construction or the rule of lenity and the liberal construction clause in RICO. *See Turkette*, 452 U.S. at 587 n.10; *United States v. Martino*, 681 F.2d 952, 956 & n.16 (5th Cir. 1982) (“need not resolve the suggested conflict because we find no ambiguity”), *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub nom.* *Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983). The rule of lenity is a rule of construction that says that the interpretation more favorable to the defendant ought to be adopted when the text of the statute or its legislative history cannot be used to resolve an ambiguity according to congressional intent. *See generally* Annot., 62 L. Ed.2d 827 (1981). The liberal construction clause, however, is a rule of statutory construction based on the text of the statute itself that provides a basis for ascertaining legislative intent. As such, it ought to govern. *See Brown v. Barry*, 3 U.S. (2 Dall.) at 367 (“intention of the legislature, when discovered, must prevail [over] any rule of construction”). In RICO, Congress drafted a “carefully crafted statute.” *Iannelli v. United States*, 420 U.S. 770, 789 (1975). Accordingly, if RICO’s language is plain, it ought to control; if the language is ambiguous, that construction which would “effectuate its remedial purposes” “by providing enhanced sanctions and new remedies” ought to be adopted. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923, 927 (1970). Strict construction, therefore, should not play any part in the interpretation of RICO.

151 18 U.S.C. § 1961(3) (1976). Statutory as well as other rules of law secure the interests of individuals, typically referred to as “persons.” IV R. POUND, JURISPRUDENCE 191 (1959).

cept of "enterprise" may be divided into four broad categories: (1)

*See also* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2, at 9-14 (1972); W. PROSSER, LAW OF TORTS § 3, at 15-16 (4th ed. 1971). "For a long time we thought of these legal units in terms of individual human beings." R. POUND, *supra*, at 192. But they need not be so limited. Today, "legal personality" is also attributed to a wide variety of artificial entities for a wide variety of purposes. Compare *United Steelworkers v. R.H. Bouligny Inc.*, 382 U.S. 145 (1965) (unincorporated association not "person" for purpose of diversity jurisdiction), with *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958) (partnership is a "person" for imposition of criminal liability). No less than seven theories of juristic personality have been advanced. R. POUND, *supra*, at 222, 260-61. Abstract theories, however, are not what is at stake. *Guy v. Donald*, 203 U.S. 399, 406 (1906) (Holmes, J.) ("[d]ebated in artificial terms, there is a danger . . . [of] deduc[ing] consequences which have no relation to the grounds on which the name was applied"); *Scales v. United States*, 367 U.S. 203, 226 n.18 (1960) (Harlan, J.) ("The problems in attributing [liability or responsibility] to an abstract entity rather than specified individuals, though perhaps difficult theoretically, as a practical matter resolve themselves into problems of proof."). It makes more sense to look at interests. "Instead of a single category of legal 'persons,' in principle all of like legal importance, we have to consider a variety of legal units in a scale from some with but one potential right . . . to others which by reason of greater social or economic importance have many rights . . . and duties imposed on them." R. POUND, *supra*, at 261. Congress sought through RICO to lessen violence, inhibit the provision of illicit goods and services, abate corruption in the labor movement and among public officials, and to curtail commercial and other frauds. *See* text accompanying notes 168-72 *infra*. Through RICO, Congress "strengthen[ed] the legal tools in the evidence gathering process, . . . establish[ed] new penal prohibitions, and . . . provid[ed] enhanced sanctions and new remedies." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970). To achieve these goals, Congress provided that "individuals" could violate the standards of § 1962. Individuals, too, were given the right to seek civil relief under § 1964. "Entities" may also violate the standards of § 1962 and seek civil relief under § 1964. Only one legal attribute need be present for an entity: it must be capable of holding a legal or beneficial interest in property. That "individuals" and "entities" are "persons" under RICO, however, does not resolve the question of what circumstances suffice to impose personal or vicarious civil liability on individuals or entities, and within the class of entities, what further distinctions must be made between private and public entities on the federal, state, and local level. Criminal liability under § 1963 must also be considered. *See* note 20 *supra* for scope of "whoever" rather than "person."

Civilly, RICO creates a new legal wrong, for which "the closest analogy is to an action in tort." *NSC Intern Corp. v. Ryan*, 531 F. Supp. 362, 363 (W.D. Ill. 1981) (legal right to jury trial). *See* *Pernell v. Southhall Realty*, 416 U.S. 363, 374-80 (1974). "Tort" is derived from the Latin "tortus" or "twisted," that is, "not straight" or "wrong." W. PROSSER, *supra*, § 1, at 2. "Broadly speaking, a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages[.]. . . an injunction, . . . restitution" or other proper relief. *Id.* "[I]t is not easy to discover any general principle upon which . . . [the law of torts is] based, unless it is the obvious one that injuries are to be compensated, and anti-social behavior is to be discouraged." *Id.* at 3. Historically, a number of factors have played a role in imposing civil responsibility: the concern to maintain peace, an assessment of the moral aspects of the defendant's conduct, the development of legal history itself, convenience of judicial administration, the capacity to bear loss, and the desire to prevent harm in the future. W. PROSSER, *supra*, at §§ 4-5. Accordingly, various theories of individual liability have been relied upon in the development of the law of torts: intent, negligence, and strict liability. *Id.* at § 6. Depending upon the character of the predicate offense incorporated into RICO's standards establishing unlawful conduct, each of these factors and theories may be expected to play a role in assessing individual civil liability under

RICO itself. In addition, the traditional rule is that those who act in concert are jointly and severally liable. *Id.* at §§ 46-48; *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 132 (1912) ("the common law imposes upon each joint tort-feasor the burden of bearing the entire loss"); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903) (liability under antitrust laws joint and several), *aff'd on other grounds*, 203 U.S. 390 (1906); *Wainright v. Kraft Co.*, 58 F.R.D. 9, 11-12 (N.D. Ga. 1973). See *Texas Indus. v. Radcliff Materials Inc.*, 451 U.S. 630 (1981) (antitrust treble damage action analogous to torts, responsibility joint and several, and no right of contribution). That rule should also apply to RICO.

Beyond acting in concert, it is well established that an employer or principal is liable for the torts of his employees or agents committed within the scope of their employment or their actual or apparent authority or those which are, in any event, subsequently ratified. *W. PROSSER, supra*, at §§ 69-70. The doctrine is usually referred to as *respondet superior*. *Id.* at 458. Various rationales have been offered for the doctrine, but most are "in accord with the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss." *Id.* at 459; *Guy v. Donald*, 203 U.S. 399, 406 (1906) (Holmes, J.) (not select, not control, not discharge, not liable). As such, modern jurisprudence rests the doctrine of "vicarious liability . . . [on] a rule of policy, a deliberate allocation of a risk." *W. PROSSER, supra*, § 69, at 459. See also *Guy v. Donald*, 203 U.S. at 406 ("When a man is carrying on business in his private interest and entrusts a part of the work to another, the world has agreed to make him answer for that other as if he had done the work himself."). While early decisions did not extend the concept to intentional torts, "modern theories of allocation of risk . . . recognize . . . that even intentional torts may give rise to responsibility." *W. PROSSER, supra*, § 70, at 464. The doctrine of joint enterprise, too, may be used to find vicarious liability; it, in turn, rests on an analogy to partnership. *Id.*, § 72, at 475. "It is an undertaking to carry out a small number of acts or objectives, which is entered into by associates under circumstances that all have an equal voice in directing the conduct of the enterprise." *Id.* The relevancy of these rules to determine civil liability under RICO is manifest.

The legal rules for determining the civil liability of entities parallel those applicable to individuals. Generally, corporations are liable on the same basis as individuals. "To enable impersonal beings—mere legal entities, which exist only in contemplation of law—to perform corporal acts . . . the principle of representation has been adopted." *Philadelphia, W. & B. R.R. v. Quigley*, 62 U.S. (21 How.) 202, 210 (1858). "[A] necessary correlative . . . is the recognition of a corporate responsibility for the acts of those representatives." *Id.* No concept of "ultra vires" is recognized to avoid tort liability. *National Bank v. Graham*, 100 U.S. 699, 702 (1879). Apparent, not actual, authority suffices where an agent acts. *Merchants' Bank v. State Bank*, 77 U.S. (10 Wall.) 604, 645 (1870). Where apparent authority is present, liability is also, even if the agent did not act to benefit the principal. *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 102 S. Ct. 1935, 1943 (1982) (antitrust). The law in assessing the liability of partnerships, which are not in corporate form, follows similar rules. "Each partner . . . [is] the agent and representative of the firm with reference to all business within the scope of the partnership." *Strang v. Bradner*, 114 U.S. 555, 561 (1885) (liable for fraud of partner); *Castle v. Bullard*, 64 U.S. (23 How.) 172, 188-89 (1859) (fraud by one member attributable to others, particularly where benefit received). For civil purposes, knowledge of one partner is imputed to the others. *Stockwell v. United States*, 80 U.S. (13 Wall.) 531, 545-46 (1871). A voluntary association, however, has no independent legal status, unless it is expressly or impliedly confirmed by statute. *UMW v. Coronado Coal Co.*, 259 U.S. 344, 383-92 (1922) (joint fraud subject to suit for authorized conduct unlawful under antitrust laws); *Brown v. United States*, 276 U.S. 134, 141-42 (1928) (implied status under antitrust statutes). As such, it does not, and cannot, hold any legal or beneficial interest in property. *Cf. Trustee*

of the Philadelphia Baptist Ass'n v. Hart's Ex'r, 17 U.S. (4 Wheat.) 1 (1819) (Marshall, C.J.); Kain v. Gibboney, 101 U.S. 362 (1879).

The same conduct may be both "a tort against an individual" and "a crime against the state." W. PROSSER, *supra* § 2, at 7. "Frequently the defendant's conduct makes him both civilly and criminally liable." W. LAFAVE & A. SCOTT, *supra*, § 3, at 13-14. "[S]ince the interests invaded are not the same, and the objects to be accomplished by the two suits are different, there may be both a civil tort action and a criminal prosecution for the same" conduct. W. PROSSER, *supra*, § 2, at 7. *See also* United States v. Cappetto, 502 F.2d 1351, 1354, 1357 (7th Cir. 1974) (RICO provides "both civil and criminal remedies for the enforcement of § 1962. . . . A civil proceeding to enjoin . . . acts [in violation of § 1963] is not rendered criminal in character by the fact that the acts are also punishable as crimes."), *cert. denied*, 420 U.S. 925 (1975). The general rules for finding individual responsibility for a crime, however, differ from those applied for imposing civil liability. Generally, there must be a concurrence between a specified state of mind and prohibited conduct, the *mens rea* and the *actus reus*. W. LAFAVE & A. SCOTT, *supra*, at § 24; *Morissette v. United States*, 342 U.S. 246, 251 (1952) ("an evil-meaning mind with an evil-doing hand"); R. POUND, *CRIMINAL JUSTICE IN AMERICA* 33 (1930) ("punishing the vicious will"). The conduct, too, must take place in the context of defined surrounding circumstances. The conduct requirement is of constitutional dimension. *Robinson v. California*, 370 U.S. 660, 666 (1962) ("status" of being an addict). There must be at least some "responsible relationship" to the prohibited conduct. *United States v. Park*, 421 U.S. 658, 673-76 (1975). State of mind is a question of legislative intent. *United States v. Bailey*, 444 U.S. 394, 402-09 (1980) ("bow to legislative mandates"). State of mind, however, will generally be read into common law, *Morissette*, 342 U.S. at 250-63, but not regulatory offenses, *United States v. Balint*, 258 U.S. 250, 251-53 (1922). *See also* *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) ("an interpretative presumption that *mens rea* is required"). But no state of mind is generally required for elements that are grading or jurisdictional only. *United States v. Feola*, 420 U.S. 671, 676 n.9 (1975); *Barnes v. United States*, 412 U.S. 837, 847 (1973); *United States v. Belt*, 516 F.2d 873, 875 (8th Cir. 1975) (value not element of offense); *United States v. Roselli*, 432 F.2d 879, 892 (9th Cir. 1970) (mistake as to value no defense). In addition, the same statute may be treated differently for criminal as opposed to civil purposes on state of mind. *United States Gypsum Co.*, 438 U.S. at 436 n.13 (antitrust state of mind as to anticompetitive effects). Where a result is a required element of an offense the prohibited conduct must, of course, cause the result. *United States Gypsum Co.*, 438 U.S. at 436-46; *Henderson v. Kibbe*, 431 U.S. 145, 153-54 (1977). Finally, a narrow class of offenses do not require any state of mind on certain elements; they impose strict liability. *Balint*, 258 U.S. at 250. *See also* *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 560-65 (1971) (knowledge of existence of regulation for acids not required); *United States v. Freed*, 401 U.S. 601, 607 (1971) (knowledge of unregistered character of hand grenades not required). Similarly, responsibility may even be strict and vicarious. *Park*, 421 U.S. at 673-76 (public health), *United States v. Dotterweich*, 320 U.S. 277, 281-85 (1943) (drugs). No constitutional restrictions have been placed on enacting such legislation, outside of the area of the first amendment. *Smith v. California*, 361 U.S. 147, 152-54 (1959) (obscenity).

Usually, individual responsibility for the conduct of another is determined by the general rules governing complicity and conspiracy. W. LAFAVE & A. SCOTT, *supra*, at §§ 63-66 (complicity), §§ 61-62 (conspiracy). Compare Ruder, *Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delicto, Indemnification, and Contribution*, 120 U. PA. L. REV. 597 (1972), with *Dirks v. SEC*, 681 F.2d 824, 844-46 (D.C. Cir. 1982) (scienter for censure of broker), *cert. granted*, 51 U.S.L.W. 3373 (U.S. Nov. 15, 1982). The conduct requirement for complicity is facilitation of the conduct of another, where the conduct of the other constitutes an offense. 18 U.S.C. § 2 (1976) (aid and abet). The conduct requirement for conspiracy is agreement, where it is agreed that conduct that constitutes an offense will be engaged in. 18 U.S.C. § 371 (1976) ("conspires"). It is not necessary that each of the co-

conspirators personally engage in the prohibited conduct to which the agreement relates. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946) (agreement alone equals conspiracy); *Direct Sales Co. v. United States*, 319 U.S. 703, 711-13 (1943) (aid plus intent equals conspiracy). If specified, conspiracy also requires an overt act. 18 U.S.C. § 371 (1976) (overt act); *Singer v. United States*, 323 U.S. 338, 340 (1945) (none specified, none required). No state of mind is set out in the general complicity or conspiracy statutes, and the lower courts are split on what state of mind should be implied. The split is represented by the views of Judges Learned Hand and John J. Parker. Compare *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (intent for complicity) and *United States v. Falcone*, 109 F.2d 579, 581 (2d Cir.) (intent for conspiracy), *aff'd on other grounds*, 311 U.S. 205 (1940), with *Backun v. United States*, 112 F.2d 635, 637 (4th Cir. 1940) (knowledge for complicity) and *Scales v. United States*, 227 F.2d 581, 587 (4th Cir. 1955) (knowledge for complicity), *aff'd on other grounds*, 367 U.S. 203 (1961). The decisions remain in conflict. Compare *United States v. Kelton*, 446 F.2d 669, 671 (8th Cir. 1971) (intent for complicity) and *United States v. Aviles*, 274 F.2d 179, 190 (2d Cir. 1962) (intent for conspiracy), with *United States v. Harris*, 435 F.2d 74, 88-89 (D.C. Cir. 1970) (knowledge for complicity) and *United States v. James*, 494 F.2d 1007, 1024 (D.C. Cir. 1974) (knowledge for conspiracy), *cert. denied*, 419 U.S. 1020 (1975). The Supreme Court has never authoritatively resolved the split. *Direct Sales Co. v. United States*, 319 U.S. 703, 713 ("stake in the venture" as test of intent "may not be essential").

The legal rules for determining the criminal responsibility of entities parallel those applicable to individuals. A corporation is responsible for the offenses its employees or agents commit in the scope of their employment or authority with intent to benefit the corporation. *New York Cent. & H. R. R.R. v. United States*, 212 U.S. 481, 493-95 (1909) ("because the act is done for the benefit of the principal" under the "principle governing civil liability," there is "no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable"; the corporation and individuals may be joined in one indictment). In addition, the duty to be enforced by the criminal sanctions may "not arise out of the relation of employer and employee but [may be] one that, in virtue of the statute, [is] owed by [the corporation itself to the] public." *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 244 (1938). Corporations have been regularly convicted since 1909. See, e.g., *United States v. Cincotta*, 689 F.2d 238, 241-43 (1st Cir. 1982). See generally *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1246-51 (1979). Similar rules are applicable to partnerships, *United States v. A & P. Trucking Co.*, 358 U.S. 121, 125-27 (1958), and voluntary associations, *United States v. Adams Express Co.*, 229 U.S. 381, 389-90 (1913) (joint stock companies). The individual and the entity, however, are both responsible; entity responsibility does not mean an end of personal responsibility. *United States v. Wise*, 370 U.S. 405, 408-11 (1962). Generally, for criminal purposes, unlike civil liability, one partner's knowledge will not be imputed to another. *Gordon v. United States*, 347 U.S. 909, 910 (1954). But criminal responsibility may be strict and vicarious. *Dotterweich*, 320 U.S. at 277.

Where the imposition of civil liability or criminal responsibility on governmental entities or officials is involved, a variety of constitutional considerations, statutes, and judicial doctrines are implicated. *Nixon v. Fitzgerald*, 102 S. Ct. 2690, 2701 (1982) ("guided by the Constitution, federal statutes, . . . history . . . [and] common law"); W. PROSSER, *supra*, § 131, at 970-92. The United States may, of course, not be sued without its consent. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411-12 (1821) (Marshall, C.J.). That limited consent is defined by the narrow terms of the Federal Tort Claims Act, 28 U.S.C. § 1346 (1976). See generally 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3658 (1976). Individual federal officials, too, may have an absolute or qualified immunity from personal civil liability. Compare *Nixon v. Fitzgerald*, 102 S. Ct. at 2690 (president has absolute immunity), with *Butz v. Economou*, 438 U.S. 478, 504-08 (1978) (secretary of agriculture has qualified immunity). But no general immunity exists from personal criminal respon-

sibility. *See, e.g.*, *United States v. Brewster*, 408 U.S. 501, 507-29 (1972)(senator); *United States v. Hastings*, 681 F.2d 706, 709-12 (11th Cir. 1982)(judge). In addition, the eleventh amendment and related judicial doctrine preclude suits in federal courts by individuals against the states. U.S. CONST. AMEND. XI (suits by citizens of another state); *Hans v. Louisiana*, 134 U.S. 1, 10-19 (1890) (suits by its own citizens). *See generally* 13 C. WRIGHT, A. MILLER & E. COOPER, *supra*, at § 3524 (1975). Counties or municipalities do not enjoy similar immunity. *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890) (county); *Monell v. Department of Social Serv.*, 436 U.S. 658, 695-701 (1978)(municipality). Nevertheless, injunctive and damage actions may be maintained against state officials themselves within the context of a complex body of jurisprudence. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 130-47 (1978). State officials, too, may have personal immunities. *Scheuer v. Rhodes*, 416 U.S. 232, 238-49 (1974)(executive official has qualified immunity); *Pierson v. Ray*, 386 U.S. 547, 553-57 (1957) (state judge has absolute, a police officer qualified immunity); *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951)(express abrogation of absolute privilege by state legislature required). Like federal officials, state officials have no immunity from federal criminal sanctions. *United States v. Mandel*, 415 F. Supp 997, 1023-24 (D. Md. 1976)(governor subject to RICO), *rev'd on other grounds*, 591 F.2d 1347 (4th Cir.), *reinstated by equally divided court*, 602 F.2d 653 (4th 1979), *cert. denied*, 445 U.S. 961 (1980). *See O'Shea v. Littleton*, 414 U.S. 488, 503 (1974) ("[T]he judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress'" (quoting *Gravel v. United States*, 408 U.S. 606, 627 (1972))); *United States v. Gillock*, 445 U.S. 360, 371-74 (1980)("have drawn the line at civil actions"); *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982)(office of governor may be "enterprise" without tenth amendment violation under National League of Cities v. Usery, 426 U.S. 833 (1976) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)); *United States v. Angelilli*, 660 F.2d 23, 34 (2d Cir. 1981)(felons automatically removed from office, but federal forfeiture of office not "displac[ing] the State's freedom to structure integral governmental functions"). No textual, legislative history, or policy reasons exist why this general jurisprudence ought not be applicable to RICO. Indeed, RICO was designed to supplement, not supplant current law. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947 (1970). It has not always been so interpreted in criminal prosecutions.

Like the antitrust statutes upon which it was modeled, RICO neither sets out a state of mind requirement nor differentiates between its elements on the question. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 438-46 (1978). Unfortunately, the lack of an express state of mind element has led some courts to conclude that no showing of state of mind is necessary. *United States v. Scotto*, 641 F.2d 47, 55-56 (2d Cir. 1980) ("the RICO count does not include a scienter element over and above that required by the predicate crimes"). Nevertheless, as *Scotto* correctly recognized, RICO and its predicate offenses are separate offenses; its predicate offenses are not lesser included offenses. *See United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir. 1980); *United States v. Rone*, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947 ("Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title."). As such, the elements RICO adds to the predicate offenses are not mere aggravating factors, that is, grading elements. *United States v. Anderson*, 626 F.2d 1358, 1367-68 n.17 (8th Cir. 1980) (RICO is not just a special recidivist type statute). *See also United States v. Bledsoe*, 674 F.2d 647, 664 (8th Cir. 1982). In short, RICO does not stand in relation to its incorporated offenses in the same manner as greater to lesser included offenses, but rather as compound to predicate offenses. *See Whalen v. United States*, 445 U.S. 684, 709 (1980)("Two statutes stand in the relationship of compound and predicate offenses when one statute incorporates several other offenses by reference and compounds those offenses if a certain additional element is present."). Accordingly, a state of mind requirement should be read into RICO; thus, *Scotto* and *Boylan* were wrongly decided. *See United States v. Bledsoe*,



674 F.2d at 661 ("we express grave doubts as to propriety of these holdings"). For a detailed analysis of RICO, each of its elements—conduct, surrounding circumstances, and result—and the issue of state of mind, see W. Kolen, *RICO and State of Mind*, in *MATERIALS*, *supra* note 23, at 1286, 1318-31. The correct approach to the state of mind requirement was followed in *United States v. Elliott*, 571 F.2d 880, 906-07 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); and *United States v. Diecidue*, 603 F.2d 535, 553-55 (5th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980). See also *United States v. Sutherland*, 656 F.2d 1181, 1191-95 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451 (1982). RICO contains conduct requirements: (a) "use or invest"; (b) "acquire or maintain"; (c) "conduct or participate"; (d) "conspire." Unfortunately, RICO's conduct requirement for conspiracy has also been misread. In *Elliott*, the Fifth Circuit observed: "To be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*" 571 F.2d at 903 (emphasis in original). The court's observation in *Elliott*, however, is ambiguous. Does it mean that an individual committed two or more offenses, that he agreed personally to commit two or more offenses, or that he agreed that someone in the enterprise would commit two or more offenses? See *United States v. Lemm*, 680 F.2d 1193, 1203 n.11 (8th Cir. 1982); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981).

Arguably, the Fourth Circuit requires that two offenses be committed before a conviction will be upheld for conspiracy. *United States v. Karas*, 624 F.2d 500, 503 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981). Even Tarlow concedes that this result "conflict[s] 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." Tarlow, *supra* note 25, at 256 n.488. *Karas*, he suggests, "fails to explain why a group of people cannot agree to commit two racketeering acts without attempting to commit the offenses." *Id.*

Initially, the Fifth Circuit used *Elliott* as a rule of evidence. Where a defendant in fact committed two acts, the court was willing to uphold a verdict that he was a member of a RICO conspiracy. Compare *Elliott*, 571 F.2d at 903 ("Where the evidence establishes that each defendant . . . committed several acts of racketeering in furtherance of the enterprise's affairs, the inference of an agreement is unmistakable."), with *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980). Nonetheless, in *United States v. Martino*, 648 F.2d 367, 394 (5th Cir. 1981), *rev'd on other grounds en banc*, 681 F.2d 952 (5th Cir.), *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub nom.* *Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983), the court undertook to restate RICO's statutory elements: (1) the existence of the enterprise; (2) the enterprise's effect on commerce; (3) the association of the defendant with the enterprise; (4) the defendant's participation in the conduct of the affairs of the enterprise; and (5) the defendant participated in the enterprise through a pattern of racketeering activity. The court, citing *Bright* and *Elliott*, commented that a RICO conspiracy was formed by an agreement "[t]o participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes." 648 F.2d at 394. The court then proceeded to apply the *Elliott* rule of evidence, however, as if it were a rule of law, finding that because individual defendants had not been shown to have committed two or more predicate offenses, they were guilty of committing neither a RICO conspiracy nor violating RICO itself. 648 F.2d at 396. The court noted: "One who does not agree to do that vital element—participate in the enterprise through the commission of at least two predicate acts—cannot be convicted on a RICO conspiracy charge." *Id.* The court also observed: "The evidence establishes that . . . [the defendant] committed only one predicate act. . . . A RICO conspiracy conviction requires that . . . two predicate crimes [be] agreed to." *Id.* at 400. Accord *United States v. Phillips*, 664 F.2d 971, 1011-12, 1039 (5th Cir. 1981); *United States v. Sutherland*, 656 F.2d 1181, 1189 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451 (1982); *United States v. Welch*, 656 F.2d 1039, 1057 (5th Cir. 1981); *United States v. Peacock*, 654 F.2d 339, 341 (5th Cir. 1981). Nevertheless, unlike the Fourth Circuit, the Fifth Circuit does not require that the two offenses actually be committed. *Sutherland*, 656 F.2d at 1186-89. Likewise, the Ninth Circuit

does not require that the two predicate offenses actually be committed. *United States v. Brooklier*, 685 F.2d 1208, 1220 (9th Cir. 1982). The First Circuit has also followed the Fifth Circuit's lead. *United States v. Winter*, 663 F.2d at 1136 (defendant must have agreed to commit "personally two or more predicate crimes"). The First Circuit adopted the Fifth Circuit's two personal act rule to provide "protection to those who might otherwise be convicted through guilt by association." *Id.*

While few wish to promote guilt by association, it must be observed that the two personal act rule is not justified in the text of RICO or its legislative history. It is also impossible to square it with the general principles of accomplice or conspiratorial responsibility, as noted in *Direct Sales Co.*, 319 U.S. 703 (1943) or *Pinkerton*, 328 U.S. 640 (1946). Most importantly, however, it is perverse. RICO was designed to attack modern forms of organized crime. That aspect of RICO ought not be quarrelled with. It was designed, for example, to facilitate the prosecution of diversified organizations that the traditional conspiracy doctrine, with its narrow focus on a single offense or a single offense and a limited range of cognate or subservient offenses, could not easily reach. Traditional conspiracy doctrines were generally ineffective because they had to rely on circumstantial evidence to establish state of mind, which, of course, determined the scope of conspiratorial liability. *United States v. Brooklier*, 685 F.2d 1208, 1222 (9th Cir. 1982); *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir. 1981); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 102 S. Ct. 307 (1981); *United States v. Elliott*, 571 F.2d at 900-05. Compare *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944) (one who intentionally joins a multi-dimensional scheme "takes his chances" as to the people involved and their objectives), with *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) ("one who embarks on a criminal venture with a circumscribed outline is not responsible for acts of his co-conspirators which are beyond the goals as the defendant understands them.").

To the degree that the ABA has made recommendations that would modify RICO in these areas, it has myopically failed to take into account the character of contemporary criminal groups. ABA, *supra* note 25, at 7, 12, 23. See W. LAFAYE & A. SCOTT, *supra*, at 460 n.75 ("The advantages of division of labor and complex organization characteristic of modern economic society have their counterparts in many forms of criminal activity."). As such, its recommendations are retrogressive. Concern over guilt by association is real, but complicity and conspiracy doctrine, even in the RICO context, takes those considerations into account. *Scales v. United States*, 367 U.S. 203, 225-27 (1961) ("Any thought that due process puts beyond the reach of the criminal law all individual associational relationships, unless accompanied by the commission of specific acts of criminality, is dispelled by familiar concepts of the law of conspiracy and complicity. . . . [We] can perceive no reason why one who actively and knowingly works in the ranks of . . . [an] organization [which engages in criminal activity], intending to contribute to the success of those specifically illegal activities, should be any more immune from prosecution than he to whom the organization has assigned the task of carrying out the substantive criminal act."). See also *United States v. Elliott*, 571 F.2d at 903. Here, as elsewhere, "the good sense of prosecutors, the wise guidance of the trial judges, and the ultimate judgment of juries must be trusted." *United States v. Dotterweich*, 320 U.S. 277, 285 (1943). The defendant's role in the enterprise, not specific individual offenses he agrees to commit, ought to suffice for RICO liability. See, e.g., *United States v. Zemek*, 634 F.2d 1159, 1171 (9th Cir. 1980) (the court found sufficient evidence to connect the defendant, a "financier and overseer to the enterprise" with the conspiracy), *cert. denied*, 101 S. Ct. 1359 (1981). See also *United States v. Brooklier*, 685 F.2d 1208, 1220-23 (9th Cir. 1982) (contrary rule imposes "unnecessary burden"). Yet under the two personal act rule any one who keeps his hands clean—merely directs others—will not be criminally responsible either for conspiracy, or for violating RICO itself. The fact patterns, for example, in *People v. Luciano*, 277 N.Y. 348, 361, 14 N.E.2d 433, 446 (1938) (Luciano did not take an active part in the management or daily operations of the business, "but he cannot escape his criminal responsibility as the leader and principal."), *cert. denied*, 305 U.S. 620 (1938), or *United States v. Aviles*, 274 F.2d

commercial entities (*e.g.* corporations,<sup>152</sup> partnerships,<sup>153</sup> sole proprietorships);<sup>154</sup> (2) benevolent organizations (*e.g.* unions,<sup>155</sup> benefit funds,<sup>156</sup> schools<sup>157</sup>); (3) governmental units (*e.g.* the office of a gov-

179 (2d Cir.) (the defendant did not handle narcotics himself, but was still convicted), *cert. denied*, 362 U.S. 974 (1960), would be difficult, if not impossible to prosecute under RICO; this result is hardly consistent with Congressional intent, for an analysis of both prosecutions played a key role in the early stages of the thinking that led to RICO. TASK FORCE REPORT, *supra* note 40, at 4, nn.46 & 82. The Luciano prosecution is particularly instructive. Thomas E. Dewey, the prosecutor, had to get legislation passed that would permit the joinder of a number of crimes in one indictment in order to present the full picture of the Luciano's vice syndicate. It was called the "Dewey Law." H. POWELL, NINETY TIMES GUILTY 168 (1939). In addition, there was no crime called "racketeering," although that was how Luciano's operation would ordinarily be described. *Id.* at 167. RICO, of course, permits the prosecution of diverse predicate offenses, making them independently unlawful when they are related to a common "enterprise." RICO also describes the conduct in ordinary language: "racketeering." It is but a perfectly proper generalization of Dewey's 1939 experience to see that "racketeering" is not limited to the underworld, or persons like Luciano. *See* note 41 *supra*. In addition, the Fifth Circuit has suggested that a RICO conspiracy requires an overt act. *Sutherland*, 656 F.2d at 1186 n.4. RICO does not contain such a requirement, as is demonstrated in *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 102 S. Ct. 307 (1981). Unfortunately, the developing civil jurisprudence under RICO at the district court level also evidences slight awareness of the text of the statute, its legislative history, or general jurisprudence. *See* notes 129-371 *supra*.

152 *United States v. Weisman*, 624 F.2d 1118, 1120 (2d Cir.) (theater operated through pattern of securities and bankruptcy fraud), *cert. denied*, 101 S. Ct. 209 (1980). The corporation may be foreign. *United States v. Parness*, 503 F.2d 430, 436 (2d Cir. 1975), *cert. denied*, 419 U.S. 1105 (1975). It also includes unincorporated subdivisions as "associations in fact." *United States v. Computer Sciences*, 689 F.2d 1181, 1190 (4th Cir. 1982).

153 *United States v. Zang*, Nos. 80-2227, 80-2228 (10th Cir. 1982) (partnership) (available on LEXIS, Genfed library, Cir file); *United States v. Jannotti*, 501 F. Supp 1182, 1185-86 (E.D. Pa. 1981) (law firm operated through payment of bribes), *rev'd on other grounds and conviction reinstated*, 673 F.2d 578 (3d Cir. 1982). *See United States v. Griffin*, 660 F.2d 996, 949 (4th Cir. 1981) (partnership may be enterprise).

154 *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 676 (N.D. Ind. 1982) (business operated by pattern of arson and mail fraud). *See United States v. Melton*, 689 F.2d 679 (7th Cir. 1982) (conviction of Caton accomplices affirmed).

155 *United States v. Provenzano*, 688 F.2d 194, 199-200 (3rd Cir. 1982); *United States v. Scotto*, 641 F.2d 47, 50 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1982); *United States v. Kaye*, 556 F.2d 855, 861 (7th Cir.), *cert. denied*, 434 U.S. 921 (1977).

156 *United States v. Rubin*, 559 F.2d 975, 978 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978) *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). *See* note 177 *infra*.

157 *United States v. Weatherspoon*, 581 F.2d 595, 597-98 (7th Cir. 1978). *See United States v. Bledsoe*, 674 F.2d 649 (8th Cir. 1982) (co-operative may be enterprise).

ernor,<sup>158</sup> a state legislator,<sup>159</sup> a court,<sup>160</sup> a prosecutor's office,<sup>161</sup> a police<sup>162</sup> or sheriff's<sup>163</sup> department, or an executive department or agency<sup>164</sup>; or (4) associations in fact (licit or illicit).<sup>165</sup> The catego-

158 *United States v. Thompson*, 685 F.2d 993, 994-95 (6th Cir. 1982). *But see* *United States v. Mandel*, 415 F. Supp. 997, 1020-22 (D. Md. 1976)(State of Maryland not "enterprise"), *rev'd on other grounds*, 591 F.2d 1347 (4th Cir.), *aff'd on rehearing en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). *Mandel* does not reflect the law in the Fourth Circuit. *United States v. Altomare*, 625 F.2d 5, 7 n.7 (4th Cir. 1980)(county prosecutor's office; *Mandel* rejected); *United States v. Baker*, 617 F.2d 1060, 1061 (4th Cir. 1980)(sheriff's department; "constrained to disagree with" *Mandel*). *See* note 93 *supra*.

159 *United States v. Long*, 651 F.2d 239, 241 (4th Cir.) (office of state senator), *cert. denied*, 454 U.S. 896 (1981). *See* *United States v. Gillock*, 445 U.S. 360, 373 n.11 (1979) ("Of course, even a Member of Congress would not be immune under the federal Speech or Debate Clause from prosecution for the acts which form the basis of the Hobbs Act, 18 U.S.C. § 1951, and RICO, 18 U.S.C. § 1962, charges here.").

160 *United States v. Stratton*, 649 F.2d 1066, 1074-75 (5th Cir. 1981) (judicial circuit).

161 *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980)(county prosecutor's office).

162 *United States v. Grzywacz*, 603 F.2d 682, 685-87 (7th Cir. 1979)(police department), *cert. denied*, 446 U.S. 935 (1980).

163 *United States v. Lee Stoller Enters.*, 652 F.2d 1313, 1316-19 (7th Cir.) (sheriff's office), *cert. denied*, 454 U.S. 1082 (1981).

164 *United States v. Dozier*, 672 F.2d 531, 543 & n.8 (5th Cir. 1982) (Louisiana Department of Agriculture); *United States v. Davis*, 576 F.2d 1065, 1067 (3d Cir. 1978) (warden of county prison), *cert. denied*, 439 U.S. 836 (1978); *United States v. Frumento*, 563 F.2d 1083, 1091-92 (3d Cir. 1977) (Pennsylvania Bureau of Cigarette and Beverage Taxes), *cert. denied*, 434 U.S. 1072 (1978).

165 *United States v. Turkette*, 452 U.S. 576, 580 (1981)("there is no restriction upon the associations embraced"). In *Turkette*, the Court observed: "The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . The . . . [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583. Prior to *Turkette*, the courts of appeals had little difficulty finding that associations in fact existed. *See, e.g.*, *United States v. Errico*, 635 F.2d 152, 156 (2d Cir. 1980)("community of interest and continuing core of personnel"), *cert. denied*, 453 U.S. 911 (1981); *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir.)(diversified criminal enterprise), *cert. denied*, 439 U.S. 953 (1978). The Eighth Circuit was an exception, largely because of the Sixth Circuit's panel decision in *Sutton*. *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980)("enterprise" does not "encompass a simple association to commit the predicate crimes [but is] . . . only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal . . . that can be defined apart from . . . the predicate [offenses]"). Since *Turkette* rejected the reasoning of the *Sutton* panel, the other courts of appeals have had no difficulty in implementing the approved perspective. *See, e.g.*, *United States v. DeRosa*, 670 F.2d 889, 896 (9th Cir. 1982)("activities . . . apart from . . . predicate acts of narcotics . . . sufficient to establish 'enterprise'"); *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir. 1981) ("proof of . . . existence [of enterprise] may overlap proof of . . . pattern of racketeering activity" but from "circumstantial evidence," "common purpose," and "composition," an inference of "continuity, unity, shared purpose and identifiable structure" may be made); *United States v. Bagnariol*, 665 F.2d 877, 890-91 (9th Cir. 1981)("separate and discrete element . . . [but] government . . . not precluded from using the same evidence," which was sufficient to establish an association in fact to make gambling legal). The Eighth Circuit has continued to have trouble. In *United States v. Bledsoe*, 674 F.2d 647 (8th Cir. 1982), the court stated that RICO was "not intended

ries are not mutually exclusive.<sup>166</sup>

"Patterns of racketeering activity"<sup>167</sup> may also be grouped into four broad, but not mutually exclusive categories: (1) violence;<sup>168</sup> (2)

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to be a catchall reaching all concerted action." *Id.* at 659. A RICO violation requires "an association with an enterprise which is distinct from participation in the conduct of the enterprise through a pattern of racketeering activity." *Id.* at 663. A RICO "enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts." *Id.* at 664. A RICO enterprise is more than "a conspiracy of two or more persons . . . [plus] two or more overt acts of fraud," *id.* at 661, or any confederation, no matter how loose or temporary," *id.* at 662. A RICO enterprise requires a distinct structure like, for example, "[t]he command system of a Mafia family . . . [or] the hierarchy, planning and division of profits within a prostitution ring." *Id.* at 665. *See also* United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1982) ("(1) common or shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that inherent in the conduct of the pattern"). Ironically, the Eighth Circuit and the Sixth Circuit are now on a collision course. *Compare Anderson*, 626 F.2d at 1365 n.10 (association in fact issue could have been avoided if governmental entity charged) *with* United States v. Thompson, 685 F.2d 993, 1000 (6th Cir. 1982) (governmental entity issue could have been avoided if association in fact charged).

166 They are also not exhaustive. *See, e.g.,* Gunther v. Dinger, 547 F. Supp 25, 27 (S.D.N.Y. 1982) (decedent's "estate" may be enterprise). On the meaning of "includes" see note 16 *supra*; *Basic Concepts*, *supra* note 3, at 1023. "The shifting definition of 'enterprise' . . . [is] necessary in view of the fluid nature of criminal associations." United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979). Accordingly, "enterprise" also includes an enterprise composed of several corporations, United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); an enterprise composed of two corporations and a union, United States v. Companale, 518 F.2d 352, 357 n.11 (9th Cir. 1975), *cert. denied*, 452 U.S. 1050 (1976); and an enterprise that consists of an area-wide type of business, United States v. Zemek, 634 F.2d 1159, 1162 (9th Cir. 1980) ("tavern business of Pierce County"). The "enterprise" concept is not unconstitutionally vague. United States v. Scotto, 641 F.2d 47, 52-53 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981); United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980); United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (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).

167 The "pattern of racketeering activity" concept is not unconstitutionally vague. United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981), *modified on other grounds*, 681 F.2d 952 (5th Cir.), *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub nom.* Russello v. United States, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983); United States v. Zemek, 634 F.2d 1159, 1170 (9th Cir. 1980); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *See* United States v. Stofsky, 409 F. Supp. 609, 612 (S.D.N.Y. 1973) (not vague since predicate offenses clearly defined), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See generally* United States v. Morelli, 643 F.2d 402, 412 (6th Cir. 1981) ("RICO . . . has survived various void-for-vagueness challenges."). The *Parness* case is discussed in further detail in note 175 *infra*.

168 The *violence* offenses would include state murder, kidnapping, arson, robbery, and extortion, and federal loansharking (18 U.S.C. §§ 891-894), obstruction of justice (18 U.S.C. § 1503), obstruction of criminal investigations (18 U.S.C. § 1510), extortion (18 U.S.C. § 1951), robbery (18 U.S.C. § 1951), and interstate racketeering (18 U.S.C. § 1952) ("crime of violence").

RICO has been used against a wide variety of violent groups. Foreign terrorists have been successfully prosecuted. *See, e.g.,* United States v. Ljubas, No. 81-CR402 (S.D.N.Y.

June 30, 1982) (use of book bombs) (available on LEXIS, Genfed library, Dist. file); *Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations for 1983: Hearings before a Subcomm. of the House Comm. on Appropriations*, 97th Cong., 2d Sess. 1093 (1982) (testimony of William H. Webster) [hereinafter cited as *1983 Appropriations Hearings*] ("The application of . . . RICO . . . to terrorist activity has provided further thrust to the investigation of terrorists groups who are involved in murder, extortion, bombing or arson activity. . . . RICO . . . [was] successfully used against Croatian terrorists to prevent a bombing and assassination plot from taking place and to effect the arrest and conviction of several key members of this group."). See also *In re Grand Jury Proceeding Involving Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982) (grand jury investigation of \$1.5 million Brinks robbery-murder under 18 U.S.C. § 1961 attacked as "attempt to harass . . . because of political views"); *In re Fula*, 672 F.2d 279, 283 (2d Cir. 1982); *N.Y. Times*, July 4, 1982, at 16, col. 6 (Motley, J. "[T]he mere advocacy of ideas is a precious right in this country . . . [but] [i]t is these acts of violence, and not the defendants' beliefs, for which the defendants [Croatian terrorists] were tried and convicted."). See also *N.Y. Times*, November 6, 1981, at 14, col. 3 (17 New World of Islam sect members convicted on a RICO charge for robbing \$113,000 from nine banks over a 10 month period to raise money for their religion. In one robbery, a police officer was killed.); *United States v. Dickens*, 695 F.2d 765 (3d Cir. 1983) (conviction upheld). In addition, the Hell's Angels motorcycle gang was unsuccessfully prosecuted in California. See *United States v. Cheshier*, 678 F.2d 1352, 1355 (9th Cir. 1981) (Hell's Angels Motor Club charged as RICO enterprise); *TIME*, May 26, 1980, at 10, 11 (Ralph "Sonny" Barger: "I done exactly what I wanted to do, but I haven't done racketeering and murder. There's been Hell's Angels convicted of murder, but that was on a one-to-one basis, not club policy."); *N.Y. Times*, July 4, 1980, at A19, col. 1 (mistrial); *N.Y. Times*, February 26, 1981, at 8, col. 1 (cost to government of proceeding estimated at four to seven million dollars by the United States Attorney, and 10 to 20 million dollars by defense attorneys.). Individual members were subsequently convicted in separate prosecutions of the predicate offenses. *United States v. Motley*, 655 F.2d 186, 190 (9th Cir. 1982) (charge of vindictive prosecution rejected) ("It is understandable why the prosecutor would abandon the RICO substantive and conspiracy counts with all their complications in favor of straight forward charges of the predicate drug offenses. After a long, fruitless trial, the complex RICO counts lost some of their seductive appeal."). A civil action was unsuccessfully brought against the KKK in *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993, 1014 (S.D. Texas 1981) (Klan held to be "enterprise," but no "pattern of racketeering activity" shown). The result in *Vietnamese Fishermen's Ass'n* is appropriately criticized in *Civil RICO*, *supra* note 52, at 711 n.375 ("sufficient 'predicate' acts, including arson and extortion").

The most successful use of RICO against violent groups, however, has been in criminal prosecutions brought against major organized crime figures, though not all of these prosecutions have been based on RICO charges. See *1983 Appropriations Hearings*, *supra*, at 1050, 1051 ("[D]uring calendar year 1981, 14 recognized leaders of the 25 traditional Organized Crime 'families' were indicted or convicted. Included in this unprecedented statistic are the 'Bosses' of the New Orleans Organized Crime 'Family'; the Colombo and Genovese 'families' of New York; and the Bufalino 'Family' of Pennsylvania, who have all been convicted. Indicted were the 'Bosses' of the Organized Crime 'Families' in Boston, Cleveland, Tampa, and Chicago. With regard to the Bonanno 'Family' in New York and the Organized Crime 'Families' in Kansas City and Milwaukee, not only have the 'Bosses' been indicted, but also the ruling hierarchies of these 'families.'"). See, e.g., *United States v. Brooklier*, 685 F.2d 1208, 1213 (9th Cir. 1982) (RICO prosecution of "members of La Cosa Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling, and loansharking."); *United States v. Marcello*, 537 F. Supp. 1364 (E.D. La. 1982) (conviction of New Orleans boss under RICO). For a description of several recent RICO prosecutions, see *Departments of Commerce, Justice and State, The Judiciary, and Related Agencies Appropriations for 1982: Hearing before a Subcomm. of the House Comm. on Appropriations*, 97th

Cong., 1st Sess. 49-61 (1981) (testimony of William F. Smith). Compare *United States v. Bufalino*, 285 F.2d 408, 419 (2d Cir. 1960) (Clark, J., concurring) ("not a shred of legal evidence that the Apalachin gathering was illegal.") with *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982) (evidence introduced to show that Bufalino, who was at the Apalachin gathering, was a member of "La Cosa Nostra, an organization whose members perform murders for one another as a matter of professional courtesy.").

As impressive as these individual prosecutions against major organized crime figures are, a word of caution is nevertheless in order. In 1969 President Nixon observed, "For two decades now, since the Attorney General's Conference on Organized Crime in 1950, the Federal effort [against organized crime] has slowly increased . . . . But . . . [n]ot a single one of the 24 Cosa Nostra families has been destroyed." *Senate Hearings, supra* note 28, at 445. It was estimated in 1969 that the "overall strength of these gangs [was]. . . 3,000 to 5,000." S. REP. NO. 617, 91st Cong., 1st Sess. 36 (1969). Currently, 50% of the F.B.I.'s organized crime program (676 agents) is devoted to these groups. *1983 Appropriations Hearings, supra*, at 1074-75. Overall, the organized crime program of the Bureau in 1983 will involve more than 2,000 positions and spend more than 90 million dollars. *Id.* at 1069. Federal Strike Forces operate in 14 cities with 12 sub-offices; the entire program costs more than an estimated \$100 million per year. *Stronger Federal Effort Needed In Fight Against Organized Crime*, REPORT BY COMPTROLLER GENERAL OF THE UNITED STATES 1, 3 (December 7, 1981). Investigative techniques used include undercover agents, electronic surveillance, financial reviews, and informants. *1983 Appropriations Hearings, supra*, at 1072. Today, our knowledge of organized crime is vastly improved. *Id.* at 967 (testimony of William H. Webster) ("We are at a point in our experience where we know a great deal more about organized crime mechanisms and units than we did, say, 20 years ago when I was a United States Attorney being told that there wasn't anything like organized crime except for some loose familial relationships."). The current level of the commitment of the Department of Justice resources is, moreover, resulting in approximately 150 convictions a year of members or associates. *1983 Appropriations Hearings, supra*, at 992. In 1980, 132 traditional organized crime members or associates were convicted or awaiting trial. In 1981, the number increased to 185. *Id.* Yet, the blunt fact is that even if these criminal convictions permanently disabled each defendant, and no new members joined, it would take more than a quarter of a century to incarcerate and thus end the criminal careers of each member of these organized crime groups. On the impact in fact of individual prosecutions, see note 176 *infra*. In addition, organized crime obviously involves more than just these groups. The strategies employed and the level of existing efforts against organized crime, in all its various forms, are inadequate. A strategy of organized crime control, for example, that relies almost exclusively on criminal prosecutions will not achieve meaningful success. The public resources devoted to the program must, in short, be increased and the strategy followed must include more than the mere use of criminal sanctions. Private enforcement must also be integrated into the overall effort.

On organized crime and violence, see generally *Organized Crime and Use of Violence: Hearings Before Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess., Parts 1 and 2 (1980); 127 CONG. REC. H8,623, H8,626-27 (daily ed. November 19, 1981) (statement of Congressman Louis Stokes on introduction of Violence Control Act of 1982) (in 1980, 23,000 murders, of which only 73% were cleared by arrest; between 1977-79, 1,280 organized crime-related killings). Finally, while violence against anyone is to be deplored, one facet of contemporary organized crime violence that is historically unique in the United States is the extent to which it is directed toward judicial and prosecutive officials. See, e.g., *N.Y. Times*, Dec. 15, 1982, at 10, col. 1 (conviction of killers of Judge John H. Wood, Jr.); *id.*, March 14, 1982, at 18, col. 3 (review of plots against judges, prosecutors, and investigators taking part in drug cases); *id.* April 16, 1982, at 7, col. 6 (indictment of "narcotic smuggler and a hired killer . . . on charges of murdering the Federal district judge" scheduled to preside over a drug case against them).

provision of illegal goods and services;<sup>169</sup> (3) corruption in the labor

169 The category of illegal goods and services would include: (1) *gambling*: state gambling and federal sports bribery (18 U.S.C. § 224), transmission of gambling information (18 U.S.C. § 1084), obstruction of local law enforcement (18 U.S.C. § 1511), transportation of wagering paraphernalia (18 U.S.C. § 1953), gambling businesses (18 U.S.C. § 1955), and interstate racketeering (18 U.S.C. § 1952); (2) *narcotics*: state narcotics and dangerous drugs; federal narcotics, dangerous drugs, and interstate racketeering (18 U.S.C. § 1952); (3) *liquor* (18 U.S.C. § 1952); (4) *prostitution* (18 U.S.C. § 1952) and white slavery (18 U.S.C. §§ 2421-2424); (5) *loansharking*: state extortion and federal loansharking (18 U.S.C. §§ 891-894); (6) *theft and fencing*: state robbery and federal theft from interstate shipments (18 U.S.C. § 659), robbery (18 U.S.C. § 1951), interstate transportation of stolen property (18 U.S.C. §§ 2314-2315); and (7) *counterfeiting* (18 U.S.C. §§ 471-473).

The scope and impact of the traffic in illegal goods and services are substantial. Two areas illustrate both longstanding attitudes and practices and current realities: gambling and drugs. Traditionally, gambling is thought of as the chief source of income for organized crime. PRESIDENT'S REPORT, *supra* note 43, at 188 ("Law Enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime."). The Justice Department estimated for the National Gambling Commission in 1974 that the gross volume of illegal gambling was between 29 and 39 billion dollars each year. GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF NATIONAL POLICY TOWARD GAMBLING 63 (1976)[hereinafter cited as GAMBLING IN AMERICA]. Studies done for the Commission, however, put the figure at five billion dollars, characterizing an upper range beyond \$10 billion "statistically impossible." Kallick, Kaufman, & Reuter, *Micro and Macro Dimensions of Gambling in the United States*, 35 J. OF SOC. ISSUES 19 (No. 3 1979). The Commission expressed reservations about the validity of the studies insofar as they estimated the illegal handle. GAMBLING IN AMERICA, *supra*, at 63-65. Even at the lower figure, illegal gambling would almost equal the overall figure for the national amusement and recreation services industry in 1975, 5.2 billion dollars. THE WORLD ALMANAC AND BOOK OF FACTS 1982, at 105 (1981). Nevertheless, using the figures from the Commission's study, the net take would not exceed \$1.5 billion. Other estimates of handle and take are higher. *See, e.g.*, EASY MONEY: REPORT OF THE TASK FORCE ON LEGALIZED GAMBLING 54 (Fund for the City of New York and the Twentieth Century Fund, New York, 1974) [hereinafter cited as EASY MONEY] (handle: 22.9, gross take: 3.5, net take: 1.6 billion dollars). Plainly, gambling is not the major source of income for organized crime. The popular myth of organized crime's monopoly ownership of illicit gambling is also unsupported by hard evidence. Current estimates of ownership or control by mafia-type organized crime are as follows: far west, 29.2%; midwest, 41.4%; northeast, 53.2%; southeast, 35.7%; and southwest, 2%. EASY MONEY, *supra*, at 9. Indeed, revisionist literature makes gambling today a marginal activity of organized crime. Reuter & Rubinstein, *Fact, Fancy and Organized Crime*, 53 PUB. INTEREST 45, 47 (Fall 1978). On the other hand, monopoly ownership or control is not necessary to take monopoly profits out of an industry. As long as a monopoly can be maintained over an essential component of a product or service, monopoly profits can be extracted. *See* P. SAMUELSON, ECONOMICS 93-97 (6th ed. 1964). Increasingly, loansharking is characterized as having that relationship to illicit gambling. As the Pennsylvania Crime Commission observed in 1980, "Gamblers are a natural market for the illegal money lender." PENNSYLVANIA CRIME COMMISSION, A DECADE OF ORGANIZED CRIME: 1980 REPORT 126 (1980) [hereinafter cited as PENNSYLVANIA 1980]. Public participation in illegal gambling, too, is not as high as many believe; only about 11% of adults bet in any form of an illegal game. GAMBLING IN AMERICA, *supra*, at 58. For a history of federal gambling legislation, see Blakey & Kurland, *The Development of the Federal Law of Gambling*, 63 CORNELL L. REV. 923 (1978). For an empirical study of gambling enforcement, see F. Fowler, T. Mangione & F. Pratter, GAMBLING ENFORCEMENT IN MAJOR AMERICAN CITIES: EXECUTIVE SUMMARY (1978)(conclusion: less than one per-



cent of resources are devoted to gambling enforcement because lack of public support suspected). For a discussion based on empirical surveys of what are in fact current social attitudes toward gambling enforcement, see *GAMBLING IN AMERICA*, *supra*, at 48-49 (42% of sample thought gambling enforcement "very important"; 55% thought jail an appropriate consequence).

Today, the traffic in illicit drugs is in fact the major source of income for organized criminal groups. Illegal drugs "generated \$64 billion in retail sales in 1979 compared to \$50 billion in 1978 and 48 billion in 1977." *THE NATIONAL INTELLIGENCE CONSUMERS COMM., THE SUPPLY OF DRUGS TO THE U.S. ILLICIT MARKET FROM FOREIGN AND DOMESTIC SOURCES IN 1979*, at 5 (1979). The rise "was principally the result of increased consumption of cocaine, marihuana and dangerous drugs." *Id.* See *N.Y. Times*, Oct. 15, 1982, at 11, col. 6 (1980: \$79 billion). Perspective is helpful. An income of \$79 billion per year would make the drug traffic more than twice as large as banking (\$34 billion) or insurance (\$24 billion), and it would rank in between transportation (\$76 billion) and the medical and health services (\$86 billion) industries. *THE WORLD ALMANAC AND BOOK OF FACTS 1982*, at 105 (1981). Profit margins are incredibly high. See generally *S. REP. NO. 887*, 96th Cong., 2d Sess. (1980). The cocaine traffic is illustrative. A South American farmer sells 500 kilos of coca leaves for approximately \$250, which ultimately produced one kilo of cocaine hydrochloride; it, in turn, is then cut to about 12% purity and sold at the street level for \$800,000. *Id.* at 13. The traffic in most drugs is also highly organized. *Organized Crime and the Use of Violence: Hearings Before the Perm. Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 61-62 (1980) (testimony of Peter B. Bensinger) ("sophisticated organized criminal syndicates with a corporate-like structure and motivated by power and profit").

Little evidence exists that current law enforcement resource commitment and strategy are having a significant impact on drug traffic. Federal expenditures in drug control programs amount to one billion dollars each year, yet only two to five percent of the heroin, for example, is diverted. *N.Y. Times*, Oct. 15, 1982, at 11, col. 6. Overall, less than 10% of all drug traffic entering the country is intercepted. *N.Y. Times*, Nov. 6, 1982, at 6, col. 1. For the most comprehensive study of the federal effort, see *S. REP. NO. 1039*, 94th Cong., 2d Sess. (1976). A number of changes have been made since 1976, but the traffic in drugs continues to grow. On October 14, 1982, the President announced the creation of 12 special task forces to fight narcotics and organized crime estimated to cost 160 to 200 million dollars. *N.Y. Times*, Oct. 15, 1982, at 1, col. 2. Sadly, the money for the task forces will "be found by shifting funds from existing budgets." *Id.*

Organized crime's role in loansharking is comprehensively analyzed in Goldstock & Coenen, *Controlling the Contemporary Loan shark: The Law of Illicit Lending and the Problem of Witness Fear*, 65 *CORNELL L. REV.* 127 (1980). Organized crime's role in theft and fencing is comprehensively analyzed in Blakey & Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 *MICH. L. REV.* 1511 (1977). See also *Professional Motor Vehicle Theft and Chop Shops: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 3 (1979) (auto theft four billion dollars a year, with 3 billion dollars in insurance claims); *N.Y. Times*, June 13, 1982, at 33, col. 1 (1.1 million cars "many of . . . [which are] . . . quickly disassembled in 'chop shops' and sold as spare parts"). For a study of illicit sex in one state, see *PENNSYLVANIA 1980*, *supra*, at 118-25. See also R. Rohde, *The Massage Parlor Problem and RICO Civil Remedies*, in 3 *MATERIALS*, *supra* note 23, at 1562. Current studies of the traffic in illicit liquor or counterfeiting that focus on the nation as a whole and integrate law and procedure do not exist. In fact, the number of counterfeit notes passed has remained fairly stable in the past 10 years (135,775 to 189,015), although the dollar amount has increased by 39% (2.1 million to 5.5 million). *U.S. DEPARTMENT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1981*, at 379. Similarly, the number of investigations received in the counterfeit area has also remained relatively stable (22,346 to 18,289). *Id.* at 437.

movement<sup>170</sup> or among public officials;<sup>171</sup> and (4) commercial and

170 The category of "corruption within the labor movement" would include: state extortion and bribery and federal embezzlement from unions and pension and welfare funds (18 U.S.C. § 664; 29 U.S.C. § 501 (c)); mail fraud (18 U.S.C. § 1341); wire fraud (18 U.S.C. § 1343); extortion (18 U.S.C. § 1951); interstate racketeering (18 U.S.C. § 1952) ("bribery" or "extortion"); unlawful payments (18 U.S.C. § 1954); welfare and pension funds (18 U.S.C. § 1986); and theft and fraud (18 U.S.C. §§ 2314-2315).

Labor racketeering, the use of lawful union power and wealth for personal aggrandizement or profit, has been characterized by David Dubinsky, the former president of the Garment Workers, as a pervasive and dreaded disease, a "cancer that almost destroyed the American Trade Unions." D. DUBINSKY & A. RASKIN, *DAVID DUBINSKY: A LIFE WITH LABOR* 145 (1977). The conclusions of numerous national and local studies are reviewed in G. BLAKEY, R. GOLDSTOCK, & G. BRADLEY, *LABOR RACKETEERING: BACKGROUND MATERIALS* (Cornell Institute on Organized Crime (1979)). See also Blakey & Goldstock, *On the Waterfront: RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341 (1980). One cannot question that the disease is dread. That it is pervasive is an overstatement, for the vast majority of the nation's 500,000 elected labor officials have never been charged or convicted with a crime. U.S. NEWS & WORLD REP., Sept. 8, 1980, at 33. Even the Department of Justice, hardly a disinterested observer, does not suggest that more than 300 of the 75,000 union locals are plagued with corruption. *Labor Management Racketeering Hearings before the Permanent Subcomm. on Investigations of the Senate Comm. on Governmental Affairs*, 95th Cong., 2nd Sess. 9 (1978) (testimony of Benjamin Civiletti) (labor racketeering termed "a serious national problem"). In fact, the federal government, as part of its current high priority effort, has secured convictions between 1973 and 1980 of only 450 union officers and employees, and of that number, one-third were concentrated in only four unions: the Teamsters, the Laborers, the Hotel Workers, and the Longshoremen. U.S. NEWS & WORLD REP., Sept. 8, 1980, at 34. The Teamsters Union illustrates the corruption and organized crime influence in these unions, which seems impervious to the traditional law enforcement efforts and strategies launched and followed over the past twenty years. In 1956, Robert F. Kennedy, a counsel to a Senate committee, learned that Dave Beck, the President of the Teamsters Union, was corrupt. R. SCHLESINGER, JR., *ROBERT KENNEDY AND HIS TIMES* 139-44 (1978). Beck was eventually prosecuted, Beck v. Washington, 369 U.S. 541 (1962), only to be pardoned by President Ford. SCHLESINGER, *supra*, at 149. Beck was succeeded by James R. Hoffa, who was prosecuted while Robert F. Kennedy was Attorney General. Hoffa v. United States, 385 U.S. 293 (1966) (jury bribery); United States v. Hoffa, 436 F.2d 1243 (7th Cir. 1970) (benefit fund corruption), cert. denied, 400 U.S. 1000 (1971). His sentence was commuted by President Nixon. SCHLESINGER, *supra*, at 202. Hoffa was succeeded by Frank E. Fitzsimmons, who died before he was prosecuted. Fitzsimmons' successor, Roy L. Williams, who has been linked to organized crime in congressional testimony, has recently been convicted for conspiracy to bribe a United States Senator and for wire fraud. See note 177 *infra*. Williams' leadership may be worse than the first, for while Beck was personally corrupt, he was not dominated by mob figures. As with the Mandel commutation, note 176 *infra*, the relationship of powerful unions to political power, too, is manifest.

171 The category of "corruption among public officials" would include state bribery or extortion and federal bribery (18 U.S.C. § 201); mail fraud (18 U.S.C. § 1341); wire fraud (18 U.S.C. § 1343); obstruction of justice (18 U.S.C. § 1503); obstruction of criminal investigations (18 U.S.C. § 1510); obstruction of state law enforcement (18 U.S.C. § 1911); extortion by fear or color of law (18 U.S.C. § 1951); interstate racketeering (18 U.S.C. § 1952) ("extortion or bribery"); and interstate transportation of stolen property (18 U.S.C. §§ 2314-2315).

From their beginnings, governments have had corrupt officials, and the problem has not dissipated. Witness the 1970's: a "President left office in disgrace, a Vice-president was convicted of abuse of position, and a Supreme Court Justice resigned under a cloud of suspicion."

other forms of fraud.<sup>172</sup> Since RICO's standards make "unlawful"

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BLAKEY & GOLDSTOCK, OFFICIAL CORRUPTION: BACKGROUND MATERIALS 2 (Cornell Institute on Organized Crime (1977)). "In turn, two cabinet officers, two U.S. Senators, eight Congressmen, a federal judge, five governors and Lt. governors, several state judges (44) and various and assorted mayors (43), state legislators (60), and sheriffs and police officials (260)" were indicted or convicted. *Id.* Then came Abscam, which cost \$800,000, involved more than 100 FBI agents in five cities, and resulted in the exposure of eight national legislators and at least two dozen lesser officials. TIME, Feb. 18, 1980, at 10. The overall statistics on the corruption uncovered by the current federal program are impressive. Since 1970, federal (1,119), state (520), and local (1,757) officials as well as others (1,738) have been federally indicted, while 3,937 convictions (federal: 924, state: 369, local: 1290; others: 1354) have been obtained. 1,300 trials are pending. U.S. DEPARTMENT OF JUSTICE, REPORT TO CONGRESS ON THE ACTIVITIES AND OPERATIONS OF THE PUBLIC INTEGRITY SECTION FOR 1981, at 20 (1982). Frequently employed statutes in the anticorruption program of the Public Integrity Section include RICO and its predicate offenses. *Id.* at 25-27. While the work of the Public Integrity Section is impressive, it is not well managed. See generally REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES: JUSTICE NEEDS TO BETTER MANAGE ITS FIGHT AGAINST PUBLIC CORRUPTION (1980). The corruption uncovered by the Section is a source of shame for our nation. But see U.S. NEWS & WORLD REPORT, Feb. 28, 1981, at 36 (acting Deputy Attorney General quoted: "There's no way to tell whether we have more corruption than we had 100 years before. But there's no question that efforts to prosecute those who betray public office are at a higher pitch than ever before.").

172 The category of "commercial or other frauds" would include state arson and bribery, and federal sports bribery (18 U.S.C. § 224); counterfeiting (18 U.S.C. §§ 471-473); theft from interstate shipments (18 U.S.C. § 659); mail fraud (18 U.S.C. § 1341); wire fraud (18 U.S.C. § 1343); interstate racketeering (18 U.S.C. § 1952) ("bribery" and "arson"); interstate transportation of stolen property (18 U.S.C. §§ 2314-2315); bankruptcy fraud, and fraud in the sale of securities. For data on the scope and impact of fraud, see text accompanying notes 224-35 *infra*.

The expressed fear, note 120 *supra*, that taking civil RICO at face value in the area of "common law" type fraud will result in the uncontrollable and unwarranted inundation of federal courts with *new* litigation has about it, in Mr. Justice Cardozo's words, a "sanguinary simile." Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 217 (1946). First, it has hardly been true since 1970. "Only a handful of cases have been brought in more than a decade. Apparently the RICO plaintiff needs more, not less, incentive to sue." *Basic Concepts, supra* note 3, at 1043. Second, it will take a resourceful and hardy plaintiff to bring a civil RICO case in many of the fact patterns that arise under it, considering the type of defendant who can be expected to engage in the conduct that falls within its terms and the difficulty in gathering evidence by the government, much less private individuals, in some of the areas covered by RICO. PRESIDENT'S REPORT, *supra* note 43, at 198-99. See notes 59 *supra* and 175 *infra*. Third, many of the typical RICO defendants will be judgment proof or their assets, appropriately concealed, will not be subject to the kind of traditional legal process available to private plaintiffs. Fourth, where the civil case follows, rather than precedes, a criminal prosecution, the litigation should be brief and conclusive under modern concepts of issue preclusion and summary judgment. See *Anderson v. Janovich*, 543 F. Supp. 1124, 1128-34 (W.D. Wash. 1982) (follow-up civil suit to *United States v. Zemek*, 634 F.2d 1159 (9th Cir. 1980), *cert. denied*, 450 U.S. 916 (1981)); *State Farm Fire & Casualty Co. v. Estate of Caton*, 540 F. Supp. 673, 682-83 (N.D. Ind. 1982) (*Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) held applicable for non-mutual issue preclusion to civil RICO suit following criminal conviction); FED. R. CIV. P. 56(e) (judgment on affidavits); *Basic Concepts, supra* note 3, at 1044. Fifth, much of what is covered by civil RICO can already be—and is now—brought in federal courts, including types of antitrust actions (bid rigging, for example), securities fraud,

certain investments, acquisitions or conduct in connection with an "enterprises," the roles that the enterprise may play in a violation of these standards may be variously—but not mutually exclusively—described as "prize," "instrument," "victim," or "perpetrator."<sup>173</sup>

A violation involving an unlawful investment will usually cast the enterprise in the role of a "prize."<sup>174</sup> Typically, a violation in-

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commodity fraud, and copyright fraud. In fact, most major commercial fraud litigation is already now in the federal courts. RICO will often provide, in short, a new theory of recovery, not a new basis for federal jurisdiction. On securities fraud and RICO, see Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Morrison, *Old Bottle—Not So New Wine: Treble Damages in Actions Under the Federal Securities Laws*, 10 SEC. REG. L.J. 67 (1982). Finally, even the lure of treble damages is not wholly new. RICO requires more than a showing of "common law fraud," as it reflects the elements, if not the burden of proof, of conduct otherwise considered criminal. RICO does not provide for constructive fraud, negligence, or strict liability. See note 216 *infra*. In such cases, punitive damages are already generally available. See D. DOBBS, REMEDIES §§ 3.9, 9.1-9.6 (1973); W. PROSSER, LAW OF TORTS § 18 (4th ed. 1971). What RICO promises is not so much new as certain, for the law of fraud and punitive damages, as hoary as it is, is hardly well settled. That, too, is RICO's point: if the RICO fraud suit is to serve its appointed purpose of helping to underwrite legally the integrity of the nation's marketplace, it must be, in an appropriate combination, swift, sure, and severe. See generally R. POSNER, ECONOMIC ANALYSIS OF LAW § 7.2 (2d ed. 1977). RICO promises that combination, unless it is unduly restricted by unauthorized judicial interpretation.

173 See note 19 *supra* for the text of 18 U.S.C. § 1962. The analysis here reflects basic linguistics theory. See, e.g., Fillmore, *The Case for Case*, in UNIVERSALS IN LINGUISTICS THEORY 24-25 (E. Bach & R. Harms ed. 1968).

174 For example, in *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980), the mayor of the Village of Lansing, Illinois, was convicted of a § 1962(a) violation. The mayor owned two businesses, B&M Manufacturing Company and Ports of Call Travel Service. Using his authority as mayor, he extorted certain contractors; he also took certain bribes, the acts of extortion and bribes constituting a "pattern of racketeering activity." The mayor was convicted of having received income from the pattern of racketeering activity and investing it in the operation of the two enterprises. Of \$85,000 received, the mayor deposited \$65,000 into his Manufacturing Company account. Subsequently, he transferred in excess of \$103,000 from the Manufacturing Company account to his Ports of Call account. The government contended that the commingling of the illicit income with the licit funds and the subsequent investment of these combined assets constituted a violation of § 1962(a). The court of appeals held: "Whether . . . [the mayor's] investment in Ports of Call is termed as 'indirect' use or investment of racketeering income, or the use or investment of the 'proceeds of such income,' it is . . . the . . . activity proscribed by" RICO. 620 F.2d at 629. The court also upheld a special verdict finding that the mayor's interests in the businesses were subject to criminal forfeiture. It is possible to term the interests in the two businesses underwritten by the racketeer funds as the "prize" sought or maintained by the mayor's prohibited conduct. Under the theory of the prosecution, neither of the two businesses were, of course, implicated in the scheme to generate the funds; they were not, therefore, used as "instruments" of an offense, "victimized" by it in any fashion, or involved as a "perpetrator" in the racketeering activity itself. See *United States v. Zang*, No. 80-227 (10th Cir. June 7, 1982) (available on LEXIS, Genfed library, Cir. file) (§ 1963(a) forfeiture limited to amount of investment). See also *United States v. Goins*, 593 F.2d 88, 89-90 (8th Cir.) (bribe money used to purchase tavern), *cert. denied*, 444 U.S. 827 (1979).

volving an unlawful acquisition will find the enterprise in the role of "prize" or "victim."<sup>175</sup> Violations involving the operation of an en-

175 For example, in *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), Milton Parness was convicted of a § 1962(b) violation. Allan Gberman refinanced and completed the construction of a \$3.5 million hotel-casino complex in the Netherlands Antilles. Parness owned Olympic Sports Club, Inc., a corporation, through which he ran "junkets" for Gberman's hotel-casino; he also collected for Gberman "markers" from gamblers who went on the junkets. Parness, however, withheld \$400,000 in overdue "markers" from Gberman, forcing him to borrow \$160,000, which Parness arranged to lend him through Parness's nominees. The \$160,000 was in fact Gberman's own money. Gberman had to put up the casino-hotel as security, which Parness subsequently foreclosed when Gberman was unable to repay the \$160,000 "markers" because Parness was withholding them. Parness was convicted of acquiring the hotel-casino through a pattern of racketeering activity, which consisted of the interstate transportation of money obtained by fraud; it also involved causing the victim, Gberman, to travel interstate.

As *Parness* was prosecuted, it is possible to term the hotel-casino either a "prize" or a "victim." Had no economic or other damage been done to the hotel—only Gberman's interest taken over—it would be a pure "prize" case. As it was, the money withheld from the hotel-casino not only damaged Gberman, it also probably damaged the hotel-casino. Accordingly, the fact pattern illustrates both the "prize" and "victim" relationships. Clearly, the hotel-casino itself played no role in the scheme as an "instrument" or "perpetrator." For another example, see *United States v. Jacobson*, 691 F.2d 111 (2d Cir. 1982) (collection of unlawful debt to acquire lease); *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977) (extortion used to take over garbage company), *cert. denied*, 435 U.S. 952 (1978).

Parness avoided jail on his ten year sentence for 25 months, until the Second Circuit Court of Appeals ordered his incarceration in *United States v. Parness*, 536 F.2d 474, 475 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976), noting that Parness had been "presented as a dangerous special offender" under Title X of the Organized Crime Control Act of 1970 (18 U.S.C. §§ 3575-3578). The court of appeals also noted that Parness had been on a period of mandatory release supervision or parole from stolen securities convictions when he victimized Gberman.

The sentencing provisions of Title X have been sustained as constitutional. *United States v. Schell*, 692 F.2d 676 (10th Cir. 1982). See also *United States v. Moccia*, 681 F.2d 61 (1st Cir. 1982) (DSO sentence sustained under parallel provisions of drug statute). In addition, their provisions for appellate review of sentences by the government have been upheld. *United States v. DiFrancesco*, 449 U.S. 117 (1980). The reasons offered by the Department of Justice for failing to use RICO and Title X as part of a comprehensive strategy to deal with organized crime type offenders are unsatisfactory. See generally REPORT BY COMPTROLLER GENERAL OF THE UNITED STATES: STRONGER FEDERAL EFFORT NEEDED IN FIGHT AGAINST ORGANIZED CRIME (1981); REPORT BY COMPTROLLER GENERAL OF THE UNITED STATES: WAR ON ORGANIZED CRIME FALTERING—FEDERAL STRIKE FORCES NOT GETTING THE JOB DONE (1977). For a comprehensive analysis of the rationale, legislative history and proper statutory construction of Title X, see Brief as Amicus Curiae in support of *United States v. Duardi*, No. 75-1354 (8th Cir. 1975), reprinted in 18 CRIM. L. REP. [BNA] 3001 (1975). It is regrettable that greater use is not made of the sentencing provisions of Title X, as they were designed to strengthen the impact of RICO by assuring an upper range of extended incarceration where isolation by imprisonment is the only way to deal with certain offenders, like Parness.

It also appears that Gberman sued Parness civilly, but the docket entries show that Gberman not only suffered a dismissal of his complaint, but also a judgment in excess of \$150,000 on a counterclaim, *Gberman v. Parness*, No. 71-182 (N.J. 1977), a fact that might be related to Parness's connection with Angelo DeCarlo, a *caporegima* in the Genovese family of La Cosa Nostra. *Senate Hearings*, *supra* note 28, at 127. Parness, it seems, was a money

terprise by a pattern of racketeering activity may find the enterprise in the role of an "instrument,"<sup>176</sup> "victim,"<sup>177</sup> or "perpetrator."<sup>178</sup>

mover for DeCarlo. H. ZEIGER, *THE JERSEY MOB* 50, 126 (1975). See generally R. SALERNO & J. TOMPKINS, *THE CRIME CONFEDERATION* 101 (1969) ("Gambling, loansharking, narcotics and other activities produce a multi-billion dollar cash flow. The money mover solves a twofold problem: he puts the cash to work and hides its true ownership."). Apparently, it is not always wise to sue mob-connected defendants.

*Parness* was criticized by the ABA as an inappropriate prosecution under RICO on the ground that separate transactions as part of a common scheme were not shown. *ABA, supra* note 25, at 5 n.1. Even on this narrow ground, the criticism is mistaken. In fact, Parness engaged in two separate transactions: the conversion of Goberman's money (the wrongfully withheld markers, each of which constituted a separate theft), and the fraudulent loan of Goberman's own money back to him.

176 The role of "instrument" is played in at least three different contexts: "tool," "front," and "conduit." The "tool" relationship is well illustrated by *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). Anthony Scotto was convicted of a § 1962(c) violation. Scotto was president of Local 1814 of the International Longshoremen's Association (ILA); he and a codefendant were convicted of operating the union "through" a pattern of racketeering activity, which consisted of receiving in excess of \$250,000 in violation of 29 U.S.C. § 186(b) (1976). Scotto argued on appeal that the district court's instructions on the concept "through" were inadequate. The court of appeals upheld the instructions, observing that "[RICO] declines to define in quantitative terms the degree of interrelationship between the pattern . . . and the conduct of the enterprise's affairs." 641 F.2d at 54. "[O]ne conducts the activities of an enterprise," the court said, "through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over [its] . . . affairs . . . , or (2) the predicate offenses are related to the activities of that enterprise." *Id.* It is not necessary, the court concluded, to show that the enterprise's affairs were "advanced," that it was itself "corrupt," or that the racketeering acts were "authorized." *Id.*

As *Scotto* was prosecuted, it is possible to term the union a "tool." It was the instrument through which Scotto committed the predicate offenses. Under the theory of the prosecution, the union itself was not a "prize" Scotto gained or maintained. Nor was the union in any primary sense "victimized." To be sure, Scotto was a faithless servant who should have to account to the union for his stewardship, but that is a secondary sense of "victimization." See note 218 *infra* for an analysis of possible RICO civil relief in the context of breach of fiduciary duties. Nor was the union itself a "perpetrator"; as its affairs were not "advanced," it was not "corrupt," and it had not "authorized or approved" Scotto's unlawful conduct. For other similar examples, see *United States v. Kopitok*, 690 F.2d 1289 (11th Cir. 1982) (ILA waterfront corruption prosecution under RICO); *United States v. Palmeri*, 630 F.2d 192, 199 (3d Cir. 1980), *cert. denied*, 450 U.S. 967 (1981) (kickback scheme in union local); *United States v. Bright*, 630 F.2d 804, 829 (5th Cir. 1980) (bribery and kickback schemes in sheriff's office).

In 1981, the Senate Permanent Subcommittee on Investigations, as a culmination of a year-long investigation, held two weeks of hearings on corruption and organized crime domination of the waterfront. See generally *Waterfront Corruption: Hearings before the Perm. Subcomm. on Investigations, Comm. on Governmental Affairs*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Corruption*]. Testifying before the Committee were representatives of the Department of Justice, prosecutors, agents of the Federal Bureau of Investigation, including its director, The New York-New Jersey Waterfront Commission, representatives of law enforcement agencies from New Jersey, the industry and the union, as well as those who paid off and those who were paid off. The evidence reviewed by the Committee was the result not only of its own efforts, but of a five year investigation by the Department of Justice, called UNIRAC, that

included extensive electronic surveillance, undercover activities, and grand jury hearings. This evidence revealed a pervasive and sordid pattern of payoffs, kickbacks, threats, intimidation and obstruction of justice on the waterfront along the east coast from New York City to Miami, Florida. For example, witnesses were shot. *Id.* at 235. As of the date of the hearings, 129 indictments and 110 convictions had been obtained, including 52 union officials, 9 of whom were organized crime members or associates; of the remaining 77 defendants, which included industry officials and corporations, 20 were organized crime members or associates. *Id.* at 11. A "racketeering" tariff had been added to every service or product being moved in commerce by the shipping industry, making American goods less competitive and American ports more costly. *Id.* The victims included members of the union, who had placed their trust in its leadership, the stockholders of the companies, whose money was unlawfully paid out, and the American people, who had to pay higher prices for goods. In short, for a number of years, "the free enterprise system simply ha[d] not functioned on the east coast of the United States." *Id.* at 227 (statement of Robert B. Fiske, Jr., former U.S. Attorney for the Southern District of New York). The investigation was termed "the most successful labor racketeering investigation ever conducted by the FBI." *Id.* at 8 (statement of FBI Director William Webster). It was also called the "one of the most productive and successful" of the four year term of the principal prosecutor. *Id.* at 248 (statement of Robert B. Fiske, Jr.). Nevertheless, the hearings indicated that corrupt ILA officials still controlled certain ILA locals. Corruption "bred by organized crime [was] still 'business as usual' in some port cities." *Id.* at 3 (statement of Senator Nunn). See also *id.* at 18 (statement of William Webster). The Department of Justice, through criminal prosecution, had done all that it could, "yet the convicted union officials . . . still [held] office or exert[ed] control over the ILA through associates or surrogates." *Id.* at 4 (statement of Senator Nunn).

The hearings also traced Scotto's career from the day he pledged loyalty to Cosa Nostra family boss Carlo Gambino, at age 28, for which he was made a member, ultimately a *caporegima*, and president of Local 1814 of the ILA, to the day when he was indicted under RICO. As a result of his pledge of loyalty, he rose to have significant political power on the local, state and national level. Scotto's political position in New York City at the time of his trial was illustrated by his character witnesses: Governor Hugh Carey, former mayors John Lindsey and Robert Wagner, and Lane Kirkland, then secretary-treasurer, now president of the AFL-CIO. *Id.* at 229. He influenced state legislation, *id.* at 392 (testimony of D. O'Hearn, President McGrath Servs. Corp.), and political appointments, *id.* at 250 (statement of Robert B. Fiske, Jr.). Because he was a ranking member of organized crime, those who dealt with him had to be concerned about "physical retaliation." *Id.* at 251. Scotto was, moreover, paid "tribute" by businessmen in terms of cash payments, not only by those who expected something specific in return, but also by others "solely to maintain [their] company's existing business." *Id.* He had sources in the Waterfront Commission that informed him of pending matters. *Id.* at 236 (testimony of Robert B. Fiske, Jr.). Scotto's conviction was possible largely because of electronic surveillance; it was termed the "single most important tool" in the Scotto investigation. *Id.* at 233 (testimony of Jack Burrett, special FBI agent). See also N.Y. Times, Nov. 17, 1979, at 27, col. 5 (Juror Lucile Brockway: "The tapes were crucial [; it was] the hardest evidence"). The surveillance was upheld in a companion prosecution, *United States v. Clemente*, 482 F. Supp. 102 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 207 (2d Cir. 1980). After the Waterfront Commission removed Scotto from his office, his "handpicked" successor succeeded him. *Corruption, supra*, at 247 (testimony of Alan Levine, former Assistant United States Attorney for the Southern District of New York). No evidence was presented to the Committee that indicated that the union had any "intention of cleaning its own house." *Id.* at 226 (testimony of Robert F. Fiske, Jr.). Its record was termed "a disgrace." *Id.* at 241. Criticism was leveled at the Department of Labor, *id.* at 296 (testimony of Michael Devorkin, former Assistant U.S. Attorney for the Southern District of New York) and the Department of the Treasury, *id.* at 292. The sentencing practices of the judiciary were also criticized, because Scotto received only 5 out of a possible 20 years, considerably less than other defendants

in other prosecutions. In addition, the prosecutor recognized that he would be out on parole in even less time. *Id.* at 223-24 (testimony of Robert B. Fiske, Jr.). Congress was also implicitly criticized, for recommendations were made for new tools to help law enforcement, including the mandatory criminal forfeiture of the proceeds of illicit transactions, more stringent civil sanctions, and procedures for obtaining the imposition of more stringent criminal sanctions. *Id.* 312-13 (statement of Michael Devorkin). See the statement of former Assistant U.S. Attorney Michael Devorkin, *id.* at 288, that the place to start is "by raising the stakes to both sides of these potential criminal transactions, to make the penalties much higher, much swifter, much more certain, to try to deter at least those on the margins;" in short, some way "to motivate businessmen to reject demands from corrupt union officials needed to be found." *Id.* at 27 (testimony of Michael Levin, Attorney-in-charge, Miami Organized Crime Task Force).

While one can have nothing but praise for the dedication and craftsmanship of those associated with the investigation and criminal prosecution of the *Scotto* case, not all was done that could have been done. Indeed, the *Scotto* prosecution aptly illustrates the futility of relying on a legal strategy that rests exclusively—or almost exclusively—on criminal prosecution without the consideration of parallel public and private civil sanctions. In fact, the prosecutive authorities in *Scotto* did not even appear to know what authority they had, or to have used that authority—beyond obtaining the conviction—in such a fashion that it had the greatest impact, criminally and civilly. The failure, in short, was not of law or of courage, but of understanding, and the fault lay with those connected with the prosecution who were the freest with their criticism of others. For example, the *Scotto* jury was not asked to return a special verdict under § 1963(a)(2) criminally forfeiting *Scotto's* positions in the ILA. See, e.g., *United States v. Rubin*, 559 F.2d 975, 991-93 (5th Cir. 1977) (forfeiture of union office upheld), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979). The prosecutors were dissatisfied with the sentence imposed on *Scotto* by the court, but they had not filed for a Title X proceeding, so no appeal of the lenient term was possible. See note 175 *supra*. Nor was a civil suit filed seeking to have *Scotto* removed from office immediately after the conviction. See 559 F.2d at 993. Only the ILA representative at the hearing appeared to recognize that RICO was applicable to remove an officer civilly. Compare *Corruption, supra*, at 231 (testimony of Robert E. Fiske, Jr.) with *id.* at 463 (testimony of ILA President Thomas W. Gleason, Sr.). Moreover, by statute the criminal conviction was available to the government as estoppel in civil litigation. 18 U.S.C. § 1964(d) (1976) ("shall estop"). It was final when returned; it was not necessary to await the outcome of the appeal. *United States v. NYSCO Laboratories, Inc.*, 215 F. Supp. 87, 89 (E.D.N.Y.) (stay pending appeal denied and summary judgment granted for injunction), *aff'd*, 318 F.2d 817 (2d Cir. 1963). See *Huron Corp. v. Lincoln Co.*, 312 U.S. 183, 189 (1941) ("while appeal . . . stays execution at the judgment, it does not detract from its . . . finality"). To be sure, the Waterfront Commission stood ready to act, and did act, *Corruption, supra*, at 230 (testimony of Robert B. Fiske, Jr.), but removal from office by the Commission was a remedy that the prosecutors themselves could not control. Nor has the government sought, through civil litigation under § 1964, to reform the ILA in light of its extensive history of corruption and domination by organized crime figures. RICO explicitly authorizes such suits. 18 U.S.C. §§ 1964(a) and (b) (1976). The legislative history was favorable. See notes 87 and 116 *supra*. So, too, was the case law. See *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974) (civil RICO provision held constitutional), *cert. denied*, 420 U.S. 925 (1975). Corruption and mob influence in the ILA had a venerable history. See generally H. NELLI, *THE BUSINESS OF CRIME* 107-09, 245 (1976); D. CHANDLER, *BROTHERS IN BLOOD* 42 (1975). There was no reason to believe that one or two, or even a series of, prosecutions would impact on the industry or the union.

In fact, since 1970 only one civil suit has been brought by the government under RICO to reform a union; it is currently pending against Local 560 of the Teamsters in New Jersey. *United States v. Local No. 560*, 550 F. Supp. 511 (D.N.J. 1982) (civil RICO complaint up-



held). It is based on the domination of Local 560 by Anthony Provenzano, a *caporegima* in the Genovese family of La Cosa Nostra. See generally S. BRILL, *THE TEAMSTERS* (Pocket Book 1978).

Civil suits under RICO, however, have been brought by private parties growing out of the Scotto investigation and prosecution. *Hellenic Lines Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981); *Prudential Lines, Inc. v. McKeon*, No. 80-5853, slip op. (S.D.N.Y. Apr. 21, 1982). In *Hellenic Lines*, the plaintiff was a Greek shipping corporation, which operated out of a Brooklyn pier. According to the complaint, an official of Export Carpenters, Inc. conspired with ILA officials (Scotto included) to take bribes from Hellenic Lines employees with the approval of the president of McGrath Services Corp., causing Hellenic Lines to pay out \$100,000 for services never rendered. Similarly, the president of Jackson Engineering made cash kickbacks to Hellenic Lines employees to cause Hellenic Lines to place orders with and accept padded bills from Jackson Engineering to generate cash for payoffs to ILA officials, from which Hellenic Lines suffered \$800,000 damages. The complaint prayed for treble damages under § 1964(c) and actual and punitive damages under common law fraud. The defendants included individuals and corporations. See note 147 *supra*. The court denied a motion to dismiss on the grounds that Hellenic Lines was *in pari delicto* and that neither "organized crime" nor "competitive" injury was alleged. The court observed that there was no requirement that the defendants "be members of a group or society of criminals operating outside of the law"; the argument that RICO requires "competitive injury" was "specious"; and that "the broad remedial purposes of RICO clearly permit[ed] private lawsuits by a firm forced to pay bribes or kickbacks," even though the predicate crimes might also "be actionable under state fraud laws." 523 F. Supp. at 248. In addition, Hellenic Lines could not have been involved because its employees acted for their own, and not Hellenic Lines' benefit. *Id.* Nevertheless, the court dismissed the complaint, with leave to replead, for a failure to plead fraud with specificity under FED. R. CIV. P. 9(b). On the availability of the common-law *in pari delicto* defense under the antitrust laws, see *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 138 (1968) ("There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the . . . *in pari delicto* doctrine a defense to treble-damage action . . . . We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes."); *Javelin Corp. v. Uniroyal Inc.*, 546 F.2d 276, 278-80 (9th Cir. 1976).

In *Prudential Lines*, the plaintiff was engaged in the shipping business. According to the complaint, the defendant, who owned a warehouse, conspired with one of Prudential Lines' employees to pay him kickbacks to enter into a lease on terms favorable to the defendant, from which Prudential Lines suffered \$1,800,000 damages. The complaint prayed for treble damages under § 1964(c) and injunctive and declaratory relief under a common law fraud and breach of fiduciary duties theory. The court denied a motion to dismiss on the grounds that McKeon's personal operation of the warehouse could not be an enterprise and that neither "organized crime" nor "competitive" injury was alleged; it also refused to defer to a pending state action under *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800, 817 (1976) (federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them"). In addition, it rejected a contention that the claim was time-barred, holding that the New York statute of limitations dealing with fraud governed, rather than the penalty or forfeiture provision. On RICO and the statute of limitations, see *State Farm Fire and Cas. Co. v. Estate of Caton*, 540 F. Supp. 673, 683-85 (N.D. Ind. 1982) (sole proprietor enterprise upheld, and RICO's remedial character indicated proper state statute of limitation to be the Indiana fraud, not penalty, provision); *Basic Concepts*, *supra* note 3, at 1047; Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 CORNELL L. REV. 1011 (1980). For an excellent study of the Scotto prosecution, see Note, *United States v. Scotto: Progression of a Waterfront Corruption Prosecution from Investigation Through Appeal*, 57 NOTRE DAME LAW. 364 (1981).

The "front" relationship is well illustrated by *United States v. Webster*, 639 F.2d 174

(4th Cir. 1981), *modified on reh'g*, 669 F.2d 185 (4th Cir.), *cert. denied*, 102 S. Ct. 307 (1982). Walter R. Webster was convicted of a § 1962(c) violation. He was convicted of operating the 1508 Club Tavern and Liquor Store, owned by the codefendant, "through" a pattern of racketeering activity, which consisted of illegal drug activities. Webster argued on appeal that although "the facilities of the . . . [c]lub were regularly made available to, and put in service of, the . . . drug dealing business . . . the evidence completely fail[ed] to demonstrate that the affairs of the 1508 Club were promoted in any way by the illegal drug racketeering." 639 F.2d at 184. The court of appeals initially agreed with Webster's argument and reversed his conviction, relying on *United States v. Mandel*, 591 F.2d 1347, 1375-76 (4th Cir.) (mere transfer of business interest not "conducting"), *vacated on other grounds by an equally divided court*, 602 F.2d 653 (4th Cir. 1979), *petition for reh'g denied*, 600 F.2d 107, *cert. denied*, 445 U.S. 961 (1980) and *United States v. Anderson*, 626 F.2d 1358, 1366-67 n.13 (8th Cir. 1980) ("the requirement that defendant operate through a pattern of racketeering activity . . . pose[s] substantive limitations on prosecutorial zeal in the setting of infiltration of legitimate business"). On *Anderson*, see *Basic Concepts*, *supra* note 3, at 1025 n.91. The court observed, "the prosecution was required to prove that the 'enterprise' . . . had its affairs advanced or benefited in some fashion . . . by the pattern of racketeering activities." 639 F.2d at 185-86. On rehearing, the court modified its judgment. The court stated: "Unfortunately, we introduced 'promoted,' 'improved,' 'advanced' and 'benefitted' . . . for 'conducted' . . . The problem in [that] approach . . . immediately surfaces in cases where the enterprise is governmental in nature, and almost universally not organized for profit." 669 F.2d at 186. Accordingly, the court abandoned its effort to define "conduct . . . through" in a simple fashion, correctly recognizing that the required nexus would vary with the character of the "enterprise" and the alleged "pattern of racketeering activities." See *United States v. Kovic*, 684 F.2d 512, 516 (7th Cir. 1982); *United States v. Welch*, 656 F.2d 1039, 1060-61 (5th Cir. 1981) (unmodified *Webster* rejected as "unduly restrictive" in context of operation of sheriff's office by pattern of racketeering), *cert. denied*, 50 U.S.L.W. 3802 (U.S. Apr. 5, 1982). The convictions were then affirmed.

As *Webster* was prosecuted, it is possible to term the 1508 Club neither a "prize," "victim," nor "perpetrator." It was merely a "front" for the drug activity. It was the disguise that marked the illegitimate activity with the facade of the club's legal activities. For other similar examples, see *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir. 1980) (tavern business "front" for illegal gambling), *cert. denied*, 452 U.S. 905 (1981); *United States v. Swiderski*, 593 F.2d 1246, 1248 (D.C. Cir. 1978) ("Sylvester's [Restaurant] . . . was also . . . a . . . front for the illegal activity of trafficking in cocaine"), *cert. denied*, 441 U.S. 933 (1979); *United States v. Smaldone*, 583 F.2d 1129, 1131-32, 1133 (10th Cir. 1978) (conduct of Gaetano's Restaurant through a pattern of illegal gambling and collection of unlawful debt accompanied by forfeiture under § 1963(a)(2)), *cert. denied*, 439 U.S. 1073 (1979).

The "conduct" relationship is well illustrated by *United States v. Mandel*, 408 F. Supp. 679 (D. Md.), *supplemented by*, 415 F. Supp. 997 (D. Md.), *supplemented by*, 415 F. Supp. 1025 (D. Md.), *supplemented by* 415 F. Supp. 1033 (D. Md.), *supplemented by*, 415 F. Supp. 1079 (D. Md. 1976), *supplemented by*, 431 F. Supp. 90 (D. Md. 1977), *rev'd*, 591 F.2d 1347 (4th Cir.), *aff'd by equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Marvin Mandel was convicted of a § 1962(b) violation; he was also charged with a § 1962(c) violation. Codefendants were convicted of a § 1962(c) violation. Mandel was the governor of Maryland. Mandel was convicted (count 21) of acquiring an interest in Security Investment Company "through" a pattern of racketeering activity. In addition, he was charged (count 22) with conducting the State of Maryland "through" a pattern of racketeering activity. Count 22 was dismissed by the District Court. Co-defendants were convicted (count 23) of operating Security Investment Company "through" a pattern of racketeering activity; they were also convicted (count 24) of operating Marlboro Race Track "through" a pattern of racketeering activity. The racketeering activity alleged in each count consisted of mail fraud and bribery. The basic allegation was that Mandel had received approximately \$350,000 in

"gifts" from his co-defendants during his six years in office in return for which he strengthened their financial positions. Mandel argued to the district court that "through" in § 1962(b) should be read to mean that "only those 'racketeering acts' which proximately resulted in the acquisition or maintenance of" the interest in the enterprise could "be alleged to be part of the 'prohibited pattern.'" 415 F. Supp. at 1020. The district court rejected the contention, holding that such a "narrow . . . meaning of the word 'through' would . . . reward subtle and sophisticated patterns . . . in which it would be difficult, if not impossible, to identify the 'proximate cause' of an acquisition." *Id.* It would "unnecessarily frustrate Congress' intention to rid the influence of racketeering activities from legitimate businesses." *Id.* Similarly, Mandel's co-defendants argued that "conduct or participate" in § 1962(c) required "involvement in the operation or management of" the enterprise. 591 F.2d at 1375. As such, the mere transfer of a partnership interest in Security Investment Company from one of the co-defendants to Mandel did not violate § 1963(c). The district court agreed, and set aside the jury verdict on count 23, which was appealed by the government. The court of appeals upheld the district court's interpretation, and added: "We find additional support for [the district court's] view in the use of the word 'through' . . . . We do not believe Congress meant to sweep so broadly, especially in light of the mandatory forfeiture penalties . . . ." 591 F.2d at 1375. The transfer of the interest was "the antithesis of operating it." *Id.* at 1376. "Mandel's interest was purely passive[.]. . . he was not entitled to any management role . . . ." *Id.* It was not "the situation where the . . . enterprise [was] . . . a front for racketeering activity." *Id.*

The restrictive reading of "conduct or participate" and "through" by the district court and the court of appeals in *Mandel* was wrong in light of the liberal construction clause and the remedial purpose of RICO. *See* *United States v. Palmeri*, 630 F.2d 192, 199-200 (3d Cir. 1980) ("statute . . . includes within the regulated class all persons who exercise control, direct or indirect, authorized or unauthorized" in light of the liberal construction clause), *cert. denied*, 450 U.S. 967 (1981). *Compare* *United States v. Bright*, 630 F.2d 804, 830 (5th Cir. 1980) (bonding company operation pay-off of sheriff associated with sheriff's office) *with* *United States v. Forsythe*, 560 F.2d 1127, 1135-36 (3d Cir. 1977) (magistrate being paid off by bonding company operator associated with bonding company). *See also* *United States v. Martino*, 648 F.2d 367, 394 (5th Cir. 1981) ("The substantive proscriptions of the RICO statute apply to insiders and outsiders . . .") (*quoting* *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1980), *cert. denied*, 439 U.S. 953 (1978)), *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub. nom.* *Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983). Indeed, in light of *Webster*, *Mandel* may no longer reflect the law in the Fourth Circuit. In any event, as *Mandel* was prosecuted, Security Investment Company was a "prize" under count 21, but it was neither a "prize," "victim," nor a "perpetrator" under count 23. It was not a "front" either, as the court correctly noted, or a "tool," as in *Scotto*, but it was a "conduit" through which the payoff was made. It was only through the operation of the Security Investment Company, by a transfer of its shares, that the payoff was made; Security Investment Company was, in short, the "instrument" through which the objective of the scheme was achieved. Indeed, it is hard to see how a district court concerned with not "rewarding subtle and sophisticated" offenders or "frustrating Congress' intent" could have failed to see that the role the company played was well within the scope of the statute. *See* *United States v. Stofsky*, 409 F. Supp. 609, 613 (S.D.N.Y. 1973) ("No good reason suggests itself as to why Congress should want to cover some but not all of [the] . . . forms [of the perversion of legitimate enterprises]; nor is there any good reason why . . . [a] court should construe the statute to do so."), *aff'd*, 527 F.2d 237 (2nd Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *But see* 591 F.2d at 1376 (*Stofsky* distinguished).

The *Mandel* prosecution also aptly illustrates Mr. Justice Holmes' dictum: "Great cases like hard cases make bad law. . . . [I]mmediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." *Northern Secs. Co. v. United States*, 193 U.S. 197, 200-01

(1904). *Mandel* was widely publicized. Newspaper coverage of the investigations and prosecution was extensive. 415 F. Supp. at 1053, 1069-76 (neither severance nor change of venue granted because of publicity). The defense counsel publicly expressed dismay that RICO would be used against political corruption. For example, William G. Hundley, a prominent Washington defense counsel who represented one of Mandel's co-defendants, stated: "You know as well as I do that Congress never would have passed . . . [RICO] if they ever thought they were going to use it against governors and people like that." Marro & Shannon, *Are Prosecutors Going Wild Over RICO*, LEGAL TIMES OF WASHINGTON, Oct. 8, 1979, at 32, col. 1. Ironically, Hundley was a former chief of the organized crime and racketeering section in the Department of Justice, and had testified in favor of other sections of the Organized Crime Control Act that dealt with police corruption in the gambling area. *Senate Hearings*, *supra* note 28, at 424. The attention focused on the trial, the novel character of the issues, and the high quality of the advocacy caused the district court to make a number of errors in interpreting RICO. It is remarkable that more mistakes were not made. Those that were merit close attention.

In *Mandel*, the prosecution moved at pre-trial, under § 1963(b), to freeze certain of the defendant's assets subject to forfeiture under § 1963(a)(2), but the district court refused to grant the freeze. The court held that freezing defendant's assets would be inconsistent with the defendant's presumption of innocence, 408 F. Supp. at 683. This judgment leaves, in the words of one court, "few, if any circumstances in which a restraining order might issue before trial . . . [and] emasculates . . . [RICO] render[ing] it nearly useless." *United States v. Bello*, 570 F. Supp. 723, 724 (S.D. Cal. 1979) (restraining order granted) ("The restraining order does not make a determination that the defendant is a racketeer, but only freezes those assets to prevent dissipation pending determination of guilt or innocence"). This aspect of *Mandel* was wrongly decided. *See United States v. Spilotro*, 680 F.2d 612, 618, 619 & n.4 (9th Cir. 1982) (*Mandel* rejected, but order held subject to adversary hearing, including rules of evidence, on probability of guilt and likelihood of forfeiture). *But see United States v. Scharf*, 551 F.2d 1124, 1126 (8th Cir.) (dictum) (entry of order authorized by indictment), *cert. denied*, 434 U.S. 824 (1977); *United States v. Scalzitti*, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975) (pretrial order like posting of bond), *appeal dismissed*, 556 F.2d 569 (3d Cir. 1977). The *Spilotro* court was correct in its determination that *Mandel* was wrongly decided, but *Spilotro*, too, goes too far in applying the rules of evidence to a § 1963(b) hearing. Indeed, persuasive arguments can be made that the indictment itself ought to be considered a sufficient finding of probable cause on the question of criminal responsibility and that the property is therefore subject to seizure. As such, no further judicial review ought to be necessary on these issues. *See Gerstein v. Pugh*, 420 U.S. 103, 117 n.19, 119-25 (1974) (while judicial review of an information is required to hold defendant before trial, no review is required of indictment by grand jury). In a proper case a court might want to inspect the grand jury minutes to satisfy itself that the grand jury's decision was proper. *See, e.g., United States v. O'Shea*, 447 F. Supp. 330, 331-32 (S.D. Fla. 1978) (inspection and dismissal where indictment not supported by evidence); *Jaffe v. Scheinman*, 47 N.Y.2d 188, 417 N.Y.S.2d 241, 390 N.E.2d 1165 (1979) (inspection under N.Y. CODE CRIM. PRO. § 210.30) (evidence not legally sufficient, must show "reasonable cause" for court to examine, without adversarial argument, the stenographic transcript of the grand jury proceedings). The only issue before the court should be the "proper" terms of the "restraining order" or the performance bond. *See 18 U.S.C. § 1963(b)* (1976). *But see United States v. Long*, 654 F.2d 911, 914-15 (3d Cir. 1981) ("full hearing" required). As § 1963(b) itself does not set out the procedure required for its implementation, FED. R. CRIM. P. 57(b) governs ("If no procedure is specifically prescribed by rule, the courts may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."). *See FED. R. CRIM. P. 54(b)(4)* (nonapplicability to civil forfeiture implies applicability to criminal forfeiture). *See also United States v. Veon*, 538 F. Supp. 237, 246 n.12 (E.D. Cal. 1982). The applicability of the rules of evidence, in turn, is determined by FED. R. EVID. 1101. Subsection 1101(b) makes the Federal Rules of Evidence "generally" applicable "to criminal

cases and proceedings," but subsection(d)(3) makes them inapplicable to "proceedings with respect to release on bail or otherwise." See 18 U.S.C. § 3146(f) ("need not conform"). Thus, the Rules are inapplicable to determinations relating to pretrial liberty. See, e.g., *United States v. Wind*, 527 F.2d 672, 675-76 (6th Cir. 1975) (hearing required to deny release, but reliance on hearsay upheld). See also, *United States v. Graewe*, 689 F.2d 54, 56-58 (6th Cir. 1982) (pretrial bail denied based on hearsay showing of danger to witnesses in RICO prosecution); *United States v. James*, 674 F.2d 886, 891-92 (11th Cir. 1982) (pretrial bail raised to \$2 million to assure appearance at RICO prosecution). See *Costello v. United States*, 350 U.S. 359, 364 (1965) ("Neither justice nor the concept of fair trial requires" an abandonment of the practice of returning indictments on hearsay.). The analogy between pretrial bail for the person and a pretrial restraining order for property is compelling. Surely, property ought not receive more protection than person. Section 1963(b) hearings ought to be held, therefore, to fall within "or otherwise." FED. R. EVID. 1101(d)(3). Converting a § 1963(b) hearing into a mini-trial, as *Spilotro* requires, will cause unnecessary delay and may unwisely afford defendants pretrial criminal discovery that could lead to the fabrication of defenses and the interference with the lives and physical safety of witnesses, subverting the policy of limited discovery of FED. R. CRIM. P. 16(d)(i) (protective order may be granted on showing to court alone). See, e.g., *United States v. Thevis*, 665 F.2d 616, 625 (5th Cir. 1982) (RICO prosecution involving obstruction of justice and murder of principal government witness). *Spilotro* relied on *United States v. Veon*, 538 F. Supp. 237, 680 F.2d at 619 n.4. While the court's opinion in *Veon* is thoughtful (propriety of orders upheld, hearing required, and burden of persuasion by preponderance on government for probability of guilt and likelihood of conviction), it misapplies the rule of lenity in the RICO context. Compare 538 F. Supp. at 244-45 with notes 25 & 150 *supra*. The court did not consider the applicability of FED. R. EVID. 1101(d)(3), as the government apparently only argued that a § 1963(b) hearing was a "preliminary examination," 538 F. Supp. at 249 n.18 ("disingenuous argument"); the court also misread *United States v. Long*, 654 F.2d 911, 914-15 (3d Cir. 1981) ("full hearing" required under 21 U.S.C. § 848 (1976), rejecting argument that indictment alone was sufficient). In fact, the court of appeals in *Long* approved the receipt of hearsay testimony from the case agent. 654 F.2d at 915 ("agent's testimony is enough to sustain the restraining order and the performance bond"). But see 538 F. Supp. at 249 (*Long* distinguished). The government declined to put on admissible evidence, filing instead a notice of lis pendens under 28 U.S.C. § 1964 (1976) and CAL. CODE CIV. P. § 409. The court expunged it, *United States v. Veon*, 549 F. Supp. 274 (D.C. Cal. 1982), a decision for which there is little that can be said that is charitable. The "settled doctrine" is that a forfeiture takes place "immediately upon the commission" of the offense, and the right to the property then vests in the government, although it is not "perfected" until a judicial decree so declares. *United States v. Stowell*, 133 U.S. 1, 16-17 (1890); *Florida Dealers and Growers Bank v. United States*, 279 F.2d 673, 676 (5th Cir. 1960). Accordingly, the government should have been held to have had an interest in the property subject to forfeiture from the time of the offense. See *Trojanowski, RICO Forfeiture: Tracing and Procedure*, I Materials, *supra* note 23, at 353 (forfeiture like equitable lien). Determining that due process considerations argue for a hearing, moreover, does not answer the question of what process is due. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). That question requires a particularized analysis. *Mathews v. Eldridge*, 424 U.S. 319, 332-35 (1976) (the factors to analyze are the private interest affected, risk of error, and the government interest protected). Given the stakes at issue, see note 59 *supra*, the issues ought to be limited and hearsay ought to suffice, particularly because the defendant can secure the release of his property, as he can secure his own release, with the posting of a "satisfactory performance bond." 18 U.S.C. § 1963(b)(1976). See *Gerstein v. Pugh*, 420 U.S. 103, 125 n.27 (1975) ("'process that is due' for seizure of person or property in criminal cases"; "relatively simple civil procedures . . . are inapposite and irrelevant in the wholly different context of the criminal justice system.").

The district court in *Mandel*, on the other hand, properly rejected *Mandel's* contention that RICO only applied to "organized crime." Compare 415 F. Supp. at 1018 ("would simply

render the statute unenforceable”) *with* notes 112, 113 & 136 *supra*. It also held that the state of Maryland could not be an “enterprise,” *compare* 415 F. Supp. at 1020 *with* note 115 *supra*, largely on the supposed inapplicability of civil remedies to governmental units. *Compare* 415 F. Supp. at 102 *with* note 93 *supra*. It also wrongly held that the liberal construction clause only applied to the civil remedies. *Compare* 415 F. Supp. at 1022 *with* note 25 *supra*.

The high pressure atmosphere in which the Mandel prosecution was brought is also underscored by the efforts that were made to fix the jury, which resulted in a mistrial. N.Y. Times, Dec. 9, 1976, at 1, col. 1. A person, with “direct Mafia” acquaintances and affiliations, contacted defense counsel and offered to “shag” the trial for \$15,000. *Id.* He was subsequently convicted for obstruction of justice. *United States v. Neiswender*, 590 F.2d 1269 (4th Cir. 1979). A relative of one of the jurors also offered to prevent the conviction for \$10,000. N.Y. Times, Dec. 9, 1976, at 1, col. 1. Accordingly, the remarkable aspect of the trial was not that the district court judge made errors but that he made so few and that it was possible to secure any verdict after almost two weeks of deliberation. *Id.*

The State of Maryland did not follow up the criminal prosecution by filing a RICO civil suit against Mandel or his codefendants under RICO. *See* note 218 *infra*. Private civil actions were, however, brought under federal and state securities laws and the common law of fraud by plaintiffs claiming they were defrauded in the sale of stock in the Marlboro Race Track. Nevertheless, the district court dismissed the federal action as time-barred; it then dismissed the pendent state claims under *United Mine Workers v. Gibbs*, 303 U.S. 715, 726 (1966). On the scope of *Gibbs*, *see* note 212 *infra*. The district court applied the one-year state securities fraud statute of limitations to the federal claim and the court of appeals affirmed. *O’Hara v. Kovens*, 625 F.2d 15, 17-18 (4th Cir. 1980) (noting “commonality of purpose between federal right and the state statutory scheme”). Apparently, no thought was given to bringing a private RICO action, where a three year statute of limitations probably would have been applicable. MD. CTS. & JUD. PROC. CODE ANN § 5-101 (1974). *See* *Seaboard Terminals Corp. v. Standard Oil Co.*, 104 F.2d 659 (2d Cir. 1939) (as a matter of Maryland law, the three year statute applied to a treble damage antitrust suit). *See also* N.Y. Times, Jan. 5, 1983, at 8, col. 4 (private non-RICO civil suit against former vice-president Agnew resulting in \$248,735 judgment).

The *Mandel* jury also returned a special verdict finding that one of Mandel’s codefendants owned stocks subject to forfeiture under 18 U.S.C. § 1963(a)(2)(1976) “through . . . [a] nominee.” 505 F. Supp. at 190. When the government petitioned the court for an order authorizing the seizure of the property under 18 U.S.C. § 1963(b)(1976) “upon such terms and conditions as the court shall deem proper,” the district court issued a show cause order to “any and all interested parties” why the property should not be forfeited. 505 F. Supp. at 190. The “nominee,” who was not a defendant, responded with a claim of actual ownership. The government answered that the special verdict was “dispositive of the question of ownership and that . . . [the] court had no discretion to deny forfeiture . . .” *Id.* The district court observed that it did have discretion in ordering the forfeiture, but did not determine the issue, since it decided to remand the “nominee” to the Attorney General to seek “remission or mitigation” under § 1963(c). 505 F. Supp. at 192. Both actions were wrong. Other forfeitures involved in the *Mandel* prosecution were upheld in *United States v. Hess*, 691 F.2d 188 (4th Cir. 1982).

Section 1963 forfeitures are mandatory. FED. R. CRIM. P. 32(b) (“When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forfeiture shall . . .”). *See* FED. R. CRIM. P. 7(c)(2) (“No judgment of forfeiture may be entered . . . unless the indictment . . . shall allege the extent of the interest.”); FED. R. CRIM. P. 31(e) (“If the indictment . . . alleges that an interest . . . is subject to criminal forfeiture, a special verdict shall be returned.”). The forfeiture is not discretionary. *Hess*, 691 F.2d at 190; *United States v. L’Hoste*, 609 F.2d 796, 809-13 (5th Cir.), *reh’g denied*, 615 F.2d 383 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980). *But see* *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979) (discretion permitted to avoid draconian application), *cert. denied*, 445 U.S. 927 (1980); *United*

States v. L'Hoste, 615 F.2d 383, 389 (5th Cir.) (Tate, J. dissenting from petition for rehearing) (arguing for strict construction), *cert. denied*, 449 U.S. 833 (1980). *Hess* and *L'Hoste* are well reasoned and correctly decided. The government was grossly mistaken, however, in its suggestion that the special verdict was dispositive of the nominee's rights, for it could only settle the scope of the defendant's interest—whatever it was—as the nominee was in fact not a party to the proceedings. See *United States v. Scharf*, 551 F.2d 1124, 1127 (8th Cir. 1977) (dismissal of count "automatically eliminated the possibility . . . [of forfeiture] . . . [of] assets under § 1963"); *United States v. Thevis*, 474 F. Supp. 134, 145 (N.D. Ga. 1979) ("To the extent that [others] . . . are not before the Court, there can be no forfeiture under 18 U.S.C. § 1963, since there can be no conviction under § 1962."), *aff'd on other grounds*, 665 F.2d 616 (5th Cir. 1982). Forfeiture under § 1963 depends upon an *in personam* criminal judgment. Due process precludes binding one who is not a party. *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."). *But see* 609 F.2d at 812 (wife may lose marital interest). Section 1963 does not involve an *in rem* forfeiture that may, consistent with due process, bind innocent parties. See generally *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 684 (1974); Note, *Bane of American Forfeiture Law—Banished at Last*, 62 CORNELL L. REV. 768 (1977). *But see* *United States v. Ore Tintoretto Painting*, 691 F.2d 603, 605-08 (2d Cir. 1982) (in rem forfeiture only on negligence). Accordingly, there was nothing for the Attorney General to remit or mitigate. The nominee's interest, if any, had not been affected by the criminal proceeding. *But see* ABA, *supra* note 25, at 18 (criminal court issues forfeiture against third parties' property). The court's decision is supportable, if at all, only to the extent that it can be read to require a third party claimant to exhaust administrative remedies before seeking judicial relief. See generally 3 K. DAVIS, ADMINISTRATIVE LAW § 20.02-10 (1958) (exhaustion sometimes required, but sometimes not). But if the claimant does not receive satisfaction, nothing should stand in the way of his filing a civil action to seek relief from possible adverse action by the Attorney General, who is mandated to act under § 1963(c) with "due provision for the rights of innocent persons." See 28 U.S.C. § 2409(a); U.S. DEPT. OF JUSTICE, CRIMINAL DIVISION, CRIMINAL FORFEITURES UNDER RICO AND THE CONTINUING CRIMINAL ENTERPRISE STATUTE 34-35 (1980).

On December 3, 1981, on the advice of the Department of Justice, the President commuted Mandel's sentence; he had served seventeen months of a three year term. *N. Y. Times*, Dec. 4, 1981, at 18, col. 4. As is the situation with powerful unions, political figures, too, have friends in high places. See note 170 *supra*. On October 28, 1982, the Maryland Court of Appeals disbarred Mandel. *N. Y. Times*, Oct. 29, 1982, at 7, col. 6.

177 For example, in *United States v. Rubin*, 559 F.2d 975, 989 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *reinstated in relevant part*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979), Bernard G. Rubin was convicted of a § 1962(c) violation. Rubin was a Special International Representative of the Laborer's International Union; he also held offices in a district council, various locals, and benefit funds. Rubin was convicted of operating the various unions and benefit funds "through" a pattern of racketeering activity, which consisted of embezzlement. Rubin argued on appeal that the district court's instructions on "through" were inadequate because they did not require the government to prove that the embezzlement "furthered" his ability to participate in or conduct the affairs of the locals or funds. The court of appeals upheld the instructions, observing that it was only necessary that there be a "substantial nexus" between the defendant's conduct and the enterprise's affairs. 559 F.2d at 990.

As *Rubin* was prosecuted, it is possible to term the union and welfare funds neither "prizes," "instruments" nor "perpetrators." They were, in short, "victims." No other concept more clearly describes the role they played in Rubin's pattern of racketeering activity, and it is difficult to imagine a clearer illustration of the victim concept. For similar examples, see *United States v. Provenzano*, 688 F.2d 194, 200 (3d Cir. 1982) ("The fact that the union was

harmed rather than benefited does not remove the conduct from RICO's ambit."); *United States v. LeRoy*, 687 F.2d 610, 617 (2d Cir. 1982) (embezzlement of union funds); *United States v. Weisman*, 624 F.2d 1118, 1123 n.4 (2d Cir. 1980) (operation of theatre by pattern of bankruptcy fraud).

The court of appeals in *Rubin* also affirmed an order under § 1963(a)(2) forfeiting Rubin's present union and benefit fund offices, but it struck down the forfeiture insofar as it applied to the right to hold office in the future, noting that that was left under § 1964 to "equitable discretion." 559 F.2d at 993. Without mentioning the liberal construction clause, the court applied the rule of lenity to § 1963, *see* notes 25 & 150 *supra*, a result that has misled district courts, *United States v. Thevis*, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (liberal construction to be ignored in construction of forfeiture, held not to include illicit proceeds), *aff'd on other grounds*, 665 F.2d 616 (5th Cir. 1982), but has not led ultimately to the establishment of bad law, *see United States v. Martino*, 681 F.2d 952, 955 nn.17 & 15 (5th Cir. 1982) (*Thevis* rejected and illicit proceeds held subject to forfeiture) *cert. denied*, 102 S. Ct. 2006 (1982), *cert. granted sub nom. Russello v. United States*, 51 U.S.L.W. 3497 (U.S. Jan. 11, 1983). Plainly, the *Rubin* court was wrong. *See Organized Crime Control Act of 1970*, Pub. L. No. 91-452, § 904, 84 Stat. 947 (1970); notes 25 and 150 *supra*.

The court of appeals in *Rubin* also noted that nothing in its opinion reflected a "finding or sense of any kind that . . . [Rubin] is or has been affiliated with what might be labeled organized crime." 559 F.2d at 991. In fact, the Laborer's Union is thought by the Justice Department to be "a tool of the crime syndicate." U.S. NEWS & WORLD REP., Sept. 8, 1980, at 35. *See* note 170 *supra*. The International president, Angelo Fosco, who took over when his father, Peter, died in 1975, is thought to take "his orders" from Joseph Aiuppa, the current organized crime family head in Chicago, Illinois. U.S. NEWS & WORLD REP., Sept. 8, 1980, at 35. Peter, in turn, had been an associate of Paul Ricca, a former Chicago crime family head. *Id.* Rubin himself was subsequently tried along with Fosco and Anthony Accardo, a former crime family head, now senior "statesman" in Chicago, for skimming an alleged two million dollars from the Union's health and welfare funds. Chicago Sun-Times, June 19, 1982, at 14, col. 1. Rubin was convicted, while Fosco and Accardo were acquitted. *Id.* A grand jury is now probing allegations that the jury was fixed. Miami Herald, Aug. 13, 1982, at C2, col. 3.

In 1979, the Senate Permanent Subcommittee on Investigations, as a culmination of a year's investigation, held three weeks of hearings on labor union insurance activities. LABOR UNION INSURANCE ACTIVITIES OF JOSEPH HAUSER AND HIS ASSOCIATES, S. REP. NO. 426, 96th Cong., 1st Sess. 58 (1979) [hereinafter cited as INSURANCE]. The Subcommittee focused on the activities of Joseph Hauser. Of some \$39 million in union insurance premiums obtained by Hauser-connected companies, \$11 million were illegally diverted. *Id.* at 2. The Teamsters' Central States Southeast and Southwest Areas Health and Welfare Fund (Teamsters Fund), for example, lost \$7 million. The Teamsters' Fund is a sister fund to the Central States Southeast and Southwestern Areas Pension Fund (Teamsters Pension Fund). *Id.* at 119. In addition, the Laborer's Union in Florida lost \$1 million. *Id.* "[I]ndividual policy holders suffered significant financial losses and great hardship when their insurance companies failed in the wake of Hauser's scheme." *Id.* Ultimately, Hauser was convicted of bribery in connection with payoffs made to trustees of California union benefit plans. *Id.* Despite the investigation that led to his conviction, Hauser gained control of Farmers National Life Insurance Company (Farmers) in Florida and Family Provides Life Insurance Company (Family) in Arizona, neither of which, however, were licensed to do business nationwide. Consequently, Hauser entered into a reinsurance arrangement (called "fronting") with Old Security Life Insurance Company of Missouri (Security). *Id.* at 54. Eventually, the companies went into receivership after the collapse of Hauser's schemes which centered in Florida, Indiana, Massachusetts, and Arizona. Hauser's acquisition of Farmers was approved by Thomas D. O'Malley, then the Florida State Insurance Commissioner, despite a recommendation that called into question Hauser's "integrity, competency and experience." *Id.* at 64. O'Malley



was eventually impeached by the Florida House of Representatives, but he resigned before he was tried by the Florida Senate. *Id.* at 64 n.8. He was also convicted of mail fraud. *Id.* Once Hauser gained control of Farmers, he corruptly used Seymour A. Gopman, an attorney, to gain illicit influence with Rubin. Gopman later pleaded guilty to embezzlement, kickbacks, and tax evasion in connection with the operation of the union benefit plans. *Id.* at 5 n.8.

In a scheme unrelated to Hauser, Rubin was convicted of the embezzlement of \$400,000 from union and benefit funds. *Id.* at 6. Immediately after Rubin's indictment in 1975 for embezzlement, the government sought to place the union and benefit funds under trusteeship under § 1963(b). When the Labor Department declined to assist, raising questions of "statutory authority" and "lack of manpower," the effort was abandoned. *Id.* The Laborer's Union itself took no action. Rubin was convicted in October, 1975. Sentence was stayed pending appeal. In a bond revocation hearing in October, 1977, the government established that Rubin had embezzled an additional \$2 million after his conviction. It was only then that the International imposed a trusteeship on the Rubin-connected local and benefit funds. *Id.* at 6.

Hauser's most ambitious scheme, however, centered around the Teamsters Welfare Fund, which then provided \$216 billion of in force insurance for 180,000 teamsters and had \$23 million in annual premiums. *Id.* at 16. Despite bids from major insurance companies, including Prudential Life Insurance of America, Hauser succeeded in having the insurance contract awarded to Security, which was acting as a front for Family. A key factor in the award was Hauser's agreement to permit the Amalgamated Insurance Agency of Illinois (Amalgamated) to process claims. *Id.* at 117. Amalgamated was operated by Allen Dorfman, whose stepfather, Paul Dorfman, took over the Waste Handlers Local Union in Chicago in 1939 after its founder and president was murdered. R. KENNEDY, *THE ENEMY WITHIN* 87 (Popular Lib. ed. 1960). James Hoffa gained the presidency of the Teamsters in 1957 though an alliance with Paul Dorfman, who, in turn, was closely connected to Anthony Accardo, then the crime family head in Chicago. *Id.* Dorfman's reward was the insurance business of the Teamster Welfare Fund, which was then given to Allen. Allen Dorfman was found not guilty in 1964 in Hoffa's jury tampering prosecution; he was also found not guilty in 1974 of embezzlement and mail fraud in connection with a Benefit Fund loan of \$1 million, when a key witness was shotgunned to death in front of his wife and two-year-old son before testifying. S. BRILL, *THE TEAMSTERS* 208, 222-32 (Pocket ed. 1979). Among Dorfman's co-defendants was Anthony Spilotro, described by the Illinois Crime Investigating Commission as "one of the most dangerous gang terrorists in the Chicago area." *Id.* at 220. Dorfman was, however, found guilty in 1972 for conspiracy to take a \$55,000 kickback for arranging a \$1.5 million Teamsters Pension Fund loan. *United States v. Dorfman*, 335 F. Supp. 675 (S.D.N.Y. 1971), *aff'd*, 470 F.2d 2166 (2d Cir. 1972), *cert. dismissed*, 411 U.S. 923 (1973). Dorfman was released from prison after serving eight and one-half months of a one year sentence. *INSURANCE*, *supra*, at 26 n.36. No effort was made by Frank Fitzsimmons, the Teamsters' president and a trustee of the Teamster Welfare Fund, or the Fund itself, to remove Amalgamated from its role with the fund. Fitzsimmons said, "[i]t is like a horse that will bite one person but won't bite another . . ." *Id.* The Committee, however, concluded: "The influence of Dorfman over the Teamsters [Welfare] . . . Fund at the time of the insurance award to . . . Security appears to have been as pervasive as it was 20 years ago when his activities were first exposed [by Senate investigations under the leadership of Robert F. Kennedy]." *Id.* Shortly after the award to Security, Hauser's operation collapsed, resulting in a loss of \$7 million to the Teamsters' Welfare Fund.

A number of civil suits have been filed since Hauser's companies went into receivership, including actions brought by the Department of Labor, the Securities and Exchange Commission, the Teamsters Welfare Fund, and Fund beneficiaries. *Id.* at 161-63. *See also, e.g.*, *Thornton v. Evans*, 692 F.2d 1064, 1065 (7th Cir. 1982) (beneficiary suit) ("Evidence . . . of . . . fraud traces a pattern . . . distressingly prevalent today . . ."). The Commission sought injunctive relief to bar Hauser from holding a position with any other public company

for a period of ten years. A consent judgment was entered in December, 1976. *INSURANCE, supra*, at 162 n.47. The Department of Labor acted under the Employee Retirement Income Security Act of 1914 (*ERISA*), 29 U.S.C. § 1001 *et. seq.* No RICO civil suits growing out of Hauser's scheme, however, have been reported. Nothing in *ERISA* would have prevented such actions. 29 U.S.C. § 1144(a) ("nothing [in *ERISA*] shall be construed to . . . supersede any law of the United States"). As with the waterfront prosecutions, the Hauser matter aptly illustrates the futility of a less than comprehensive legal strategy in dealing with corruption; the only redeeming feature of the saga is that in the Rubin aspect of the story at least the Department of Justice tried. Nothing as charitable can be said about the role of the other participants and the other aspects of the matter.

The Committee concluded its investigation with a finding that the "present state insurance regulatory network does not provide adequate protection to employee benefit plans." *INSURANCE, supra*, at 29. The Committee described the "relative ease with which diversions of assets of business entities and payments for influence can be disguised" and "the difficulty . . . of recovering funds . . . improperly diverted." *Id.* at 40.

For a comprehensive review of the government's efforts to investigate the Teamsters Pension Fund since 1955, concentrating on the period after 1975, see *OVERSIGHT INQUIRY OF THE DEPARTMENT OF LABOR'S INVESTIGATION OF THE TEAMSTERS CENTRAL SYSTEM PENSION FUND*, S. REP. NO. 177, 97th Cong., 1st Sess. (1981) [hereinafter cited as *OVERSIGHT INQUIRY*]. The report notes, "Substantial portions of [the Fund's] resources have been used to finance high risk real estate ventures. Many of its loans were made to reputed organized criminals. The fund has earned the reputation for being a lending institution for unsavory borrowers and questionable projects." *Id.* at 159. One private source has estimated that \$600 million of the Fund's \$1.2 billion in loans since 1957 have been to those who are "organized crime" connected. S. BRILL, *THE TEAMSTERS* 255 (Pocket ed. 1978). Undercharged interest has cost the Fund \$100 million; bad loans have cost the Fund \$285 million. *Id.* at 262-63. As part of the investigation that led to its report, the Senate Permanent Subcommittee on Investigations examined the relationship between Roy Lee Williams, the successor of Frank Fitzsimmons, and Nicholas Civella, the head of the organized crime family in Kansas City, Missouri. *OVERSIGHT INQUIRY, supra*, at 174-75. Civella's record in the courts is long and impressive. *United States v. Civella*, 648 F.2d 1167 (8th Cir. 1981) (bribery of public official uncovered in course of RICO bug of automobile and restaurant table); *United States v. Civella*, 533 F.2d 1395 (8th Cir. 1976) (large scale illegal bookmaking) (a principal government witness in this prosecution was murdered); *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960). Evidence introduced before the Committee indicated that Williams was the beneficiary of \$1,500 a month of "skim," money taken unlawfully from a Las Vegas casino. *OVERSIGHT INQUIRY, supra*, at 174 n.2. Williams and Dorfman were recently convicted in Chicago, Illinois, for conspiracy to bribe a United States Senator and for wire fraud. *New York Times*, Dec. 16, 1982, at 1, col. 1. *See United States v. Dorfman*, 532 F. Supp. 1118 (N.D. Ill. 1981) (detailed description of charges upheld on face of indictment), *supplemented by*, 542 F. Supp. 345 (N.D. Ill. 1982) (motion to suppress 14 months of electronic surveillance denied), *supplemented by*, 542 F. Supp. 402 (N.D. Ill. 1982) (motion to permit Thorman P. Sullivan, former United States Attorney for the Northern District of Illinois, to represent Dorfman denied under 18 U.S.C. § 207(b) (1976) as a conflict of interest and MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 ("appearance of impropriety")), *supplemented by*, 550 F. Supp. 877 (N.D. Ill. 1982) (motion by media to inspect exhibits granted in part). One of their co-defendants, Joseph Lombardo, has been identified as "a major figure in Chicago-area organized crime." *New York Times*, Apr. 4, 1982, at 19, col. 3. *See also United States v. Dorfman*, 690 F.2d 1217 (7th Cir. 1982) (appeal of denial of motion to suppress); *id.* at 1230 (appeal of order granting inspection). Dorfman was the victim of a gangland slaying on January 20, 1983. *New York Times*, Jan. 21, 1983, at 1, col. 1.

178 For example, in *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980), *Marubeni America Corporation and Hitachi Cable Ltd.*, as well as a corporate officer

of each, were charged under § 1962(c) with operating the affairs of an enterprise "through" a pattern of racketeering activity, which consisted of mail fraud, wire fraud, and interstate bribery. The indictment alleged that Marubeni's local representative paid bribes to Richard McBride, an employee of Anchorage Telephone Utility, an instrumentality of the Municipality of Anchorage, Alaska, to obtain confidential bidding information that was used to secure \$8.8 million in telephone cable contracts. *See* United States v. Tamura, 694 F.2d 591 (9th Cir. 1982) (conviction of representative upheld). In addition, the government sought forfeiture under § 1963(a)(1) of "any and all sums or amounts paid or payable" to either corporation as a result of contracts procured through the § 1962(c) violation. When the district court dismissed the forfeiture count on the ground that forfeitures under § 1963(a)(1) were limited to interests "in an enterprise" and did not include proceeds acquired by a pattern of racketeering, the government appealed, arguing that "Congress was not so short-sighted as to attempt to stop criminal infiltration into legitimate institutions by attacking only the actual infiltration." 611 F.2d at 766. "Congress must," it suggested, "have sought to attack the potential for infiltration by depriving criminals of the ill-gotten gains." *Id.* The court of appeals conceded that the "government's position [was] . . . attractive," but after an analysis of the statute's text and legislative history, it upheld the district court. *Id.* *But see* United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979) (denied the source of income to use to invest in legitimate business), *cert. denied*, 445 U.S. 946 (1980). *Rone* is not mentioned in the court's opinion, yet the force of its reasoning should have been compelling, and it is difficult to justify its omission. On remand, after a five week trial, Marubeni and one of its supervisors were convicted on all counts; Hitachi had plead guilty to the predicate offenses before trial. National Law Journal, Nov. 24, 1980, at 1, col. 1. The evidence introduced showed that they had paid more than \$330,000 in bribes. *Id.* The government also alleged that Marubeni and Hitachi were among the "persons" charged and the "enterprise" itself. *Id.*

Although "through" was not a matter of contention in the *Marubeni* prosecution, it is possible to term the two corporations "perpetrators." Under the theory of the prosecution, neither corporation was a "prize," "victim," or an "instrument" of the other. Each was in fact the "perpetrator" of a pattern of racketeering, which was undertaken to "advance" its affairs. To be sure, each acted only through its agents and employees, but the agents and employees were not acting on their own; their conduct, unlike in *Scotto*, was "authorized" and "approved." *See* note 151 *supra*. The corporations themselves were, in short, "corrupt." For similar examples, see United States v. Hartley, 678 F.2d 961, 990-91 (11th Cir. 1982) (operation of shrimp business by pattern of mail fraud and interstate transportation of money obtained by fraud); United States v. Computer Sciences Inc., 689 F.2d 1181, 1189-91 (4th Cir. 1982) (operation of unincorporated subdivision by a pattern of mail, wire fraud, and bribery); United States v. Starnes, 644 F.2d 673, 675, 679-80 (7th Cir.) (operation of business by pattern of arson and mail fraud), *cert. denied*, 454 U.S. 826 (1981); United States v. Zemek, 634 F.2d 1159, 1167 (9th Cir. 1980) (tavern business operated through a pattern of arson, bribery, mail fraud, extortion, and obstruction of communications to a criminal investigator), *cert. denied*, 450 U.S. 985 (1981); United States v. Grande, 620 F.2d 1026, 1030-31, 1037-39 (4th Cir.) (operation of construction company by a pattern of extortion and mail fraud; forfeiture under § 1963(a)(2) ordered), *cert. denied*, 449 U.S. 830 (1980); United States v. L'Hoste, 609 F.2d 796, 800-01 (5th Cir.) (operation of construction company by pattern of bribery and mail fraud; forfeiture under § 1963(a)(2) ordered), *reh'g denied*, 615 F.2d 383 (5th Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Huber, 603 F.2d 387, 393-94 (2d Cir. 1979) (operation of group of corporations by pattern of fraud and theft; forfeiture under § 1963(a)(2) ordered), *cert. denied*, 445 U.S. 927 (1980).

Where the enterprise is an illicit association in fact, no problem with "through" is presented; the association will inevitably play the role of "perpetrator." *See, e.g.,* United States v. Turkette, 452 U.S. 576, 579 (1980) (drugs, arson, mail fraud, and bribery conglomerate); United States v. Errico, 635 F.2d 152, 156 (2d Cir. 1980) (network of jockeys and betters

Where an enterprise is a "prize" or "victim," no salutary remedial purpose would be served by attributing the conduct of an individual involved in the pattern of racketeering activity to the individual or entity playing the role of the enterprise, whether for civil liability or criminal responsibility. Indeed, doing so would undermine the purpose of the Act.<sup>179</sup> On the other hand, the remedial purpose of the statute would be enhanced by such an attribution where the individual or entity was playing the role of "perpetrator." Vicarious and entity civil liability and criminal responsibility are well-established principles in federal jurisprudence; they should also serve well in implementing RICO's broad remedial purposes.<sup>180</sup>

A more difficult issue, however, is presented by the role of "instrument." The enterprise is used in the unlawful conduct, but it is not its author in the same sense as it is when the enterprise is the "perpetrator." Nonetheless, it is not wholly innocent, as when it plays the role of purely a "prize" or "victim." The crucial issue comes down to determining the general impact of vicarious or entity

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fixing races), *cert. denied*, 453 U.S. 911 (1981); *United States v. Provenzano*, 620 F.2d 985, 989, 992-93 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980) (labor kickbacks scenario); *United States v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980) (prostitution ring run by bribery); *United States v. Aleman*, 609 F.2d 298, 304-05 (7th Cir. 1979) (professional robbery and burglary ring), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979) (extortion scheme), *cert. denied*, 445 U.S. 946 (1980); *United States v. Elliot*, 571 F.2d 880, 896-98 (5th Cir.) (arson, theft, murder, and drug conglomerate), *cert. denied*, 439 U.S. 953 (1978).

Following the *Marubeni* conviction, the Municipality of Anchorage filed a civil suit under RICO. The municipality moved for summary judgment relying on the prior RICO conviction. Recovery could include treble damages for the amount of the bribes and rescission of the contracts without *quantum meruit* accounting. The decision is pending. *Municipality of Anchorage v. Hitachi Cable Ltd.*, 547 F. Supp. 633, 644-45 (D.C. Alaska 1982). See note 218 *infra*.

179 Judge Shaudur in *Parnes v. Heinold Commodities*, 548 F. Supp. 20 (N.D. Ill. 1982) grasped the correct principle, even if he incorrectly applied it. In *Parnes* two brokers, acting within the scope of their apparent authority, were alleged to have defrauded the plaintiff. Suit was brought against their agency for treble damages. Terming the agency a "victim," Judge Shaudur expressed an "intuitive unease" at imposing civil liability under RICO. "That sort of respondeat superior application, perhaps permissible to establish ordinary civil liability, would be bizarre indeed as a means to warp the facts alleged in this case into the RICO mold. Under that theory, malefactors at a low corporate level could thrust treble damage liability on a wholly unwitting corporate management and shareholders." *Id.* at 24 n.9. Apparently, Judge Shaudur was unaware that well-established federal jurisprudence imposes criminal and civil responsibility under precisely that theory. See note 151 *supra*. His arguments were in fact rejected in the criminal context by the Supreme Court in 1909. *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909). If they do not preclude the imposition of criminal responsibility, it is difficult to see how they ought to preclude civil liability. In addition, the facts alleged make the agency not a "victim," but a "perpetrator," which hardly casts the agency in a sympathetic role.

180 See note 151 *supra*.

liability in controlling the unlawful conduct. Should the risks of loss be shifted for civil liability? Would a broadening of the onus of criminal responsibility tend to alter the conduct of other individuals or those who are in charge of the entity, so that the unlawful conduct itself would be curtailed? On balance, the remedial purposes of RICO tip the judgment toward finding civil liability, but not criminal responsibility for the enterprise when its role is purely that of "instrument."<sup>181</sup> Indeed, once it is recognized that substantial policy

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181 It is the classic question where should the line be drawn, to which the classic answer of Lord Nottingham in the *Duke of Norfolk's* case, 22 Eng. Rep. 931, 960 [Ch. 1682] is appropriate: "I will stop wherever any visible inconvenience doth appear." See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW* 120-59 (2d ed. 1977). The various considerations are perceptively analyzed in Calabresi, *Some Thoughts On Risk Distribution And The Law of Torts*, 70 *YALE L. J.* 499 (1961). For some purposes, civil liability and criminal responsibility may be treated similarly, at least where only monetary sanctions are to be imposed, because "damages . . . paid to the plaintiff [are], from an economic standpoint, a detail." R. POSNER, *supra*, at 143 (emphasis added). Nevertheless, criminal sanctions carry a condemnation, whose effectiveness is cheapened if it is not generally related to fault. See J. FEINBERG, *DOING AND DESERVING* 111-13 (1970). Accordingly, substantial policy reasons exist to distinguish the scope of the liability of an enterprise for civil sanctions and the responsibility of an enterprise for criminal penalties, even though the imposition of each sanction represents a form of strict liability.

Two recent decisions of the courts of appeals in the context of criminal prosecutions also faced the "enterprise as person" question. *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982); *United States v. Computer Sciences*, 689 F.2d 1181 (4th Cir. 1982). *Hartley* is a thoughtful, well-reasoned opinion, while the reasoning of *Computer Sciences* is fatally flawed. In *Hartley*, Treasure Isle Inc., its vice president, and its plant manager were convicted for conspiring to defraud the United States and for operating Treasure Isle Inc. as an enterprise by a pattern of racketeering, including mail fraud and the interstate transportation of money obtained by fraud in connection with a scheme of supplying breaded shrimp to the government that did not conform to military specifications. On appeal, the defendants contended that there was insufficient evidence to link the military inspectors to the scheme. As such, the conspiracy charge should fail, because a corporation cannot conspire with its officers and employees, since they form a single entity. The Eleventh Circuit found, however, that there was sufficient evidence to tie the inspectors to the scheme. The court also indicated that it would have upheld the convictions anyway. The court rejected the single entity fiction, upheld the no-intra-corporate conspiracy rule, and recognized that the purpose of the single entity fiction was "to expand . . . corporate responsibility." 678 F.2d at 970. The court then declined to permit the fiction "to limit corporate responsibility" by "allowing a corporation or its agents to hide behind the identity of the other." *Id.* The court then rejected antitrust precedent as "a peculiar form of legal action." *Id.* at 971.

The defendants in *Hartley* also argued that Treasure Isle Inc. could not be named as both defendant and enterprise. In light of the liberal construction clause, and in the absence of "any prohibition" of "assuming a dual role," the court held that a "corporation may be simultaneously both a defendant and the enterprise under RICO." *Id.* at 988. The defendants argued that such a holding would read the enterprise element out of the statute; the court noted that proof would still be required of the corporation's separate identity. *Id.* The defendants then argued that the rule would be "particularly grievous" in view of the doctrine of corporate liability for the acts of its agents and employees; the court responded that that was "simply a reality to be faced by corporate entities." *Id.* at 988-89 n.43. "With the advantages of incorporation must come the appendant responsibilities." *Id.* The court also agreed

justifications in certain cases support treating the "enterprise" as a "person" and that the result, in any event, may be achieved by artful pleading (as the *Bennett* court noted), requiring the plaintiff to plead a "person" separate from the "enterprise" can be seen to be artificial. Accordingly, the court of appeals wrongly decided in *Bennett* that a single RICO count may not treat an "enterprise" as both an "enterprise" and a "person."

C. *The Question of an "Enterprise" Separate From the Charged "Pattern of Racketeering Activity"*

The defendants in *Bennett* contended that the complaint failed to allege the existence of an "enterprise" distinct from the alleged pattern of "racketeering activity." The district court agreed, noting that the complaint portrayed the enterprise, the John Knox Village, as "pervasively fraudulent."<sup>182</sup> The court of appeals disagreed, finding that the Village had an existence separate from the fraud alleged, since it provided "numerous legitimate services";<sup>183</sup> it was, moreover, an incorporated body under Missouri law.

The defendant's objection here did little more than echo the

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with the government that a contrary rule would not have made sense, as it could have been circumvented by pleading an association-in-fact enterprise. Finally, the court saw no reason why the corporate veil could not have been pierced for some, but not all, of the roles Treasure Isle played in the scheme. *Id.* at 989.

In *Computer Sciences*, individuals and Computer Sciences Inc. were indicted for operating "In Fonet," an unincorporated division of the corporation, as an enterprise by a pattern of racketeering, including mail and wire fraud and bribery in connection with a scheme to defraud the government by false claims. 689 F.2d at 1182, 1184. The district court dismissed the indictment on a variety of grounds, and the government appealed. The Fourth Circuit began its analysis by expressing doubt that Congress intended RICO to extend to false claims against the government. The court also noted that the "defendants . . . [did] not immediately appear to fit a category against whom the act was generally considered to be directed." *Id.* at 1189. The court did not resolve its doubts, however, as it did not have a full record before it. Nevertheless, the court held that "enterprise was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish." *Id.* at 1190. The court observed, "we would not take seriously, in the absence, at least, of very explicit statutory language, an assertion that a defendant could conspire with his right arm." The court also rested its judgment on the principle that "lenity applies even in RICO cases." *Id.* at 1190-91. The *Computer Sciences* opinion does not withstand close analysis. First, it ignores the liberal construction and no supersession clauses. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904, 84 Stat. 947 (1970). *See* note 25 *supra*. *See* notes 40 and 41 *supra*. Second, it lets a fiction dictate a result without a consideration of the policy behind the fiction. Finally, it proceeds on the false assumption that RICO was designed to deal with "a certain category of defendants" rather than anyone who commits designated offenses in a specified fashion. *See* notes 40 and 41 *supra*. Accordingly, *Computer Sciences* was wrongly decided, and other courts should not follow it.

<sup>182</sup> 685 F.2d at 1060.

<sup>183</sup> *Id.*

now discredited analysis of *Sutton*, *Anderson*, and *Turkette*.<sup>184</sup> At least where legitimate entities are involved, little difficulty exists in discerning and establishing the elements of "enterprise" and "pattern." The objection therefore represented little more than a shotgun approach that sought to raise all conceivable errors.<sup>185</sup> Appropriately, it was rejected.

#### D. *The Question of "Pattern"*

The defendant next contended that the complaint had failed to allege a "pattern of racketeering activity." In addition, they objected under Rule 9(b) of the Federal Rules of Civil Procedure to the specificity of the allegations of fraud. The court of appeals rejected the first contention out of hand, but it found "some merit" in the second objection.<sup>186</sup> The court was troubled that matters relating to time, place, and content had been alleged as to only some of the representations and particularized as to only some of the defendants. Nevertheless, while the court struck the offending allegations, the action was taken without prejudice to make proper amendment on remand.

Rule 9(b) requires all averments of fraud or mistake to state the circumstances with particularity.<sup>187</sup> The rule is rooted in a concededly valid desire to protect defendants from lightly made claims, often advanced only for their settlement value as part of "strike"

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184 See note 165 *supra*; *Basic Concepts*, *supra* note 3, at 1025 n. 91.

185 See *United States v. Computer Sciences*, 689 F.2d 1181, 1183 (4th Cir. 1982) ("Resourceful lawyers representing criminal defendants often desire to be thorough and to overlook nothing in their commendable zeal to afford first-class representation. Consequently in many cases they tend to excess as they inundate us with a plethora of arguments, some good and some not so good. Sometimes one wonders whether such lack of selectivity is not counterproductive, for a party raising a point of little merit exposes himself to the risk of excessive discount for a better point because of the company it keeps") *United States v. Hart*, 693 F.2d 286, 287 n.1 (3d Cir. 1982) (inordinate number of meritless objections makes finding a bona fide issue like finding a needle in a haystack). The court of appeals reserved judgment on the question whether a "not-for-profit" corporation or a single individual could be an enterprise for purposes of RICO. 685 F.2d at 1061. This reservation, too, was an echo of the Eight Circuit's effort in *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981) to give the enterprise concept a special definition: "a discrete *economic* association existing separately from the racketeering activity." In light of *United States v. Turkette*, 452 U.S. 576, 583 (1981), the effort need not have been made. No reason existed to limit the concept to "economic" associations. See note 168 *supra*.

186 685 F.2d at 1062.

187 FED. R. CIV. P. 9(b) states:

Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

suits.<sup>188</sup> Nevertheless, the rule does not abrogate Rule 8,<sup>189</sup> and the two must be harmonized.<sup>190</sup> Ultimately, Rule 9(b)'s aim is to provide "adequate notice of plaintiff's claim of fraud."<sup>191</sup> Circumstances usually include such matters as the time, place, and content of false representations, the identity of the speaker, and what was lost.<sup>192</sup> In the context of the general jurisprudence of Rule 9, the court of appeals' decision was, therefore, wholly proper.<sup>193</sup>

### E. *The Question of "Investment," "Acquisition," or "Conduct"*

The defendants also argued that the plaintiffs had failed to allege that they had "invested" racketeering proceeds in an enterprise,

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188 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 299 (1969). See *McGinty v. Beranger Volkswagen Inc.*, 633 F.2d 226, 229 n.2 (1st Cir. 1980) ("designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize 'strike suits' and to discourage the filing of suits in the hope of turning up relevant information"). For a discussion of the general problem in the context of *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), see note 199 *infra*.

189 FED. R. CIV. P. 8 states:

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim or third party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

190 633 F.2d at 228-29.

191 *Id.* See *Credit & Fin. Corp. Ltd. v. Warner & Swasey Co.*, 638 F.2d 563, 567 (2d Cir. 1981). Rule 9 merely lists those actions "in which slightly more is needed for notice." *Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975). Where "the issues are complex . . . or the transactions . . . cover a long period of time" the court allows greater leniency in not pleading detail. 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 9.03, at 9-28 (2d ed. 1982). Leave to amend, where particularity is not met, is "almost always" granted. *Id.* at 9-34. See, e.g., *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 248-49 (S.D.N.Y. 1981) (leave granted in RICO suit). See note 176 *supra* for a detailed discussion of *Hellenic Lines*. But dismissal is proper where, even though leave is granted, the amended complaint does not meet the test of the rule. *Englund v. Mathews*, No. 81-3017 (S.D.N.Y. 1982) (RICO fraud complaint dismissed for failure to plead with specificity).

192 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE, *supra* note 190, § 9.03, at 9-24.

193 Rule 9(a) may be "relaxed somewhat as to matters peculiarly within the adverse party's knowledge." *Id.* at 9-26; *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *cert. denied*, 421 U.S. 976 (1975). Compliance with the Rule, in short, is a question of "variables." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1298 (1969). The issue boils down to "notice." *Id.* at 415. "Accordingly, challenges [under Rule 9] should be limited to instances in which there is a clear justification for imposing a higher pleading burden than is set forth in Rule 8(a)." *Id.* That plus a "liberal amendment policy" will "guarantee that there are a minimal number of purely technical pleading attacks under Rule 9(b)." *Id.*



“acquired an interest in” an enterprise through a pattern of racketeering activity, or “associated with” an enterprise in the conduct of its affairs through a pattern of racketeering activity. The court of appeals treated only the allegation of “association with,” noting that it was the plaintiff’s “strongest claim.”<sup>194</sup> The court had no difficulty, however, in finding that the “multiple incidents” of mail and wire fraud and the “numerous allegations of particular false statements”<sup>195</sup> constituted conduct falling within the proscription of Section 1962(c).<sup>196</sup>

Here, too, the defendant’s challenge to the language of the complaint was little more than another effort to touch all bases in resisting the plaintiff’s suit. It was clearly without merit, and it deserved the cursory treatment it received.

### F. *The Question of Cognizable Inquiry*

The defendants also contended that the plaintiffs “failed to allege the kind of injury which supports standing to bring a civil RICO suit.”<sup>197</sup> The plaintiffs had alleged several forms of monetary loss, including depreciated entrance endowment payments and higher monthly service charges. Defendants responded by arguing that such injury was not “injury to property” within section 1964(c),<sup>198</sup> which

194 685 F.2d at 1060 n.8.

195 *Id.* at 1062.

196 *Id.* at 1060 n. 8.

197 *Id.* at 1058.

198 For the text of 18 U.S.C. § 1964(c), see note 14 *supra*. For the defendants to win, the court of appeals had to be willing to redraft § 1964(c) to read:

[Only] a person [competitively] injured in his business or [commercial] property . . . may sue therefore . . . .

The italicized words do not appear in § 1964(c) as Congress drafted it. See 18 U.S.C. § 1964(c). The court of appeals properly declined the invitation to undertake the requested legislative reform, noting: “[I]t is beyond our authority to restrict the reach of the statute.” 685 F.2d at 1064. Apparently, some district courts felt they had broader authority than courts of appeals. See text accompanying notes 130 & 134-35 *supra*.

Congress was concerned about “competitive” and “commercial” injuries. The defendant’s contention, therefore, was a deceptive half-truth, false only in what it omitted, like a number of other arguments that have been advanced under RICO. See *Basic Concepts*, *supra* note 3, at 1035 n.117. Congress was concerned about competition. See, e.g., Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) (“competing organizations” harmed and “free competition” interfered with by “organized crime”). But its concern was not limited only to competitive injuries. *Id.* (“Corruption” was used “to infiltrate . . . legitimate business and . . . to subvert . . . our [Nation’s] democratic processes,” the effects of which “undermine[d] the general welfare of the Nation and its citizens.” “Fraud” was used to “harm innocent investors.” “[L]abor unions” were “corrupt[ed].”) Accordingly, limiting RICO to “competitive” or “commercial” injury would hardly have implemented either the text or the purpose of RICO.

was, they suggested, limited to injury to "competitive or commercial interests."<sup>199</sup>

The court of appeals termed the argument "troublesome,"<sup>200</sup> and it noted that it had found favor with "some courts."<sup>201</sup> Never-

199 685 F.2d at 1058. This argument was not unknown to the Eighth Circuit. In *Reiter v. Sonotone Corp.*, 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 442 U.S. 330 (1979), defendants, in an action under § 4 of the Clayton Act, 15 U.S.C. § 15 (1976) on which RICO was modeled, argued that consumers of price-fixed hearing aids had not suffered a "commercial" injury. Accordingly, they were not entitled to treble damage relief. The *Reiter* court first looked to the legislative history of the Sherman Act and concluded that it "was designed to prevent restraints of trade significantly affecting business competition." 579 F.2d at 1079. The court also quoted Senator Morgan's remarks that the bill "ought not . . . be a breeder of lawsuits." *Id.* at 1080. When the Clayton Act was enacted in 1914, it was not, the panel held, designed "to amend the [scope of] the Sherman Act" in the area of treble damage suits. *Id.* Finally, the court indicated it found nothing in the jurisprudence of the antitrust statutes or subsequent congressional action that convinced it that consumers injured in their property could seek relief under § 4. Its decision was, it observed, "sensible as a matter of policy and compelled as a matter of law." 579 F.2d at 1087. The plea of three members of the court of appeals for a rehearing *en banc* went unanswered. 579 F.2d at 1087-88. The Supreme Court unanimously disagreed with the Eighth Circuit. So, too, did the Department of Justice and the Attorneys General of forty-seven states, who filed *amicus curiae* briefs. In an opinion by Chief Justice Burger, the Court reversed the Eighth Circuit's decision. The Chief Justice began his analysis with "the language employed by Congress." 442 U.S. at 337. "On its face," he observed, § 4 "contain[ed] little in the way of restrictive language." *Id.* In *Pfizer Inc. v. India*, 434 U.S. 308, 312 (1978) the Court had, he noted, given "person" its "naturally broad and inclusive meaning." 442 U.S. at 337-38. "Similarly . . . the word 'property' has a naturally broad and inclusive meaning." *Id.* at 338. "Money, of course, is a form of property." *Id.* The Chief Justice then rejected the defendant's efforts to use "business" in the phrase "business or property" to limit "property." It would, he wrote, "ignore the disjunctive 'or' and rob the term property of its independent and ordinary significance." *Id.* Nothing in the legislative history of § 4 "conflict[ed] with [the Court's] holding." *Id.* at 342. Nor did he find *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477 (1977) (antitrust-type injury required) inconsistent with the Court's ruling. 442 U.S. at 343. Finally, he noted the defendant's argument that recognition of the plaintiff's claim would "add a significant burden to the already crowded dockets of the federal courts." *Id.* at 344. He replied, "That may well be true but [it] cannot be a controlling consideration . . ." *Id.* "We must take the statute as we find it." *Id.* Congress in fact, "created the treble-damage remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations." *Id.* (emphasis in original). "District courts" could "identify frivolous claims brought to extort nuisance settlements." *Id.* at 345. "[I]f the district courts exercise sound discretion and use the tools available" the Court's decision need not "result in administrative chaos." *Id.* The relevance of the reasoning of the Chief Justice to the facile claims of the defendants in *Bennett* could hardly have escaped the court of appeals, although *Reiter* was not cited in its opinion. It was, however, cited in the plaintiff's brief and relied upon in materials that the court did use. See 685 F.2d at 1059, 1064; *Basic Concepts*, *supra* note 3, at 1041; *Materials*, *supra* note 23, at 533-73. Surely, too, the defendants' counsel must have felt uncomfortable arguing the antitrust analogy, without citing and distinguishing *Reiter*.

200 685 F.2d at 1058.

201 685 F.2d at 1058-59. Here, the court referred to *Van Schaick v. Church of Scientology*, 535 F. Supp. 1125 (D. Mass. 1982) and *North Barrington Dev. Inc. v. Fanslow*, 547 F. Supp. 207 (N.D. Ill. 1980). See note 134 *supra*.

theless, it held that "commercial or competitive injury" [was] not required by . . . RICO."<sup>202</sup> To be sure, RICO was "intended . . . to combat the threat posed by racketeer influence in the free market system, [but]. . . Congress did not see the objectives of RICO and the antitrust laws as coterminous."<sup>203</sup> The court noted that "[d]ifferent policies under[lay] the two bodies of law."<sup>204</sup>

The court of appeal's opinion is a refreshing model of clarity of expression and insight on this issue. It was precisely the possibility of the argument advanced by the defendants that led Congress to draft RICO outside of the antitrust statutes.<sup>205</sup> That defendants would make such a specious argument is understandable. That district courts would be persuaded by it is lamentable.<sup>206</sup> Appropriately, the court of appeals rejected the defendants' contentions.

### G. *The Question of Equitable Relief Not Available to Private Plaintiffs*

Finally, the defendants argued that the equitable relief requested by the plaintiffs was not available to "private plaintiffs."<sup>207</sup>

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202 The court observed:

RICO is said to require competitive injury. We are not convinced.

. . . . .  
 We acknowledge that RICO was intended in part to combat racketeer influences in the free market system. . . . This does not mean, however, that RICO should be viewed as an extension of antitrust law in all respects. Different policies underlie the two bodies of law. To ruin an antitrust defendant, usually a legitimate businessman, would generally lessen competition and increase concentration in a particular industry. . . . In a RICO context, there are few countervailing reasons to lessen the impact of RICO remedies by importing the limitations on standing which apply in antitrust law. . . . Congress did not see the objectives of RICO and the antitrust laws as coterminous. . . .

. . . . .  
 We conclude that an allegation of commercial or competitive injury is not required by the RICO Act.

685 F.2d at 1058-59.

203 *Id.* at 1059.

204 *Id.*

205 *See* notes 51, 63 & 73 *supra*.

206 Without rejecting *Landmark Sav. & Loan v. Rhoades*, 527 F. Supp. 206, 208-09 (S.D. Mich. 1981), the court of appeals robbed it of any significance. *Landmark* held that the plaintiff must allege more than injury by the predicate offenses; a "racketeering enterprise" injury had to be averred. *See* note 134 *supra*. *Landmark* did not, however, define the character of the allegation that would meet its judicially imposed limitation. Nevertheless, the court of appeals in *Bennett* held that the test was a "reiterat[ion] in a new guise [of] the argument that no 'enterprise'. . . [was] alleged in the complaints." 685 F.2d at 1059 n.5. The *Bennett* court then held the complaint sufficient when it "allege[d] the conduct of the affairs of an enterprise through a pattern of racketeering." *Id.* Whatever *Landmark* was intended to do, it now should pose no problem to a plaintiff in drafting a RICO complaint.

207 685 F.2d at 1057.

In addition to treble damage relief, the plaintiffs had sought to have the Village reorganized under section 1964(a).<sup>208</sup> The court of appeals, however, declined to "reach the difficult question whether . . . this equitable relief [was] available to private plaintiffs pursuant to 18 U.S.C. § 1964 and, if not, whether such relief may be granted under the court's general equitable powers."<sup>209</sup> The court added, without "endorsing or rejecting the opinions there expressed," that such scholarship as the court had discovered had concluded that "equitable relief [was] available to the private plaintiff."<sup>210</sup>

It is, of course, wholly understandable that the court of appeals was reluctant to essay the scope of the district court's equity powers in the absence of a full record. Mr. Justice Cardozo put it well: "The plastic remedies of the chancery are moulded to the needs of justice, [b]ut . . . facts . . . are the coin which . . . [a court] must have in [its] . . . pocket if . . . [it is] to pay [its] way with legal tender. Until [it is] provided with a plentiful supply . . . [it would] do better to stay at home . . . ." <sup>211</sup> Nevertheless, scholarship is not so circumscribed. Comment may be usefully offered on the issue.

It is difficult to see how a court could conclude that RICO does not provide equitable relief for private parties. Section 1964(a) is a general grant of equitable power. It is not limited on its face or in its legislative history. Section 1964(b) grants the government authority to seek relief, an authority that it was necessary to set out lest old learning be used to circumscribe the new governmental power to seek equitable relief.<sup>212</sup> Nothing in section 1964(b) speaks in negative terms about an authorization for private parties to seek similar relief.

208 *Id.* at 1064.

209 *Id.*

210 685 F.2d at 1064. The court of appeals cited *Basic Concepts*, *supra* note 3, at 1014, 1038 nn.132-33. See also *id.* at 1047 n.197; Bailey, *Private Action for Injunctive Relief*, in I MATERIALS, *supra* note 23, at 407 (analysis of text, legislative history, and relevant Supreme Court decisions).

211 *Foreman v. Foreman*, 251 N.Y. 273, 274, 167 N.E. 428, 429, 227 N.Y.S. 807, 808 (1929) and B. CARDOZO, *THE GROWTH OF THE LAW* 98 (1924).

212 Early English jurisprudence reflected the maxim that "equity will not enjoin a crime." *Gee v. Pritchard*, 36 Eng. Rep. 670, 674 (ch. 1818). Equity would act only where a property right was at stake, but the government was not thought to have a property right, absent unusual circumstances. See *In re Pebs*, 158 U.S. 564, 482-84 (1895). Section 1964(b), therefore, put beyond question the right of the government to bring a civil suit beyond the traditional limitations of equity jurisprudence. *United States v. Cappelto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). As such, § 1964(b) ought not to be read to deny the injured party the right to seek equitable relief. *Civil RICO*, *supra* note 54, at 714-15 concludes: "[T]he statute should not be read to make treble-damage remedy exclusive. . . . Actions brought by private parties to prevent and restrain racketeering activity . . . further Congressional intent. RICO's liberal construction clause . . . should govern."

Indeed, the governmental suits are to be brought on behalf of private parties. No satisfactory explanation can be offered as to why Congress would have precluded victims from seeking help themselves. Section 1964(c), moreover, says "sue and" and not "sue to." The contrary argument would have to suggest that by adding the right to secure treble damage relief to the general right to sue Congress somehow manifested an intention to subtract the right to obtain other forms of relief. How addition might be converted into subtraction in a remedial statute that must be liberally construed strains even the legal imagination. Section 1964 ought to be read as authorizing both governmental and private suits to obtain equitable relief. To the degree that any ambiguity might be thought to exist in the choice of language, the liberal construction clause and the remedial purpose of the statute come down on the side of finding private suits to be authorized and that full relief can be granted. No satisfactory rationale can be offered, in short, to explain why a court ought to feel itself circumscribed in doing full justice for a victim under RICO.

To be sure, arguments can be made to the contrary. The remedial purpose of the statute and its liberal construction clause can be ignored. Section 1964(b) can be read to carry with it a negative implication by inserting an "only" in its text. In addition, the "and" in section 1964(c) can be read to mean "to." As so interpreted, RICO would then authorize governmental suits for equitable relief, but private suits would be limited to the recovery of treble damages. Yet it takes but a brief examination of the consequences of this illiberal rewriting of section 1964 to realize that it could not be what Congress intended. Equity's hand would, in fact, be tied down in only one situation. Where damage was threatened but not yet suffered, RICO would not afford the private plaintiffs equitable relief. But where damage was sustained, the jurisdiction conferred on the court to grant treble damage relief would carry with it the power, under well-established principles of pendent jurisdiction, to grant equitable relief for the common law causes of action that would unquestionably also exist under state law.<sup>213</sup> Subject to general limitations on federal

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213 In *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738, 823 (1824), Chief Justice Marshall observed, "[W]hen a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the [federal] . . . courts jurisdiction of that cause, although other questions of fact or of law may be involved in it." There "could hardly be any other rule." 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3567, at 439 (1975). The contemporary scope of that power and the conditions for its discretionary exercise were delineated in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). In *Gibbs*, plain-

jurisdiction,<sup>214</sup> the relief would be complete.<sup>215</sup> Nevertheless, the terms and conditions under which justice might be done would be

tiff sought relief under the Labor Management Relations (Taft-Hartley) Act § 6, 29 U.S.C. § 303 (1976) and Tennessee common law for actual and punitive damages for a secondary boycott characterized by violence. The district court denied plaintiff relief under the Taft-Hartley Act, but upheld his common law claim. The Supreme Court sustained the district court's exercise of jurisdiction, but reversed on the ground that the Norris-La Guardia Act, 29 U.S.C. § 106 (1976) required "clear proof" of actual participation or actual authorization as a prerequisite to union entity liability for individual unlawful conduct in labor disputes and that this requirement had not been met. 383 U.S. at 738-42. The scope of the district court's power was defined to include all claims "deriv[ed] from a common nucleus of operative fact" that were such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Id.* at 725. Pendent jurisdiction, however, was "a doctrine of discretion, not of plaintiff's right." *Id.* at 726. Its "justification . . . [lay] in considerations of judicial economy, convenience and fairness to litigants." *Id.* "Needless decisions of state law should be avoided as a matter of comity . . . [and] if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be . . . left for resolution to state tribunals." *Id.* at 726-27. A district court should also consider the issue of "jury confusion," although the Supreme Court recognized that such confusion, which might stem from differing standards of proof or measures of damage, "could be lessened by employing . . . special verdict[s]." *Id.* at 729. The law applicable to the state claims would be governed by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Id.* at 726. *Erie* established the doctrine that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . whether the law of the State shall be declared by its legislature in a statute or by its highest court." 304 U.S. at 78. "Congress . . . [has] no power to declare substantive rules of common law applicable in a State . . . be they commercial law or a part of the law of torts." *Id.* See *Byrd v. Blue Ridge Rural Elec. Coop. Inc.*, 356 U.S. 525, 536-37 (1958) (jury trial appropriate in diversity legal action, because contrary state rule not "bound up with the definition of the rights and obligations of the parties" and "affirmative countervailing considerations at work"); *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (substitute service appropriate, as policy of "discouragement of forum-shopping and avoidance of inequitable administration of laws" not implicated by valid federal rule of procedure); *Guaranty Trust Co. v. York*, 326 U.S. 99, 103-09 (1945) (state statute of limitations governs to protect "substantially the same" "outcome" in a diversity equity action, where it "substantially affect[s]" the enforcement of the right as given by the state). See also *Cities Serv. Oil Co. v. Dunlap*, 308 U.S. 208 (1939) (burden of proof controlled by state law); *Palmer v. Hoffman*, 318 U.S. 109 (1943). But see 326 U.S. at 106 (a federal court dealing in equity is free to grant or withhold remedies without regard to what a state court would do in a similar case); *Guffey v. Smith*, 237 U.S. 101 (1915) (federal injunction granted to protect leasehold interest, even though not avoidable under Illinois law, as equitable remedies matter of federal law). Compare *Pusey & Jones Co. v. Hanssen*, 261 U.S. 491 (1923) (Delaware statute authorizing receiver to enforce unsecured creditor not enforced because equity power of federal court not enlarged by state law.) with *Stern v. South Chester Tube Co.*, 390 U.S. 606, 609-610 (1968) ("need not decide whether . . . a federal [equitable] remedy can be provided . . . in the absence of a similar state remedy"). See generally 17 & 19 C. WRIGHT, A. MILLER & E. COOPER, *supra*, §§ 2943, 3413 (1973 & 1982) (Issuance of preliminary injunctions under Rule 65 or the appointment of receiver under Rule 66 not controlled by state law, but final injunction would be, while the question of receivers "hardest" to determine).

214 See note 212 *supra*.

215 See *Chicago G. W. Ry. v. Kendall*, 266 U.S. 94, 98 (1924); ("relief [injunction] to which entitled would be same"); *Moore v. New York Cotton Exch.*, 277 U.S. 593, 607-10

dependent, not upon the special jurisprudence of RICO, but the general federal jurisprudence of remedies and the elements of the state causes of action.<sup>216</sup>

While the relief granted could in fact be complete, that difference might be determinative of the outcome in many situations where the issue in question involved providing provisional relief, fashioning temporary restraining orders, or granting temporary injunctions,<sup>217</sup> as well as affording ultimate relief of an equitable char-

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(1926) (suit for private antitrust relief not valid, but counterclaim upheld and equitable relief granted). See *Lincoln Gas Co. v. Lincoln*, 250 U.S. 256, 264 (1919) (dictum).

216 See note 212 *supra*. The contrast between the elements of a state cause of action and a RICO claim for relief could be substantial. The question of provisional or temporary remedies is discussed at notes 217-18 *infra*. The area of fraud illustrates the differences between a state cause of action and a RICO claim. Generally, the emphasis in imposing criminal responsibility for fraud under the mail fraud statute and its cognate provisions is on a breach of legal duty accompanied by a lack of good faith. Interference with tangible rights is not paramount. See, e.g., *Durland v. United States*, 161 U.S. 306, 313-14 (1896) (mail fraud not limited to common law fraud and false pretenses); *United States v. Boffa*, 688 F.2d 919, 925-26 (3d Cir. 1982) (decisions reviewed and intangible rights doctrine called "persuasive," but "not boundless"; it includes breach of fiduciary relations, but not violation of The Nat'l Labor Relations Act, 29 U.S.C. § 157 (1976)); *United States v. Margiotta*, 688 F.2d 108, 120-30 (2d Cir. 1982) (fiduciary duty of political figure). On the other hand, common law fraud, rooted in considerations derived from the special history of the crime of larceny, emphasizes interference with tangible rights rather than a breach of duty, which may involve only intangible considerations. Interference with intangible rights is foreign to its jurisprudential framework. See Comment, *The Intangible-Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U. CHI. L. REV. 562 (1980), which argues unpersuasively for a reinterpretation of the mail fraud statute in light of the old learning, but surveys the cases and concedes the basic distinctions. Some implications of the distinctions are also analyzed in J. Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 AM. CRIM. L. REV. 117 (1981). In addition, the common law tort of deceit has its own special history, which "has been colored to a considerable extent by the ethics of bargaining between distrustful adversaries." W. PROSSER, *supra* note 151, § 105, at 684 (4th ed. 1971). Deceit, in turn, tends to run into warranty and negligence, where the requirement of a particular state of mind is absent. The proper measure of damage—out of pocket or loss of bargain—is also not free from doubt. *Id.* at 734-35. Equity, too, developed its own notions of fraud as a grounds for relief, which included innocent misrepresentation. *Id.* at 607-87. See generally, D. DOBBS, REMEDIES § 11.3, at 591-652 (1973). It is not an understatement to say, therefore, that there "has been a good deal of overlapping of theories and no little confusion." W. PROSSER, *supra* note 151, at 684. "Any attempt to bring order out of the resulting chaos must be at best a tentative one, with the qualification that many courts do not agree." *Id.* at 685. More than substantive notions would be involved. Remedies, too, would have to be considered. See note 218 *infra*.

217 Provisional relief is the same for actions bottomed upon federal question or pendent jurisdiction. See note 212 *supra*; *Granny Goose Foods Inc. v. Local 70, Int'l Brotherhood of Teamsters*, 415 U.S. 423, 436-37 n.10 (1974) ("long-settled federal law . . . in all cases in federal court . . . state law is incorporated to determine the availability of prejudgment remedies for seizure of person or property"). FED. R. CIV. P. 64 provides that "all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment . . . are available under the circumstances and in the manner provided by the law

of the state in which the district court is held." Such remedies include "attachment . . . and other corresponding or equivalent remedies." *Id.* "Typically, state law will reflect the distinction between law and equity in granting its provisional remedies, a distinction that must be honored in the federal proceedings." 11 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2932, at 346 (1973). *See* *DeBeers Consol. Mines v. United States*, 325 U.S. 212, 218 (1945) (state law controls). Attachment may not always, for example, be available to a plaintiff suing in tort. *See, e.g., Crist v. United Under Writers Ltd.*, 343 F.2d 902 (10th Cir. 1965) (securities action for rescission sounds in tort, where attachment not available under Colorado law). Generally, availability of attachment is dependent "upon each state's attitude toward the debtor-creditor relationship." 7 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 64.04[3] at 64-13 (2d ed. 1948). "Some states are definitely 'creditor' states in which the provisional remedies are generally available for all types of legal claims and with few restrictions; others are as definitely 'debtor' states in which the provisional remedies are available only for certain types of legal claims and are subject to many restrictions . . . and still others are somewhere between those extremes . . ." *Id.* at 64-13. Such provisional remedies, too, are subject to due process limitations. *Compare* *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin without notice unconstitutional) *with* *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (not all dispossession, however slight, need be preceded by an adversary hearing). Wrongful attachment gives rise to a claim for relief. *Lugar v. Edmondson*, 102 S. Ct. 2744 (1982). But good faith is a defense. *Folsom Inv. Co. v. Moore*, 682 F.2d 1033 (5th Cir. 1982). Rule 64 does not deal with provisional remedies that are equitable in character, including an injunction issued as an incident to a legal claim to effect an equitable attachment. Such a remedy would be a matter of Rule 65. 11 C. WRIGHT & A. MILLER, *supra*, at 64-20 to 21. *See* note 212 *supra*; note 218 *infra*. Finally, *lis pendens* is a substantive matter governed by local property law. Accordingly, in the absence of a statute, commencement of an action in a federal court is notice to all persons affected, but where a statute exists, its provisions govern. *Compare* *King v. Davis*, 137 F. 198 (4th Cir. 1903) *with* *United States v. Calcasieu Timber Co.*, 236 F. 196 (5th Cir. 1916).

The Federal Rules of Civil Procedure provide the procedure for obtaining temporary restraining orders and preliminary injunctions. FED. R. CIV. P. 65. "[T]he general availability of injunctive relief . . . [is] not altered by the rule and depend[s] on traditional principles of equity jurisdiction." 11 C. WRIGHT AND A. MILLER, *supra*, § 2941, at 359. *See generally* *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994 (1965). Issuing an injunction is a matter of discretion. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973) ("equitable remedies are a special blend of what is necessary, what is fair, and what is workable"); *Hecht Co. v. Bowles*, 321 U.S. 321, 328 (1944) (the language "shall be granted" does not make injuncton mandatory). *Sports Form Inc. v. United Press Int'l*, 686 F.2d 750, 752-54 (9th Cir. 1982) (standard of review is abuse of discretion). Traditionally, the test for exercising that discretion has emphasized four factors: 1) irreparable harm, 2) balance of inconvenience, 3) probability of success, and 4) the public interest. 11 C. WRIGHT & A. MILLER, *supra*, at 430-31. *See* *Doron v. Salem Inn Inc.*, 422 U.S. 922, 931-32 (1975); *Ohio Oil Co. v. Conway*, 279 U.S. 813 (1929); *Sampson v. Murray*, 415 U.S. 61, 84 n.53 (1974); *Withrow v. Larkin*, 421 U.S. 35, 45 (1975). The traditional factors have also been reformulated as probability of success and irreparable injury or serious question and balance of hardships. *See, e.g.,* *John B. Hull Inc. v. Waterbury Petroleum Prods. Inc.*, 588 F.2d 24, 27 (2d Cir. 1978), *cert. denied*, 440 U.S. 960 (1979). *See also* *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 123 (7th Cir. 1982) ("a comparison of the probabilities and consequences (public as well as private), of two types of error"). But generally the factors are formulated and applied in the traditional fashion. *See, e.g.,* *Hannis Corp. v. National Iranian Radio and Television*, 691 F.2d 1344, 1353-58 (11th Cir. 1982); *Kennecott Corp. v. Smith*, 637 F.2d 181, 187 (3d Cir. 1980); *Telvest Inc. v. Bradshaw*, 618 F.2d 1029, 1032 (4th Cir. 1980); *Camanish v. University of Texas*, 616 F.2d 127, 130 (5th Cir. 1980). *See also* *Dataphase Systems, Inc. v. CL*



Systems, Inc., 640 F.2d 109, 112-14 (8th Cir. 1981) (alternate and traditional test employed and cases analyzed).

Temporary restraining orders or preliminary injunctions have been granted in a variety of situations, where their goal was to preserve the status quo pending the outcome of litigation. For example, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F.2d 682 (5th Cir. 1980), the Fifth Circuit upheld an order requiring that the proceeds of a sale, allegedly obtained by fraud, be preserved in an interest-bearing account pending the final result of the litigation. The court found that without such an injunction, a substantial risk existed that a "meaningful decision on the merits would be impossible" because defendants, by disposing of the assets, could make "any judgment ultimately obtained against [them] . . . unenforceable." *Id.* at 686. The court held that the threat of such an "ineffective remedy" outweighed the alleged damages that such an injunction might cause the defendants. *Id.* at 687. Similarly, in *International Control Corp. v. Vesco*, 490 F.2d 1334 (2d Cir.), *cert. denied*, 417 U.S. 932 (1974), the Second Circuit upheld an order preventing the dissipation or impairment of assets located in the United States, including a Boeing 707, ICC stocks, and a yacht. The court concluded that while "an extraordinary remedy, a preliminary injunction is properly granted to preserve the status quo *pendente lite* where the balance of hardships tips decidedly toward the party requesting the temporary relief and that party has raised questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation." *Id.* at 1347. In *Vesco*, the Second Circuit relied upon *SEC v. Manor Nursing Centers Inc.*, 458 F.2d 1082 (2d Cir. 1972), which stated:

Once the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy. Thus, while neither the 1933 nor 1934 Acts specifically authorize the ancillary relief granted in this case [the appointment of a receiver and an asset freeze,] "[i]t is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded." Moreover, as the Supreme Court said in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970), "[W]e cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the Courts' power to grant appropriate remedies."

*Id.* at 1103-04. Arguments are sometimes made to the contrary, relying chiefly on *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212 (1945), in which the Court denied the government the right to freeze an antitrust violator's assets pending the outcome of a government suit for injunctive relief. As the Court noted, the only way the defendant's assets would be relevant to an action for injunctive relief brought by the government would be if injunctive relief were granted, if the injunction were disobeyed, if contempt proceedings were brought, if a fine were levied, if the fine were not paid, and if execution were then sought on the assets. *Id.* at 219. In *United States v. First Nat'l City Bank*, 379 U.S. 378 (1965), the Court recognized that *DeBeers* did not prohibit pre-judgment sequestration in other situations. In *First Nat'l*, the government sought to enjoin the bank from transferring the property of the taxpayer, a Uruguayan corporation, to protect its jeopardy income tax assessment. *See* I.R.C. § 7204(a) (1976) ("necessary or appropriate for the enforcement of the Internal Revenue Code"). The Court distinguished *DeBeers* and held the injunction to be "eminently appropriate to prevent further dissipation of assets." *Id.* at 385. The Court relied on *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940). In *Deckert*, several purchasers had brought a suit in equity to rescind the fraudulent sale of securities and to obtain restitution. The moneys necessary to satisfy the purchaser's claim were in the hands of a third-party trustee, named as a defendant, but not as a violator. The suit was brought under 15 U.S.C. § 771 (1976) ("any person" who sells fraudulent stock "shall be liable to the purchaser" who may "sue . . . to recover the consideration . . . or for damages") and 15 U.S.C. § 774 (1976) (district courts "shall have jurisdiction . . . of suits . . . brought to enforce any liability" under the securities act). Noting that the violators' assets were "in danger of dissipation and depreciation," 311 U.S. at 290, the Court upheld the asset freeze, observing that "the power

to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case." *Id.* at 288. The issuance of the injunction was a matter of "sound discretion" to be upheld on appeal absent "improvident exercise of judicial discretion." *Id.* at 290.

FED. R. CIV. P. 66 governs the appointment of receivers, as in accompanied the asset freeze in *Manor Nursing Centers*. "Precisely when the first receiver was appointed by a court is unknown, but the device was being used quite commonly as early as the reign of Queen Elizabeth I." 12 C. WRIGHT & A. MILLER, *supra*, § 2981, at 4 (1973). The traditional rule was well-stated by the New York Court of Appeals in *Decker v. Gardner*, 124 N.Y. 334, 338, 26 N.E. 814, 815, 11 N.Y.S. 388, 398 (1891). "The Court of Chancery . . . possessed and exercised . . . the power to appoint receivers *pendente lite* of property which was the subject matter of litigation before the court. . . . It did not depend upon statute, and was not affected by the character of the parties before it, whether an individual or a corporation, or by the nature of the property." *Id.* at 815. "For a long period the practice expanded as a result of the increasing willingness of courts of equity . . . [in] the United States to undertake the administration of the assets of corporations and other debtors when sufficient need was shown." 12 C. WRIGHT & A. MILLER, *supra*, § 2981, at 4. The receivership concept, however, has not been tied to the past, as the Second Circuit noted in the early part of this century. *Pennsylvania Steel Co. v. New York City Ry.*, 198 F. 721 (1912). "From the early principles the law of receiverships has . . . rapidly developed and with constantly widening scope. Indeed in no other branch of equity jurisprudence has there been such an adaptation of equitable principles to the requirements of commercial advancement." *Id.* at 236-37. The receiver "is a person specially appointed by the court to take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of preserving . . . [it] and undertaking any other appropriate action" pending its final disposition by the suit. 12 C. WRIGHT & A. MILLER, *supra*, § 2981, at 5. *See* 28 U.S.C. § 959(b) (1976)(a receiver appointed in any case shall manage and operate in the same manner as the owner). Government agencies frequently obtain receiverships in enforcing federal statutes. *See, e.g.*, *SEC v. Manor Nursing Centers Inc.*, 458 F.2d 1082 (2d Cir. 1972). Appointment is conditioned upon a private petitioner being more than a simple contract creditor; he must have some interest in or to the property. *Shapiro v. Wilgus*, 287 U.S. 348, 355-56 (1932). But it need not be legal. *Wolf v. DeWolf & Co.*, 53 F.2d 999, 1004 (7th Cir. 1931) (equitable interest supports receivership). *See generally* 12 C. WRIGHT & A. MILLER, *supra*, § 2983, at 17. A receiver may be appropriate where there has been a breach of fiduciary duties, *Ferguson v. Tabah*, 288 F.2d 665 (2d Cir. 1961) (shareholder derivative action to prevent looting of corporation), or where there is a possibility of insolvency or fraud upon creditors, *Bookout v. Atlas Financial Corp.*, 395 F. Supp. 1338, 1342-43 (N.D. Ga. 1974), *aff'd sub nom.*, *Bookout v. First Nat'l Mortgage Co.*, 514 F.2d 757 (5th Cir. 1975) (corporate officer appeared to be engaging in fraudulent transactions). Nevertheless, they should be employed with caution. *Kelleam v. Maryland Casualty Co. of Baltimore*, 312 U.S. 377, 381 (1941) ("watched with jealous eyes"); *Gordon v. Washington*, 295 U.S. 30, 39 (1935) ("only on a plain showing of some threatened loss or injury to the property, which the receivership would avoid"). Key factors to consider include fraudulent conduct, *Burnrite Coal Briquette Co. v. Riggs*, 274 U.S. 208, 212 (1927) (stockholder alleging gross fraud and mismanagement), or imminent danger of dissipation of assets, 295 U.S. at 37-38 (no interest, no danger, no receiver); *Mintzer v. Arthur L. Wright & Co.*, 263 F.2d 823 (3d Cir. 1959) (no fraud, no dissipation, no insolvency, no receiver). Balance of harm to plaintiff and to defendant as well as probability of success of the plaintiff should also be considered. 12 C. WRIGHT & A. MILLER, *supra*, § 2983, at 23-24. Where the defendant is willing to post a bond, a receivership should not be imposed. *Wadley v. Gaunce*, 87 F.2d 379 (5th Cir. 1937) (mail fraud conviction, sale of property to persons with notice, receivership not imposed, since bond would be posted). Federal law governs when to appoint a receiver. 12 C. WRIGHT & A. MILLER, *supra*, § 2983, at 28-29 ("close question on which there is little authoritative precedent"). *Connolly v. Gishwiller*, 162 F.2d 428 (7th Cir.), *cert.*

*denied*, 332 U.S. 825 (1947) is illustrative. In *Connolly*, the receiver of the Calumet National Bank of Chicago brought an action to recover illegal profits derived by the defendants through the sale of assets for less than actual value. The district court issued a temporary injunction restraining the sale or other disposition of real estate owned by the defendants and appointed a receiver for the corporate defendant. The defendants appealed, arguing that the plaintiff was nothing more than an unsecured creditor, having no rights, legal or equitable, in the corporate defendant's property. The court of appeals upheld the issuance of the injunction and the appointment of the receiver. The court observed: "[T]he problem . . . [was] either preventing the defendants from concealing or disposing of the assets or of allowing them to make away with the fruits of the fraud charged against them. . . . [W]e cannot say that the court abused its discretion when it appointed the receiver and awarded the injunctive relief to preserve the status quo pending the litigation." *Id.* at 435. See also *Adelman v. CGS Scientific Corp.*, 332 F. Supp. 137, 145-47 (E.D. Pa. 1971) (securities laws and common law suit for rescission. Solvency no bar to injunction and appointment of receiver).

Finally, the All Writs Act, 28 U.S.C. § 1651(a)(1976) may be invoked to preserve the status quo in proper circumstances. *FTC v. Dean Foods*, 384 U.S. 597, 603-05 (1966) (preliminary injunction to prevent merger); *ITT Community Dev. Corp. v. Barton*, 457 F. Supp. 224 (N.D. Fla. 1978) (injunction issued to protect damage claim).

Neither FED. R. CIV. P. 64 nor traditional equity jurisprudence controls in the face of a specific federal statute. The text of Rule 64 is explicitly made "subject to . . . any existing statute of the United States." FED. R. CIV. P. 64. The general rule under federal statutes that authorize injunctions, moreover, is that neither inadequacy of the remedy at law nor irreparable injury need be shown. *United States v. Cappelto*, 502 F.2d 1351, 1358-59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). All that must be established is a reasonable likelihood of success on the merits. *Id.* at 1359. It is immaterial, too, that the party seeking relief is private. *Atchison, Topeka & Santa Fe Ry. v. Lennen*, 640 F.2d 255, 259 (10th Cir. 1981).

RICO grants broad equitable powers. See 18 U.S.C. § 1964(a) (1976) ("prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders"). In light of its liberal construction clause and its legislative history, it ought to be held to authorize temporary restraining orders, preliminary injunctions, receiverships, and the full range of ultimate equity relief on the request of the government or private parties, and because the source of the jurisdiction is statutory, restrictive precedent ought not be held to narrow the ability of the court to do justice. See, e.g., 115 CONG. REC. 9567 (1969) (remarks of Senator McClellan) (RICO is not "limit[ed] to the remedies . . . already . . . established. The ability of our chancery courts to formulate a remedy to fit the wrong is one of the great benefits of our system of justice."); *Id.* at 6993 (remarks of Senator Hruska) ("The bill is innovative. . . . Hopefully experts on organized crime will be able to conceive of additional application of the law. The potential is great."). Nevertheless, litigants and the courts to date have been cautious in, or even hostile to, redeeming RICO's promise of new relief for old wrongs.

In *USACO Coal Co. v. Carbomin Energy*, 689 F.2d 94 (6th Cir. 1982), plaintiffs alleged that they had been defrauded of approximately \$8,300,000 in connection with certain coal leases. Count I of the complaint sought treble damages under 18 U.S.C. § 1964(c) (1976). Counts II-IV sought relief under the common law of Kentucky, including breach of fiduciary duty, fraud, and breach of contract. Plaintiffs also sought and secured a preliminary injunction restraining the defendants from dissipating certain assets *pendente lite*. An immediate appeal was taken under 28 U.S.C. § 1282 (1976). Defendants argued that a conviction was necessary before a civil suit could be filed under RICO and that, in any event, subject matter jurisdiction was lacking since a showing of organized crime or racketeering or competitive injury was required before recovery could be had. Brief for Defendants-Appellants at 3 & n.4. Principally, however, the defendants argued that the district court had no power under 18 U.S.C. § 1964(a) (1976) to sequester assets to secure a treble damage judgment under § 1964(c). In addition, they argued that the order, which was based on federal law, was improper under FED. R. CIV. P. 64, which mandates following state procedure. Finally, they

suggested that RICO was not a federal statute under FED. R. CIV. P. 64(1). The court of appeals, however, sustained the issuance of the injunction, holding that a conviction was not a prerequisite to a civil RICO suit, observing that "nothing in the plain language of RICO . . . suggest[s] that civil liability under § 1964(c) is limited only to those already convicted or charged with criminal racketeering." 689 F.2d at 95 n.1. Apparently, the court did not think that the defendants' subject matter jurisdiction arguments, which had been rejected by the district court, 539 F. Supp. at 539, deserved detailed treatment, for it merely observed that "Section 1964(c) states that an action for damages may be maintained by any person injured in his business or property by reason of a violation of § 1962." 689 F.2d at 95, *citing* Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982). The court then observed that a "literal reading of RICO . . . [was] consistent with the approach of United States v. Turkette . . . and the Supreme Court's recognition . . . that Congress intended that RICO be liberally construed to effectuate its remedial purposes." 689 F.2d at 95 n.1.

The court of appeals also rejected the defendants' other arguments as "largely superfluous." *Id.* at 96. The court found that the district court had properly issued the injunction, not to secure the damage award under RICO, but under its general equitable powers that stemmed from its pendent jurisdiction under the common law claims. *Id.* The district court, consistent with the law of Kentucky, had the power, the court of appeals held, to impose a constructive trust on the proceeds realized from the breach of fiduciary duties and other restitution. In addition, there was a "substantial likelihood" that plaintiffs would prevail and a "high probability" that the defendants would transfer the assets out of the country if not enjoined. *Id.* at 96-97. Arguments under *DeBeers* and FED. R. CIV. P. 64 were inapposite, because the district court was, the court found, well within its powers under *Deckert*. *Id.* at 97-98. Finally, the court of appeals held that there was no abuse of discretion in the issuance of the injunction tested against the traditional four factors or in setting the bond under Rule 65(c), which, the court noted, could be dispensed with entirely, particularly since the injunction did not "interfere with the defendant's day-to-day business activities." *Id.* at 100. Accordingly, the court did not reach the defendants' various arguments about the scope of the district court's equitable powers under RICO.

In sharp and unfavorable contrast to the Sixth Circuit's careful decision, the district court in *Ashland Oil v. Cleave*, 540 F. Supp. 81 (W.D.N.Y. 1982) rejected plaintiff's request for a similar injunction, where, according to the complaint, the defendants stole 375,000 gallons of gasoline through a scheme to defraud constituting a pattern of racketeering activities under RICO. Based on admissions of the defendants, the court found that a probability of success had been established. *Id.* at 82. Nevertheless, the court held that the issue was governed under FED. R. CIV. P. 64 by New York attachment practice. *Id.* at 83. Even if it were considered as a request for an injunction, the requisites for preliminary relief had not been met. First, the court thought that while the plaintiff had requested an injunction, it had to treat the request as a request for an attachment. *Id.* at 82-83. Second, it rejected plaintiff's argument that it was entitled to preliminary equitable relief, because plaintiff was ultimately seeking "the imposition of a constructive trust or [an] equitable lien." *Id.* at 83 n.1. The court believed that the plaintiff's request for a provisional remedy had "to be strictly confined" because it was "in derogation of the common law." *Id.* at 83. *But see* Pound, *Common Law and Legislation*, 21 HARV. L. REV., 383, 387-88, 406-07 (1908) ("proposition . . . has no justification. . . . The public cannot be relied upon . . . to tolerate judicial obstruction . . . of social policies."). The court then examined the text and legislative history of 18 U.S.C. § 1964 (1976), but concluded, without considering the liberal construction clause or the remedial purpose of RICO, that because "statutory attachment powers [would be] . . . a harsh remedy," they ought not be read into § 1964 in "cases brought by private parties." *Id.* at 85. Nor did the court believe that the plaintiff had established the fact of irreparable harm. "It was questionable," the court observed, "[if the] frustration of [the] enforcement of a money judgement . . . can ever constitute irreparable harm for purpose of preliminary injunctive relief." *Id.* at 86. The court rejected precedent such as *Productos Carnic S.A. v. Central Beef*

acter.<sup>218</sup> Such a circumscribed interpretation of the statute would, of

& Seafood Trading Co., 621 F.2d 683 (5th Cir. 1980), noting that such decisions "exemplify the maxim that hard cases make bad law." *Id.* It also relied by analogy on *United States v. Mandel*, 408 F. Supp. 673, 683 (D. Md. 1976), which denied a government request for preliminary relief under 18 U.S.C. § 1963(b) (1976). *See* note 177 *supra*. Finally, the court felt that the plaintiff had not made an adequate showing of current bad faith conduct. 540 F. Supp. at 84, 86-87. In light of the analysis, *supra*, further comment on *Ashland Oil* need not be made. It was simply poorly reasoned and wrongly decided; it ought not be followed by other courts. *See* note 59 *supra* on the problem of execution. *See also* *Marshall Field & Co. v. Ican*, 537 F. Supp. 413, 420 (S.D.N.Y. 1982) (injunction not granted under Williams Act, 15 U.S.C. § 78n(e) (1976) or RICO, because of inadequate showing of likelihood of success, balance of equities, or irreparable harm).

218 The question of fashioning ultimate relief of an equitable character is best illustrated by the facts of *United States v. Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980). *See also* *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982) (conviction of Marubeni employee affirmed). In *Marubeni*, the court of appeals held that the proceeds of a contract tainted by bribery were not subject to forfeiture under 18 U.S.C. § 1963(a)(1). *See* note 178 *supra*. The court noted, however, that civil remedies, namely treble damages and equitable relief, were available. 611 F.2d at 770 n.13. How general federal jurisdiction of a legal or equitable character would apply, moreover, is not in serious doubt. Breaches of the principal-agent relationship give rise to a legal claim for relief. *See* *Jankowitz v. United States*, 533 F.2d 538 (Ct. Cl. 1976) (counterclaim to recover bribes); *United States v. Drumm*, 329 F.2d 109 (1st Cir. 1964) (recovery of monies paid to poultry inspector); *United States v. Bowen*, 290 F.2d 40, 44 (5th Cir. 1961) ("The master as the party whose trust has been betrayed . . . is entitled to all of the fruits of the servant's dereliction"). Here, those damages—the amount of the bribes—would be trebled. ( $3 \times \$330,000 = \$990,000$ ). In addition, the relief would not be limited to damages. A constructive trust could be imposed and the proceeds duly traced and restitution ordered. *United States v. Carter*, 217 U.S. 286 (1910) (constructive trust imposed on illegal profits garnered by an army captain from contracts let). Contracts vitiated by fraud may also be rescinded without a *quantum meruit* accounting. *K & R Eng'g Co. Inc. v. United States*, 616 F.2d 469, 476-77 (Ct. Cl. 1980). Here, that would mean \$8.8 million returned to the utility without an accounting for the cable received. The no *quantum meruit* accounting in government contracts tainted by fraud rule stems from principles well-established since the time of the Tea Pot Dome scandals. *See* *Mammoth Oil Co. v. United States*, 275 U.S. 13 (1922) (cancellation of oil lease); *Pan American Petroleum and Transport Co. v. United States*, 273 U.S. 456 (1927). Accordingly, RICO should be read to authorize the Anchorage Telephone Utility, an instrumentality of the Municipality of Anchorage, to seek such a full range of legal and equitable relief.

If RICO were read to authorize only legal relief, recovery could be had for the bribes, duly trebled, but substantial issues might rise concerning the scope of equitable relief under pendent jurisdiction. For example, some states follow the no *quantum meruit* accounting rule. *See, e.g.,* *St. Grand Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938, 298 N.E.2d 105 (1973). But no Alaska precedent exists squarely on the question. A federal court should, therefore, be reluctant under general principles of comity to decide how the Alaskan Supreme Court might decide the question. *See* note 214 *supra*. Imposing constructive trusts is also common in state jurisprudence. *See, e.g.,* *Boston v. Santosuosso*, 298 Mass. 175, 10 N.E.2d 271 (1937) (constructive trust imposed on Mayor Curley); *Jersey City v. Hague*, 18 N.J. 584, 115 N.E.2d (1955) (constructive trust imposed on Mayor Hague). But what if Alaskan law had not had an occasion to deal with the political corruption so characteristic of the northeast? One cannot predict how a federal court would or ought to resolve such important questions. But *see* note 217 *supra* for what the Sixth Circuit was willing to do in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982).

course, introduce great uncertainty to RICO litigation,<sup>219</sup> create questions of law exam complexity,<sup>220</sup> promote forum shopping under RICO's comprehensive jurisdiction, venue, and process provisions,<sup>221</sup> and produce a wholly unjustifiable lack of uniformity in the practical impact of a major federal statute on both plaintiffs and defendants. Nothing about the prospect, in short, commends itself to the thoughtful observer. It cannot be what Congress intended when it crafted RICO. It is to be sincerely hoped that it will not prevail and bring about a need for amendatory legislation.

## VII. Conclusion

The court of appeals decision in *Bennett* must be placed in a larger context. The Supreme Court in *United States v. Turkette* commented that its decision that the concept of "enterprise" included illicit associations was "neither absurd nor surprising."<sup>222</sup> Similarly, it is neither absurd nor surprising that Congress decided in 1970 to make commercial and other forms of fraud subject to private civil relief. Nothing that has happened since then undermines that 1970 congressional policy judgment.<sup>223</sup>

219 See notes 212-18 *supra*.

220 Does, for example, the scope of pendent jurisdiction extend to parties as well as claims? 12 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3567, at 457 (1975). In *Moor v. County of Alameda*, 411 U.S. 673, 713-16 (1973), the Court thought the question subtle and complex and declined to answer it. Given the character of many of the multi-state claims that may be expected to arise under RICO, an occasion to face the issue will surely rise, particularly if relief under § 1964(c) is thoughtlessly confined to treble damages and a need manifests itself to use pendent jurisdiction to settle other important aspects of the litigation.

221 See *Basic Concepts*, *supra* note 3, at 1039-40; M. Smith, *Instituting a RICO Civil Treble Damage Action: Jurisdiction, Venue, Service of Process, Pleading and Parties*, II MATERIALS, *supra* note 23, at 607. A final point may be made. In *Minnesota v. Northern Sec. Co.*, 194 U.S. 48, 70-71 (1904), the Court made a "safe and conservative" interpretation of Sherman Act § 7, 26 Stat. 209, 210 (1890) and held that it did not authorize private equity relief. Its judgment did not stand the test of time. Congress reversed it in the Clayton Act, ch. 323, § 16, 38 Stat. 730, 737 (1914). In light of the liberal construction clause, it ought not be necessary to repeat that unfortunate history under RICO. *But see* G. HEGEL, PHILOSOPHY OF HISTORY 6 (rev. ed. 1900) ("What experience and history teach us is this—that people and governments have never learned anything from history").

222 452 U.S. 576, 587 (1981).

223 The President's Crime Commission in 1967 recognized the extent of commercial corruption in our modern society. PRESIDENT'S REPORT, *supra* note 43, at 189-91. Organized crime, for example, used "accountants, attorneys and business consultants" to run its businesses. *Id.* "Too often because of the reciprocal benefits involved in organized crime's dealing with the business world, or because of fear, the legitimate sector of society helps the illegitimate sector." *Id.* Businesses corrupted by organized crime "range[d] from accounting firms to yeast manufacturing." *Id.* In 1976, the Organized Crime Task Force of the National Advisory Committee on Criminal Justice Standards and Goals noted:

The most comprehensive study of fraud done in recent years was published in 1974 under the auspices of the Chamber of Commerce of the United States.<sup>224</sup> The Chamber estimated the direct economic cost of fraud as follows:

*Billions of Dollars*

1.	Bankruptcy Fraud	.08
2.	Bribery, Kickbacks & Payoffs	3.00
3.	Consumer Fraud	21.00
4.	Embezzlement	7.00
5.	Insurance Fraud	2.00
6.	Receiving Stolen Property	3.50
7.	Securities Theft and Frauds	4.00

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[O]ur society . . . [has developed an] increasing dependency on the professional's specialized knowledge. Attorneys, accountants, and others play a key role in helping individuals and corporations conform to complex law and regulations. Because of new laws designed to combat organized criminal activity and expanded law enforcement investigative ability, organized crime figures . . . rely more on professional assistance . . . . [S]ome professionals misuse and violate the rules by helping known criminals to exploit the law. Professionals . . . act as direct consultants and advisors to organized crime groups for the purpose of assuring the success of criminal conspiracies.

TASK FORCE REPORT, *supra* note 40, at 92.

Organized crime, however, accounts for only a part of the corruption in the commercial world, which is not limited to the service professions. White collar offenders do not need the association of organized crime to engage in patterns of unlawful conduct. FBI Director William H. Webster recently observed:

Often, perpetrators of white collar crimes are regarded as responsible pillars of their communities who occupy positions in government, industry, the professions and civic organizations. Through use of their positions of trust, cunning, and guile, white collar criminals undermine professional and governmental integrity to the dismay of all, and ultimately are responsible for the loss of billions of dollars annually from the nation's economy.

*Hearings on the Departments of Commerce, Justice, and State, The Judiciary and Related Agencies Appropriations for 1983, Before a Subcomm. of the Comm. on Appropriations, House of Representatives, 97th Cong., 2nd Sess. 1078 (1982) (testimony of FBI Director William H. Webster) [hereinafter cited as 1983 Appropriations Hearings].*

224 UNITED STATES CHAMBER OF COMMERCE, WHITE COLLAR CRIME: EVERYONE'S PROBLEM, EVERYONE'S LOSS (1974). Obviously, these estimates can only be "ballpark" figures, for the typical perpetrator of a fraud does not file an honest "annual report." It has been accurately noted that "there is little systematic data available regarding the incidence of white collar crime," and two estimates of its cost have been cited: loss of taxes on \$25 to \$40 billion of unreported income annually and \$500 million to \$1 billion annually in securities fraud. PRESIDENT'S COMM. ON LAW ENFORCEMENT & ADMIN. OF JUSTICE—TASK FORCE REPORT: ORGANIZED CRIME. On the concept of white collar crime, see G. BRADLEY, S. ISREAL & J. SANDER, FRAUD: BACKGROUND MATERIALS (Cornell Institute on Organized Crime 1980); W. Webster, *The FBI and White Collar Crime Today*, 50 N.Y. ST. B.J. 635, 636 (1978) ("[T]here is no such thing as white-collar crime as a term of art. It . . . is a cluster of criminal activities, which distinguish it from other types of activities.").

Along with credit card and check fraud (1.10) and computer related crime (.10), the total figure came to more than 40 billion dollars per year.<sup>225</sup> That figure, however, omitted fraud against the government. Given the inflation rate since 1974, moreover, it would not be unreasonable to estimate a figure twice that today.<sup>226</sup> In addition, more detailed studies since 1974 of specialized areas of fraud indicate that the Chamber's figures substantially underestimated the scope of its economic impact.<sup>227</sup> Recent studies have, for example, focused on

225 WHITE COLLAR CRIME, *supra* note 224, at 6.

226 *See, e.g., Hearings on the Department of State, Justice, and Commerce, The Judiciary, and Related Agencies Appropriations for 1981, Before a Subcomm. of the Comm. of Appropriations, House of Representatives*, 96th Cong. 2d Sess. 17 (1980) (\$44 to \$100 billion per year) (testimony of William H. Webster) [hereinafter cited as *1981 Appropriations Hearings*].

227 It is manifest that more than dollars and cents are implicated in fraud losses. Professor Edelhertz wrote:

Our economy has passed the point where it is geared to meet only the basic and elemental needs of the greater part of our population. . . .

. . . .

Our social and economic organization exposes us to new species of white-collar crime, having different or mixed objectives. In an earlier age the unlawful or ethically questionable amassing of wealth was characteristically accomplished by bald plunder or seizure of the public domain. "Teapot Dome" was a classic case, as was the land-grant device which provided the capital for building much of this Nation's railroad grid. Today such blatant power and property grabs are avoided . . . . More of us are now beneficiaries of trusts and quasi-trusts managed by the growing fiduciary industry. New targets for crime are the increasing proportion of trusts and estates of middle-class decedents, interests in union and company pension, welfare, and profit-sharing funds, and the broad panoply of mutual funds, investment trusts, credit unions, and investment clubs . . . . As individuals we are more exposed to abuse. We are more likely to deal with strangers than with those we know (whose blemishes we can assess), and we are more vulnerable than we used to be because we tend to rely more on one another or on protection by government. Those who buy securities are better protected than ever before because of the work of the Securities and Exchange Commission and comparable state agencies, yet are more exposed to the stock fraud artist who deceives the regulatory agent or totally circumvents its supervision. . . . *Caveat emptor* loses meaning when we buy closed packages. . . . White collar crime is a low visibility, high impact factor in our society. Because of the changes in the nature of our economic organization, particularly new developments in marketing, distribution, and investment, it is a fair assumption that white-collar crime has increased at a rate which exceeds population growth. Its effects intersect with and interact with other problems of our society, such as poverty and discrimination. It also weighs heavily on the aged who are, in our society, divorced from the homes and community of their children in contrast to most prior human social organization. . . . White-collar crime, like common crime, can have a serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions. Every stock market fraud lessens confidence in the securities market. Every commercial bribe or kickback debases the level of business competition, often forcing other suppliers to join in the practice if they are to survive. . . . The pharmaceutical company which markets a new drug based on fraudulent test results undercuts its competitors who are still marketing



fraud against the government. In 1978, the Comptroller General reported that the opportunities for defrauding the government were virtually unlimited.<sup>228</sup> More than \$250 billion worth of economic assistance programs then existed, many of which passed through state and local hands and could be the subject of RICO civil suits, if fraud were uncovered. In fact, the Department of Justice estimated a one to ten percent incidence of fraud: 2.5 to 25 billion dollars a year.<sup>229</sup> Other studies have focused on commodity investment

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the properly tested drugs, and may cause them to adopt similar methods. Competitors who join in a conspiracy to freeze out their competition, or to fix prices, may gravely influence the course of our economy, in addition to harming their competitors and customers.

H. EDELHERTZ, *THE NATURE, IMPACT, AND PROSECUTION OF WHITE COLLAR CRIME* 6-7 (1970) [hereinafter cited as EDELHERTZ].

228 GENERAL ACCOUNTING OFFICE, *FEDERAL AGENCIES CAN AND SHOULD DO MORE TO COMBAT FRAUD IN GOVERNMENT PROGRAMS* (1978). A follow-up study was made in 1980. GENERAL ACCOUNTING OFFICE, *FRAUD IN GOVERNMENT PROGRAMS: - HOW EXTENSIVE IS IT? - HOW CAN IT BE CONTROLLED* (1980). The 1980 study concluded that the problem remained "widespread." *Id.* It also found that the "number of cases [uncovered] ma[de] it impossible for the Department of Justice to prosecute every case of fraud referred to it." *Id.* at v. Sixty-one percent of the over 12,900 referrals were declined. *Id.* at ii. Only about one-third of those prosecuted and convicted received prison time. *Id.* at iii. The Department of Justice failed, too, to follow up on the civil aspects. *Id.* The Report concluded: "Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often does pay." *Id.* at cover summary. See M. SAXON, *WHITE COLLAR CRIME: THE PROBLEM AND THE FEDERAL RESPONSE* (1980) for a general survey of the literature including up-to-date data on impact and resource allocation and the effectiveness of public programs for control. The picture remains less than bright, particularly in light of recent cutbacks in all government funding, including the administration of justice. See 1983 *Appropriation Hearings*, *supra* note 223, at 26 (statement of Sen. Joseph Biden: "The FBI is going to lose 408 positions, including 121 special agents, as the Bureau is being forced to absorb inflation by reducing its staff. . . . According to . . . [my] analysis of . . . the nine most prominent law enforcement agencies, [Coast Guard, Customs, ATF, Secret Service, U.S. Attorneys and Marshalls, DEA, FBI, INS, and IRS] . . . their personnel will decrease by almost 20,000 positions from the 1981 levels."). Overall, of the 18 programmatic categories of the federal budget, "administration of justice" (\$4.5 billion) is last. *THE WORLD ALMANAC AND BOOK OF FACTS: 1982*, at 101 (1981). The only "law enforcement" consolation will be that with less governmental spending, there will be less government-related fraud. That prospect hardly consoles.

229 N.Y. Times, May 17, 1982, at 11, col. 2 ("Fraud in Government benefit programs is now widely viewed to be a serious national problem . . . cost[ing] the public anywhere from \$2.5 to \$25 billion per year."). A recent report by the Stanford Research Institute concluded that "no comprehensive fraud prevention strategy has emerged" in the operation of benefit programs. *Id.*

To put this fraud in perspective, consider: A stack of \$1,000 bills four inches high would equal a million dollars. A billion dollars would be 333.3 feet high, more than half as high as the Washington Monument. If the lower figure (\$2.5 billion) is correct, it comes close to what the federal government in fact spent for law enforcement protection in 1977: police (\$1.765 billion), judiciary (\$.289 billion), legal prosecution (\$.185 billion), legal defense (\$.140 billion), corrections (\$.298 billion) and other (\$.098 billion), a total of \$2.775 billion. *Trends in*

fraud,<sup>230</sup> a field said to be "vast and growing."<sup>231</sup> It is estimated that \$200 million is in fact lost through commodity investment fraud each year.<sup>232</sup> Arson-for-profit has been called the "easiest crime"<sup>233</sup> as well as the nation's "fastest-growing" crime.<sup>234</sup> Its economic and other impact is great.<sup>235</sup> Accordingly, it takes but a passing familiarity with the developing literature on fraud in our society to come to the firm conclusion that curtailing it is one of the unmet needs of our system of justice, both criminal and civil.

Resources devoted to investigation and prosecution of fraud, moreover, are not impressive. In 1977, the Section on Criminal Justice of the American Bar Association, under a federal grant, conducted a study of those resources.<sup>236</sup> The Section studied the

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*Expenditure and Employment Data for the Criminal Justice System 1971-1977* at 39 (1980). If the higher figure is correct, it exceeded *total* expenditures for police, courts, corrections, etc. for the federal, state, and local governments: \$21.573 billion. *Id.* at 37.

230 See SENATE COMM. ON GOVERNMENTAL AFFAIRS, COMMODITY INVESTMENT FRAUD, S. REP. NO. 495, 97th Cong., 2d Sess. (1982) [hereinafter cited as COMMODITY INVESTMENT FRAUD]. See also S. REP. NO. 210, 97th Cong., 1st Sess. (1981) (home health care fraud and abuse); N.Y. Times, Apr. 25, 1982, at 1, col. 1 (multibillion dollar New York construction industry "plagued by corruption"); *id.*, Apr. 26, 1982, at 1, col. 2; *id.*, Apr. 27, 1982, at 1, col. 5; *id.*, July 31, 1982, at 1, col. 6 (New Jersey local sewer project, \$1.8 billion; since 1970 millions of dollars squandered and stolen); *id.*, Nov. 6, 1982, at 10, col. 1 (counterfeiting of records and tapes robs \$400 million a year in lost royalties).

231 COMMODITY INVESTMENT FRAUD, *supra* note 230, at v.

232 *Id.* The Committee recognized the need for private federal civil relief. *Id.* at 51 ("possible solution to the . . . ineffectiveness" of the Commodity Futures Trading Commission).

233 *Arson-for-Hire, Hearings before the Perm. Subcomm. on Investigations of the Senate Comm. on Government Affairs*, 95th Cong., 2d Sess. 7 (1978)(statement of Sen. John Glenn).

234 *Id.*

235 As of 1978, it was estimated that arson-for-profit caused losses of approximately \$2 billion a year, and that the losses were rising at the rate of 25% annually. *Id.* at 1 (statement of Senator Sam Nunn). Human costs, too, were high: 1,000 deaths in 1975 alone. *Id.* Finally, the insurance industry estimated 25% of each person's insurance bill goes to pay for arson. *Id.* at 6. In addition, of the 1,000 deaths in 1975, 45 were firefighters. S. REP. NO. 535, 96th Cong., 1st Sess. 35 (1979). See also Flaherty, *War on Arson Heats Up*, *The National Law Journal*, Jan. 10, 1983, at 1, col. 1 (National Fire Prevention Association estimate in 1981 154, 500 suspicious fires wreaked \$1.66 billion damage and caused 220 deaths).

Arson fraud is only part of the problem of insurance fraud. It is estimated by the American Insurance Association that 15 to 20 percent of all claims are fraudulent—up 5 to 6 percent in just ten years. N.Y. Times, July 6, 1980, at 27, col. 1. Today, fraudulent claims may exceed \$11 billion each year, and since the typical insurance company must generate \$1.25 in premiums for every \$1 it pays in claims, policy holders are paying an extra \$13.75 billion in premiums. *Id.* at 28, col. 4. These individual figures, too, are considerably higher than the 1974 general estimate of the Chamber of Commerce. See text accompanying note 224 *supra*.

These studies also make the ABA recommendations all the more difficult to justify, for a principal impact of them would be to narrow RICO's application in the fraud area. See ABA, *supra* note 25, at 17 (two offenses, one of which is *not* fraud).

236 The final report of the study is reprinted in *White Collar Crime 1978: Hearings Before the Subcomm. on Crime, House Committee on the Judiciary*, 95th Cong., 2d Sess. 260-82 (1978).

Securities and Exchange Commission, the Federal Bureau of Investigation, the United States Postal Inspection Service, the Department of Health, Education and Welfare, the Internal Revenue Service, the Antitrust Division of the Department of Justice, various banking agencies, and selected state and local efforts. Its findings were deeply disturbing. The Section found that the "total federal effort against economic crime [was]. . . underfunded, undirected, and un-coordinated and [was]. . . in need of the development of priorities."<sup>237</sup> In addition, "available resources [were]. . . unequal to the task of combatting economic crime."<sup>238</sup> The "lack of resources," the Section found, "at the federal and local level [was]. . . a function of insufficient manpower and inadequately trained personnel."<sup>239</sup> The impli-

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237 *Id.* at 264. However, priorities have now been set. See U.S. DEPT. OF JUSTICE, NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME (1980). They have yet to be adequately staffed, funded, or organized. See generally GENERAL ACCOUNTING OFFICE, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? REPORT BY THE COMPTROLLER GENERAL (May 7, 1981). Studies by the General Accounting Office have revealed that the Department of Justice has "not emphasized the civil aspects of fraud cases and [has] needed to better coordinate criminal and civil actions." *Id.* at iii. The Department's "tradition of giving preeminence to criminal sanctions. . . [has been] implemented in such a manner that the decision to proceed against fraud was made without early consideration of available civil remedies [even though] civil remedies may be a greater deterrent than criminal prosecution because civil remedies may be more commensurate with the damage caused by the fraud." *Id.* at 32-34.

238 *Id.* EDELHERTZ aptly wrote:

The increasing complexity of our society heightens vulnerability because it increases the difficulty of obtaining redress for losses suffered. Legal services are costly, prosecutors and investigators are overburdened, and court calendars are clogged. A victim must measure the time it takes to obtain redress and wonder whether he will not be the major sufferer, rather than the target of his complaint. The prevention, deterrence, investigation, and prosecution of white-collar crime must compete with other interests for allocation of law enforcement dollars, in an atmosphere in which every other national problem is made more serious and more costly of solution by the increasing complexities of our society.

EDELHERTZ, *supra* note 227, at 8. The need for a private supplement to public redress seems manifest.

239 *Id.* at 265. Although FBI personnel are generally well-trained, as the mission of the Bureau has shifted from bank robbery to white collar fraud a change has also occurred in the skills demanded of the agents to implement the Bureau's new "Quality Case Concept." 1983 *Appropriation Hearings, supra* note 168, at 994, 1095 (testimony of William H. Webster). See N.Y. Times, Oct. 6, 1982, at 12, col. 3 ("The need for special skill has grown rapidly in recent years as the bureau has shifted its priorities. Its focus today on white-collar crimes, organized crime and foreign counter intelligence has led to more sophisticated, long term investigations than in years past, when the bureau devoted greater efforts to apprehending fugitives and solving bank robberies"). See also *FBI Oversight, 1979—Hearings Before the Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary*, 96th Cong., 1st and 2d Sess. 128 (1979) (Congressman Edwards: "Certainly crime is going to get . . . more sophisticated, more difficult to detect . . . [for example, the] transfer of money by changing the mechanism of a computer. You have to have [the] capability of resolving that." Mr. Webster: "I think we have it better

cations of that study for private enforcement under RICO are obvious.

While analogies to the jurisprudence of section 4 of the Clayton Act are limited in the RICO context, much can be learned from an

than anybody else, but we have a long way to go.”). But today the Bureau, along with other governmental agencies, must operate as “part of the overall economic picture.” *1982 Appropriations Hearings*, *supra* note 168, at 1145. *See also Corruption*, *supra* note 176, at 18 (“You speak to a thirsty man in the desert when you ask . . . [about resources]. Of course we need more resources consistent with the economy’s ability to supply it and willingness of the American people to dedicate it.”). Currently, the Bureau places white collar and organized crime among its top programs. *1982 Appropriations Hearings*, *supra* note 168, at 1064 (testimony of William H. Webster). The top three are white-collar crime, organized crime and foreign counter intelligence. *Id.* In the organized crime area, the Bureau’s priorities are focused on “hoodlum infiltration of legitimate business; labor racketeering; corruption; arson for profit; loan sharking; and pornographic operations which are national in scope, involve major organized crime figures, or which deal in the use of children.” *Id.* at 1070. In addition, the Bureau is now deeply involved in the effort to control the drug traffic, with a particular emphasis on “financial flow investigations . . . [looking to use the] forfeiture procedures of . . . RICO . . . .” *Id.* at 1071. But the picture is not bright. *Id.* at 1141 (“[I]t is clear that the FBI and the DEA can’t do this alone or . . . with existing resources.”). In the white collar crime area, the Bureau has committed 25% of its agents (1757) and a total of 2907 personnel positions; the program costs exceed \$125,000,000. *Id.* at 1069, 1085. It has 1328 investigations of public corruption underway. *Id.* at 994. Yet it has also had its complement of agent positions devoted to white collar crime cut by 95 agents. *Id.* at 995. Indeed, the last five years have seen the number of agents remain stable, while the Bureau has assumed ever more sophisticated responsibilities. *Compare id.* at 1050 (8,021 agents) with *Departments of State, Justice, Commerce, The Judiciary and Related Agencies Appropriation for 1978, Hearings before a Subcomm. of the House Comm. on Appropriation*, 95th Cong., 1st Sess. 653 (1977) (8077 agents). Similarly, the numbers of cases referred to the Department of Justice by the Securities and Exchange Commission, defendants indicted, and convictions has sharply declined from a high in 1977. U.S. DEPARTMENT OF JUSTICE: SOURCEBOOKS OF CRIMINAL JUSTICE STATISTICS 1981, at 434 (1982). In addition, mail fraud complaints made to the U.S. Postal Inspection Service have risen 63% (125,898 to 200,000), while investigations completed have fallen 44% (10,047 to 4,430). *Id.* at 430. Convictions have, however, risen 66% (910 to 1,370). *Id.* As in the organized crime area, a need exists here to supplement these necessarily limited efforts and to increase their impact by developing and implementing new crime control strategies that include the use of civil sanctions and private enforcement.

Between 1969 and 1980, the Law Enforcement Assistance Administration (LEAA) granted nearly \$8 billion to state and local agencies. *N.Y. Times*, Apr. 16, 1982, at 4, col. 6 (U.S. enforcement unit closes after 13 years). One priority in the LEAA program was organized crime. *See, e.g.*, Crime Control Act of 1973, Pub. L. No. 93-83, 1973 U.S. CODE CONG. & AD. NEWS 231, 87 Stat. 199, 204, 209 (1973). Over time, that priority was expanded to include white collar crime and public corruption. Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1172, 1179, 1195, 1198 (1979). Funds are no longer available under the LEAA to state and local governments. This absence of federal funds will be felt. *Corruption*, *supra* note 176, at 337 (testimony of New Jersey Attorney General Degnan: “We will maintain a fairly vigorous effort in the area [of organized crime and corruption], but it would be misleading if I didn’t concede that the absence of federal seed money and actual operating money for some . . . projects will greatly impair our ability. . . . My colleagues around the country, I am sure you know, have not managed to secure funding on a permanent basis for [these kinds] of programs.”).

analysis of the concept of private civil suits under that Act. Keeping the marketplace competitive is not, of course, the same as curtailing violence, inhibiting the consumption of illicit goods and services, or seeking to promote integrity among private fiduciaries or public officials. Nevertheless, what the Supreme Court has said of section 4 may be legitimately observed of RICO. In 1970, Congress authorized private civil remedies under RICO to create "a private enforcement mechanism that would deter violators . . . and . . . provide ample compensation to . . . victims."<sup>240</sup> Such "private . . . litigation is one of the surest weapons for effective enforcement."<sup>241</sup> Congress "created the treble-damage remedy . . . precisely for the purpose of encouraging *private* challenges to . . . violations."<sup>242</sup> Private suits in fact "provide a significant supplement to the limited resources available to the Department of Justice."<sup>243</sup> Accordingly, no need exists "to burden the private litigant beyond what is specifically set forth" in RICO itself.<sup>244</sup> No court ought to make a "niggardly construction of the statutory language."<sup>245</sup> Congress knew "that existing law, state and federal, was not adequate to address the problem, which was of national dimensions."<sup>246</sup> Efforts to circumscribe

240 *Blue Shield of Virginia v. McCready*, 50 U.S.L.W. 4723 (U.S. June 22, 1982).

241 *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965).

242 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979)(emphasis in original).

243 *Id.* In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provisions by the government or private parties, 84% were instituted by private plaintiffs. U.S. DEPARTMENT OF JUSTICE SOURCE BOOK OF CRIMINAL JUSTICE STATISTICS 1981, at 431.

244 *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

245 *Leh v. General Petroleum Corp.*, 382 U.S. at 59.

246 *United States v. Turkette*, 452 U.S. 576, 586 (1981).

Sound economic reasons also support Congress's 1970 judgment. Professor (now Judge) Posner argues forcefully for private enforcement of more than actual damage awards against deliberate anti-social conduct, particularly where the factor of concealment was present. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 462 (private enforcement), 143, 272 (more than actual damages for deliberate conduct), 235 (concealment) (2d ed. 1977). His concern with "over enforcement" by private rather than public bodies, *id.* at 463-64, 471-72, is mitigated under RICO by its requirement of multiple predicate acts that violate discrete statutes. Posner recognized the "importance of private enforcement of public law" and its "historical precedent" in the "criminal and regulatory law of England." *Id.* at 462. He also recognized that "if the offender is judgment proof, as is so often the case with criminal offenders, the [civil] remedy is ineffectual." *Id.* at 467. The need for a careful blend of public and private enforcement, therefore, is manifest. On the question of provisional relief to make possible execution and mitigate the fact of judgment proof defendants, see notes 59, 217 *supra*.

Nevertheless, whether Posner's analysis is valid or invalid is beside the point, for our society has entrusted the framing of this sort of equation and the resolution of its sum to the legislative branch. When it has been done—as it has been done in the processing of RICO—that judgment binds the judicial branch. As Justice Rehnquist noted, speaking for the Court in *Blue Chip Stamps v. Manor Drug Store*, 421 U.S. 723, 748 (1975):

RICO in the courts should, therefore, be turned aside. As the court of appeals in *Bennett v. Berg* has now happily done, other courts should similarly redeem Congress' 1970 promise of new remedies for victims of crime, particularly in the fraud area.<sup>247</sup>

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We quite agree that if Congress had legislated the elements of a private cause of action for damages, the duty of the Judicial Branch would be to administer the law which Congress enacted; the Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.

247 Edelhertz wrote:

If substantial progress can be made in the prevention, deterrence and successful prosecution of . . . [white collar] crimes we may reasonably anticipate substantial benefits to the material and qualitative aspects of our national life.

EDELHERTZ, *supra* note 227, at 11.

One final word: the thrust of much that has been written here is adverse to the works of some courts. Nevertheless, to borrow a quote from Mr. Justice Jackson, these materials have "select[ed] for discussion only the debits, but there are many credits which, though not relevant to our present purpose, must enter into any balanced judgement of the works of the courts." R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xix (1941). This criticism of the courts grows out of a profound respect for their work. District courts especially are not well served by the bar that appears before them. They are burdened with too many of our society's problems, many of which should be handled elsewhere, particularly in our national and state legislatures as well as in private institutions. Not all of society's problems belong in court. But some do, and the vindication of the rights of victims of crime is surely one of them. Hopefully, the courts that are now hostile to RICO will come to see that. It is in this spirit, therefore, that this discussion of RICO is offered, and it is hoped that it will be received in the spirit in which it was written.

Finally, as Mr. Justice Cardozo has written:

I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things.

NATURE OF THE JUDICIAL PROCESS 179 (1921).