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RICO AND THE COURTS: AN "ENTERPRISING" ATTEMPT TO REACH RACKETEERING ACTIVITIES

I. INTRODUCTION

Nearly ten years ago Congress enacted the controversial Organized Crime Control Act of 1970.[1] Its purpose was the "eradication of organized crime in the United States."[2] The proponents of the statute asserted that strong measures were necessary to battle a force which had "penetrated into the very roots of American life and society"[3] resulting in a "stranglehold of our citizens."[4] Although the opponents generally favored such legislation, many, like the American Civil Liberties Union, believed that the Act went beyond the goal of destroying the power of organized crime and made "drastic incursions on the civil liberties of everyone."[5] The Act was further attacked as running "counter to the letter and spirit of the Constitution"[6] and containing "the seeds of official repression."[7]

The concerns expressed by the opponents have perhaps survived only as they relate to title IX of the OCCA.[8] Title IX is entitled "Racketeer Influenced and Corrupt Organizations."[9] RICO prohibits the operation or acquisition of, or the acquisition of an interest in, through a pattern of racketeering activity, any enterprise engaged in interstate commerce.[10] Provisions are made for criminal sanctions[11] as

1. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified in scattered titles of U.S.C.) [hereinafter referred to as the OCCA].
2. *Id.* at 923.
3. *Organized Crime Control: Hearings on S. 30, and related proposals, Before Subcomm. No. 5 of the Comm. on the Judiciary, House of Rep.*, 91st Cong., 2d Sess. 144 (1970) (statement of Mario Biaggi).
4. *Id.*
5. *Id.* at 490 (statement of Lawrence Speiser). Mr. Speiser was Director of the Washington office of the ACLU. The concerns of the ACLU included: (1) the title I grant of power to federal grand juries to issue reports and presentments critical of public employees where there is insufficient evidence to support indictments; (2) the title III authorization of summary confinement of recalcitrant witnesses for up to three years without bail; (3) the breadth and vagueness of terms such as "scheme to obstruct" and "gambling business" in title VIII; and (4) the grant of "virtually unlimited" investigative powers to the government and the breadth of the terms "pattern of racketeering activity" and "collection of unlawful debt" under title IX.
6. *Id.*
7. *Id.* at 296 (report by the Committee on Federal Legislation).
8. 18 U.S.C. §§ 1961-1968 (1976).
9. [Hereinafter referred to as RICO].
10. 18 U.S.C. § 1962 (1976).
11. *Id.* § 1963.

well as civil damages[12] and violators are subject to civil orders of divestment and dissolution.[13]

Since prosecutors began bringing charges under RICO, the courts have consistently rejected challenges to its constitutionality.[14] Not only have the courts upheld RICO as valid legislation but they have been willing to construe its provisions liberally in accordance with section 904(a).[15]

One such construction has particularly been at issue in the courts. Of the six circuits to interpret section 1962 of RICO,[16] five have held

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12. *Id.* § 1964.

13. *Id.*

14. *See, e.g.*, United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973).

In *Elliott* the court stated that the conviction of a member of an enterprise conspiracy under RICO does not violate the fundamental demand of due process that guilt be individual and personal. "Congress, in a proper exercise of its legislative power, has decided that murder, like thefts from interstate commerce and the counterfeiting of securities, qualifies as racketeering activity. This, of course, ups the ante for RICO violators who personally would not contemplate taking a human life." 571 F.2d at 905.

An *ex post facto* claim and a vagueness challenge were rejected by the court in *Campanale*. As to the *ex post facto* claim, the court explained that though one illegal act forming the "pattern" could take place prior to the effective date of RICO, the second act, without which the "pattern" element of the offense could not be established, must have been committed subsequent to the October 15, 1970 effective date. The "pattern," therefore, cannot be committed until after the effective date, thereby avoiding the prohibition against *ex post facto* laws. The court dismissed the vagueness challenge to the terms used in section 1962 by stating that the definitions provided in section 1961 cure any ambiguity that may otherwise exist. The *Stofsky* court also rejected a vagueness challenge stating that section 1962(c) "sufficiently places men of reasonable intelligence on notice that persons employed by the type of enterprise therein defined cannot resort to a pattern of specified criminal acts in the conduct of affairs of that enterprise." 409 F. Supp. at 613.

15. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922. This section is not codified, however, it is referred to in the notes following section 1961 of 18 U.S.C. Hereinafter all references to RICO provisions will be cited to 18 U.S.C.

Section 904(a) of title IX reads: "The provisions of this title shall be liberally construed to effectuate its remedial purpose."

16. 18 U.S.C. § 1962 (1976). Section 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or

that the section not only prohibits the infiltration of legitimate enterprises through a pattern of racketeering activity, but also prohibits racketeering activity regardless of any involvement with a legitimate enterprise.[17] This conclusion is based upon reading the section 1961(4) definition of "enterprise" to include illegal as well as legal entities. The result is a prohibition of operating a racketeering "organization" through a pattern of racketeering.

The Sixth Circuit, in *United States v. Sutton,*[18] was the first court of appeals to hold that section 1962 may not be applied to persons engaged in racketeering activity unrelated to any legitimate organization.[19] The controversial nature of the issue was emphasized when that decision, delivered by a three judge panel, was vacated and the case was set for rehearing before the entire court.[20]

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of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(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.

17. The decisions holding that section 1962 encompasses illegitimate enterprises include: United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 1345 (1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), *cert. denied,* 99 S. Ct. 2055 (1979); United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), *cert. denied,* 440 U.S. 962 (1979); United States v. Elliott, 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978); United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), *cert. denied,* 434 U.S. 1020 (1978); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); United States v. Morris, 532 F.2d 436 (5th Cir. 1976); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

The only circuit to hold that "enterprise" under section 1962 is limited to legitimate business was the Sixth Circuit in United States v. Sutton, 605 F.2d 260 (6th Cir. 1979). That decision, though, was vacated when the court granted a rehearing *en banc. See* notes 18 and 20 and accompanying text *infra.*

18. 605 F.2d 260 (6th Cir. 1979).

19. The only other decision to hold that "enterprise" under RICO is limited to legitimate business is United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975). *See* note 98 and accompanying text *infra.*

20. Order Nos. 78-5134-5-6-7-8-9-41-2-3 and 78-5074, United States Court of Appeals for the Sixth Circuit (Nov. 7, 1979). The rehearing was scheduled for April, 1980.

Should the Sixth Circuit again hold that section 1962 violations include only the infiltration of legitimate business by racketeering activity, the resulting split in authority may have far reaching implications. As RICO is now being applied, the only requirement for obtaining a conviction under the statute is establishing that the defendants engaged in a "pattern" of two or more acts made illegal by either federal or state law. The apparent implication, under this construction, is that the "enterprise" aspect of the statute is incorporated into the "racketeering activities" requirement.

The implicit incorporation of "enterprise" into "racketeering activities" creates a statute which duplicates other federal criminal provisions and "federalizes" state crimes. The result is a potent weapon[21] for federal prosecutors to use, not against a different category of criminals, but against a greater number of them. Acts that were formerly subject only to state sanctions are now, through RICO, within the reach of the federal law.[22] Acts that were formerly subject to specific penalties under federal law can now be penalized more severely under RICO.[23]

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21. 18 U.S.C. § 1963 (1976) provides for penalties of up to $25,000 and twenty years imprisonment for violation of any section 1962 provision. Forfeiture of interest and property acquired as a result of a section 1962 violation are also provided by section 1963. The government may also take advantage of the civil remedies provided by section 1964. *See* note 83 *infra*. Although the government does not often choose this option, the option was exercised in United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

22. Under section 1961(1) "racketeering activity" is defined as including certain acts which are "chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1) (1976). If the "enterprise" element is, for practical purposes, incorporated into the "racketeering element," all the government needs to show to make out a section 1962 violation is one or more persons (enterprise) who commit at least two specified acts chargeable under state law and punishable by imprisonment for more than one year (racketeering activity) with the requisite impact on interstate commerce. In discussing the interstate commerce aspect of a section 1962 violation, Judge Van Graafeiland, in his dissenting opinion in *United States v. Altese,* stated that "[t]he interstate commerce requirement of § 1962 is likewise unlikely to greatly confine the scope of federal law enforcement efforts. In criminal statutes containing similar requirements, a de minimis involvement with, or effect on, commerce has frequently been sufficient." 542 F.2d at 108 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied,* 429 U.S. 1039 (1977).

23. "Racketeering activity" under section 1961(1) includes acts indictable under specifically enumerated sections of titles 18 and 29 as well as acts in violation of state law. Often the penalties for violating RICO section 1962 are greater than if a conviction is obtained under one of the sections included in the section 1961(1) definition. For example, a gambling business may be indictable under 18 U.S.C. § 1955, if it meets the statutory requirements and would be subject to a maximum fine of $20,000 and imprisonment of up to five years. Under section 1962 the same gambling business would be subject to a maximum fine of $25,000 and imprisonment of up to twenty years. Additionally, the government may take advantage of section 1964 civil remedies. *See* note 83 *infra*.

In the event that the Sixth Circuit reaches the same conclusion about RICO that it initially reached in *Sutton,* activities made illegal by state and federal statutes in that circuit will not be encompassed by RICO unless those activities are involved in the acquisition or operation of a legitimate business. The resulting split of authority in the circuits would also create an issue ripe for Supreme Court adjudication.[24]

The purpose of this comment is to investigate and analyze the position taken by the majority of courts and the position taken in *Sutton* regarding the applicability of RICO to racketeering activities independent of infiltration of legitimate business concerns. Although other issues surrounding the scope of "enterprise" will be briefly discussed in section III, the purpose of that discussion will merely be to provide a perspective on the liberal approach taken by the courts in interpreting RICO.[25]

The sections that follow will discuss the provisions of the OCCA and RICO, the courts' treatment of RICO, and an analysis of that treatment. The final section will conclude that, though clearly a minority view, the *Sutton* rationale offers a more persuasive argument as to the intended purpose of RICO.

II. THE STATUTE

In *United States v. Thevis*[26] the court stated that "[t]he starting point for analysis of the question presented must be the statute in question, 18 U.S.C. 1961(4)."[27] Because this comment will analyze judicial treatment of "enterprise" as used in RICO sections 1961 and 1962, and because RICO is but one portion of the OCCA, the starting point

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24. *See* page 379 *infra.*

25. One case which has proven to be important to the overall development of RICO interpretation is United States v. Parness, 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975). Many cases which have held that an "enterprise" under RICO may be illegitimate have relied on *Parness* to support their decision. *See, e.g.,* United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). *See* note 119 and accompanying text *infra.* The issue in *Parness,* however, was whether the "enterprise" concept in RICO section 1962 includes foreign corporations as well as domestic businesses. The court did not address whether an illegal enterprise is also to be encompassed by section 1962. Apparently *Parness* is cited for its statements that section 1962 is to be given a broad construction.

For a discussion of other issues arising under RICO see Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes,* 69 J. CRIM. L. & CRIMINOLOGY 1 (1978). *See also* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192 (1975).

26. 474 F. Supp. 134 (N.D. Ga. 1979). The *Thevis* court held that an "enterprise" under section 1961(4) includes a "group of individuals associated in fact with various corporations." *Id.* at 137.

27. *Id.* at 138.

for this analysis will be a broad overview of the OCCA followed by a more specific look at RICO.

In its statement of findings preceding the text of the OCCA,[28] Congress indicated that organized crime in the United States is a highly sophisticated, diversified, and widespread activity which annually drains billions of dollars from America's economy and derives much of its power through money obtained from syndicated gambling, loan sharking, the theft and fencing of property, and the importation and distribution of narcotics and other dangerous drugs. Congress further stated that the money from these illegal activities was being increasingly used to infiltrate and corrupt legitimate business and labor unions. This activity was perceived as weakening the stability of the nation's economic system, harming innocent investors and competing organizations, interfering with free competition, seriously burdening interstate and foreign commerce, threatening domestic security and undermining the general welfare of the nation and its citizens. Finally, Congress found that organized crime continues to grow because of defects in the evidence-gathering process of the law and the limited scope and impact of sanctions and remedies available to the government.

The purpose of the OCCA was stated to be 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."[29]

The statements of findings and purpose indicate that Congress intended to provide new and more effective measures to combat what was seen to be a major economic, social, and political threat. Each of the thirteen titles attempts to effectuate the purpose by addressing an aspect of the findings.

Titles I through VI, for example, attempt to make the prosecutorial process more "sophisticated" and "widespread" by establishing special grand juries in major population centers to deal specifically with organized crime activity,[30] by providing immunity and protected facilities for witnesses and their families,[31] and by authorizing civil contempt commitment for recalcitrant witnesses.[32] Title VII attempts

28. *See* note 1 *supra*.
29. *See* note 2 *supra*.
30. 18 U.S.C. §§ 3331-3334 (1976).
31. Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 501-504, 84 Stat. 922 (not codified in the U.S.C.).
32. 28 U.S.C. § 1826 (1976).

to cure the defects in the evidence-gathering process of the law by allowing liberal admissibility of government evidence.[33] Titles VIII and XI are directed at specific organized crime activities: syndicated gambling[34] and transporting explosives.[35] Extended sentences for "dangerous adult special offenders" are authorized under Title X, thereby broadening the "scope and impact" of sanctions available to the government.[36]

The remaining finding deals with the infiltration and corruption of legitimate business and labor unions. The remaining title is RICO.

RICO is divided into four sections. Section 1961 contains definitions,[37] the most important of which, for this analysis, are "racket-

33. 18 U.S.C. § 3503 (1976).
34. *Id.* §§ 1511, 1955.
35. *Id.* §§ 841-848.
36. *See* note 2 *supra.*
37. Section 1961 provides:

As used in this chapter—

(1) 'Racketeering activity' means (A) any act or threat involving murder, kidnaping [sic], gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigation), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphenalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C), any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offence involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . ;

(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

(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;

(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of

eering activity" and "enterprise." "Racketeering activity" is defined as including murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotics violations, counterfeiting, usury, mail fraud, fraud connected with a case under title 11,[38] securities fraud and obstruction of justice.[39] The listing includes generically designated state offenses and federal offenses designated by reference to specific provisions of titles 18 and 29 of the United States Code.[40] "Pattern of racketeering activity" is defined as requiring at least "two acts of racketeering activity."[41] One of the acts must have occurred after October 15, 1970; the second act must have occurred within ten years of the first.[42] The statute defines "enterprise" as including associations in fact as well as legally recognized entities such as an individual, partnership, or corporation.[43]

Section 1962 sets forth the prohibited activities under RICO.[44] Subsection (a) prohibits the investment of funds derived from a pattern of racketeering activity by a principal in the activity in any enterprise engaged in interstate or foreign commerce. An exception is made for the purchase on the open market of less than one percent of a company's securities where the investor obtains no degree of control.[45]

Subsection (b) prohibits any person from acquiring or maintaining, through a pattern of racketeering activity, an interest in any enterprise engaged in interstate or foreign commerce. No one percent limitation is provided as in subsection (a).[46]

Conducting the affairs of any enterprise through a pattern of racketeering activity by any person associated with the enterprise is prohibited by subsection (c).[47] Subsection (d) makes unlawful a conspiracy to violate any provisions of subsections (a), (b), or (c).[48]

The remaining sections of RICO provide for criminal penalties,[49]

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which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

38. The original text read, "any offense involving bankruptcy fraud . . . ." This was amended to read, "fraud connected with a case under title 11." Pub. L. No. 95-598, Title III, § 313(g), 92 Stat. 2677 (1978).

39. 18 U.S.C. § 1961(1) (1976).

40. *Id.*

41. *Id.* § 1961(5).

42. *Id.*

43. *Id.* § 1961(4).

44. *See* note 16 *supra*.

45. 18 U.S.C § 1962(a) (1976).

46. *Id.* § 1962(b).

47. *Id.* § 1962(c).

48. *Id.* § 1962(d).

49. 18 U.S.C. § 1963 (1976).

civil remedies,[50] venue and process,[51] expedition of actions,[52] evidence,[53] and civil investigative demand.[54] These sections, however, have not received the attention that has been given to sections 1961 and 1962. Initially the constitutionality of RICO sections 1961 and 1962 was frequently challenged,[55] but more recently the major issue has centered on section 1962 and the activities it does or does not prohibit. To understand how the courts have resolved this issue as to wholly illegitimate activities, a survey of decisions dealing with other aspects of the issue is necessary.

III. JUDICIAL TREATMENT OF RICO

The question of what constitutes a RICO "enterprise" has taken many forms. Three of these forms are particularly relevant to analyzing the trend of RICO interpretation: (a) whether the racketeer infiltrated enterprise must be a domestic business, (b) whether the enterprise must be a private organization, and (c) whether the enterprise must be a legitimate organization.[56] Although the focus of this comment is the judicial response to the third question, an overview of the way the courts have dealt with the first two questions provides some insight into their liberal approach to the third.

A. Domestic Business vs. Foreign Business

Only one case has addressed the question of whether the racketeer infiltrated enterprise must be a domestic business. In *United States v. Parness*,[57] the appellants had been convicted under section 1962(b), of acquiring a corporation in the Netherlands Antilles by way of an elaborate scheme of theft and deception.[58] The appellants argued that

50. *Id.* § 1964.
51. *Id.* § 1965.
52. *Id.* § 1966.
53. *Id.* § 1967.
54. *Id.* § 1968.
55. *See* note 14 and accompanying text *supra*.
56. An implicit sub-issue within (c) is whether the "enterprise" must be distinct from the "racketeering activities." By holding that the "enterprise" may be an illegitimate organization which exists only to commit "racketeering activities," the courts essentially merge the two elements of a section 1962 offense. This merger apparently indicates that the elements are not distinct and independent. *See* discussion in section IV *A infra*.
57. 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).
58. The scheme involved the withholding of funds by the appellants that were needed by the corporation to avoid defaulting on a loan. Appellants advanced purportedly borrowed money to the corporation for the purpose of repaying the loan. Continuing to withhold the corporation's funds, appellants used the note for the "borrowed" money, secured with a controlling percentage of stock, to divest the owner of the stock of his interest when the note could not be repaid. *Id.*

section 1962(b) did not proscribe the acquisition of foreign business as a result of criminal activity in the United States. The court relied on the statutory language and legislative history in holding that the section prohibits the acquisition of any enterprise, including foreign business, through a pattern of racketeering activity where the requisite impact on domestic commerce is shown.

In looking at the statutory language, the court stated that "[s]ection 1962(b) proscribes the acquisition of 'any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.' 'Enterprise' is defined in § 1961(4) to include 'any . . . corporation.' On its face the proscription is all inclusive."[59]

As an indication of the foreign corporation's impact on domestic commerce, the court pointed to the American ownership of the Antillean corporation, the financing by American banks, the numerous domestic creditors, and the primary servicing of American tourists. These facts prompted the court to "reject out of hand" the contention that the appellants' corporation did not sufficiently affect interstate commerce.[60]

In looking at legislative history, the court relied on the statement of findings and purpose of the OCCA which states that "organized crime activities weaken the stability of the Nation's economic system, harm innocent investors . . . and undermine the general welfare of the Nation and [American] citizens."[61] This evidence was considered to be a sufficient indication that Congress intended to include foreign corporations within the definition of enterprise.

B. Public Entities vs. Private Business

The issue in *Parness* centered on the type of private business encompassed by RICO. Other courts have addressed the question whether the "enterprise" concept of section 1961(4) includes public entities as well as private business.

The argument that "enterprise" is limited to private business is primarily based upon the claim that Congress only intended to include such entities within the scope of RICO. The proponents of this contention rely on an *ejusdem generis*[62] approach to reading section 1961(4)

59. *Id.* at 439.

60. *Id.* at 439 n.11.

61. *Id.* at 439 (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922).

62. Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words. Where the

as well as legislative history to support their claim. The opposing view rejects the *ejusdem generis* approach as inapplicable and relies on the liberal construction mandate of section 904(a) and legislative history to conclude that Congress did not intend to limit "enterprise" to private organizations.

1. Public "Business" Entities.

The public versus private issue was addressed by the Third Circuit in *United States v. Frumento*[63] where the Pennsylvania Bureau of Cigarette and Beverage Taxes (PBCBT) was held to be an "enterprise." The appellants had been indicted for smuggling cigarettes into Pennsylvania for the purpose of resale without payment of the Pennsylvania cigarette tax. Two of the appellants had worked for the PBCBT, one as a district supervisor and the other as a field inspector.

The district court[64] had determined that the PBCBT, as an arm of the Department of Revenue charged with a statutory duty to collect taxes, was a "legal entity" and as such fit within the RICO definition of "enterprise." The appellants argued, however, that the rule of *ejusdem generis*[65] compelled the conclusion that because "legal entity" follows nouns pertaining to different forms of business ventures,[66] it likewise was intended to include only legal business entities.

In an attempt to support their facial reading of the statute, the appellants noted the lack of any reference to governmental bodies in the legislative history of the OCCA. They relied on *United States v. Mandel*[67] where the court concluded that congressional silence as to public entities such as governments indicated an intent to exclude them from RICO coverage.

The *Frumento* court responded to the appellant's contentions by first dismissing the *ejusdem generis* argument as inapplicable:

> The rule should not be employed when the intention of the legislature is otherwise evident . . . . As we read the Organized Crime Control Act,

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opposite sequence is found, i.e. specific words following a general, the doctrine is equally applicable, restricting application of the general term to things that are similar to those enumerated.

2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 47.17 (4th ed. 1973) (citations omitted).

63. 563 F.2d 1083 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

64. United States v. Frumento, 405 F. Supp. 23 (E.D. Pa. 1975).

65. *See* note 62 *supra*.

66. *See* note 37 *supra*. Appellants also argued that the civil remedies provided for in section 1964, specifically orders for dissolution and reorganization and provisions for treble damages, could not have been intended to be applicable to state agencies. The court did not address these contentions.

67. 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979).

> Congress was not so much concerned with limiting the protective and remedial features of the act to business and labor organizations as it was with reducing the insidious capabilities of persons in organized crime to infiltrate the American economy.[68]

The court added that Congress was concerned about the effects of organized crime on the American economy in general as opposed to the limited areas within the economy. "Is it conceivable that in considering the ever more widespread tentacles of organized crime in the nation's economic life, Congress intended to ignore an important aspect of the economy because it was state operated and state controlled? We think not."[69]

Despite the court's rejection of a strict "business" requirement under section 1961(4), it chose to point out that certain aspects of the Pennsylvania government are operated as a business. "The Commonwealth of Pennsylvania purchases, distributes, and sells alcoholic beverages legally consumed among its more than 12,000,000 citizens; it sells and distributes games of chance through its much touted lottery system."[70] The court reasoned that if the appellant's reading of section 1962 was accepted, state owned and operated business organizations "would be open game for racketeers."[71]

Although the Third Circuit in *Frumento* held that a RICO enterprise need not be a private entity, it apparently recognized a necessity for connecting the public entity to the American economy. Two weeks prior to deciding *Frumento*, the Third Circuit had responded to the same recognition in a different way. In *United States v. Forsythe*,[72] the court held that RICO applied to the activities of magistrates[73] and constables. Perhaps to ensure a nexus between the RICO "enterprise" and the economy, the court determined that the enterprise through which the officials operated a bribery scheme was not the court system, but rather was a bail bond agency. Payments had been made to the officials for referring to the agency defendants who had been brought before the magistrates.

The district court[74] had dismissed the charges against the magistrates "since the plain interpretation of . . . section [1962(c)] clearly excludes the magistrates from liability for participation in the

68. 563 F.2d at 1090.
69. *Id.* at 1091.
70. *Id.*
71. *Id.*
72. 560 F.2d 1127 (3rd Cir. 1977).
73. *Id.* at 1131 n.1. The court explained that, as used in the opinion, the term "magistrates" includes alderman and justices of the peace.
74. United States v. Forsythe, 429 F. Supp. 715 (W.D. Pa. 1977).

operation of the bail bond agency.'"[75] The court stated that section 1962(c) only prohibits the wrongful conduct of those who are "employed by or associated with"[76] the enterprise. "The term 'associated with' is plainly *ejusdem generis* with the term 'employed by' and refers to parties 'inside' the enterprise rather than those 'outside.'"[77]

On appeal the Third Circuit reversed the district court, stating that Congress intended to make RICO violations dependent upon behavior rather than status.[78]

> Section 1962(c) prohibits *any* person from engaging in the proscribed conduct and defines the term 'associated with' as direct or indirect participation in the conduct of the enterprise. At the least, the activities of the magistrates and constables as described in the indictments constitute indirect participation in the Agency's affairs.[79]

The court proceeded to describe the magistrates' participation in the agency's affairs as more than indirect, likening it to an employee relationship. "Moreover, it is alleged that these defendants were paid directly by the Agency in return for referral of clients, just as salesmen or agents would be paid a commission for like services."[80]

By relating the magistrates' bribery activities to the bail bond agency rather than to the court system, the *Forsythe* court effectively reached public officials without having to deal with bringing a nonbusiness related public entity under RICO. Other courts, however, have had to deal more directly with the issue whether RICO's definition of "enterprise" includes a public entity that is not related to any business activity.

2. Nonbusiness Public Entities.

Despite the Third Circuit's apparent hesitancy to extend the "enterprise" concept to nonbusiness public entities, the Seventh Circuit, in *United States v. Grzywacz*,[81] saw no business requirement and held that a city police department and its individual officers are "legal

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75. *Id.* at 725.
76. *Id.* (quoting 18 U.S.C. § 1962(c) (1976)).
77. *Id.*
78. The court cited United States v. Mandel, 415 F. Supp. 997, 1018 (D. Md. 1976), which stated that a conviction under RICO is not dependent upon a showing that the defendant is a member of organized crime.
79. 560 F.2d at 1136.
80. *Id.*
81. 603 F.2d 682 (7th Cir. 1979).

entities" and thus are within the section 1961(4) definition of enterprise.[82]

The appellants in *Grzywacz* were three former police officers who had been convicted of conspiracy to violate section 1962(c) of RICO in violation of section 1962(d). The indictment from which they were convicted alleged a conspiracy by the officers to use their official positions to solicit and accept bribes and sexual favors from business establishments in exchange for "protection" and acquiescence in prostitution activities and operation after closing hours.

The appellants contended that the conspiracy charge under section 1962(d) was not proper because the police department was not an enterprise as defined in section 1961(4). They claimed that RICO was intended to combat the infiltration of legitimate private businesses by racketeering activities rather than acts of corruption by public officials. They supported their position by noting that the civil remedies provided by section 1964 are aimed at violations by private organizations.[83]

The court rejected appellants' contentions by relying on the holding in *United States v. Frumento*[84] that public entities which have some relationship with the economy may constitute section 1961(4) enterprises. Without attempting to show a relationship between the police department and the economy, the court next cited *United States v. Brown*[85] which held that the Macon, Georgia police department con-

82. *See also* United States v. Vignola, 464 F. Supp. 1091 (E.D. Pa. 1979). The *Vignola* court held that "[a]s a creature of statute . . . , the Philadelphia Traffic Court is a 'legal entity' and is therefore an 'enterprise' for the purpose of RICO." *Id.* at 1095.

83. *See* 18 U.S.C. § 1964 (1976). Section 1964 provides:

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

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

84. 563 F.2d 1083 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978).

85. 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). The appellants were former officers of the Macon, Georgia, police department. They were convicted, under RICO section 1962(c), of knowingly participating, as employees of the city

stituted an enterprise under RICO. The *Brown* court primarily relied on the portion of the congressional statement of findings relating to the subversion and corruption of America's democratic process and the threat to domestic security.

The *Grzywacz* court found that the authority and reasoning of *Frumento* and *Brown*, coupled with the congressional statement that RICO is to be liberally construed,[86] formed a sufficient basis for qualifying a police department and individual police officers as enterprises.

3. Private Business Only.

Not all courts have been willing to extend the meaning of "enterprise" beyond private entities. The court in *United States v. Mandel*[87] held that the State of Maryland is not an enterprise under RICO.

In *Mandel*, the government argued that as a "legal entity," the state would fall within the definitional requirements of section 1961(4). The court, however, was reluctant to construe the words "legal entity" to the limits of its potential definitional scope, "particularly where they follow words of a much more precise and narrow application."[88] In looking to the legislative history of RICO, the court noted that Congress was silent as to public entities such as governments and that to include them within the definition "would do violence to the plain purpose of Title IX. The legislative history is full of references to the major purpose of Title IX: to rid racketeering influences from the commercial life of the nation."[89] The court further indicated that the remedies provided for in section 1964, including treble damages, divestiture, and forfeiture, imply that Congress contemplated private entities in defining "enterprise." "It could hardly be contended that a private citizen of a state, aggrieved by the 'racketeering acts' of an official in conducting the state, could bring a treble damage action against that official and require forfeiture of office and dissolution of the state government."[90]

Another argument accepted by the *Mandel* court was the assertion that state governments do not require and should not receive federal

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police department, in solicitation and acceptance of bribes to protect gambling, prostitution, and the illicit manufacture, distribution, and sale of whiskey. The former officers were also convicted of conspiring to violate section 1962(c), in violation of section 1962(d).

86. *See* note 15 *supra*.

87. 415 F. Supp. 997 (D. Md. 1976), *aff'd in part and vacated and remanded in part*, 591 F.2d 1347 (4th Cir.), *aff'd on rehearing*, 602 F.2d 653 (4th Cir. 1979).

88. *Id.* at 1020.

89. *Id.*

90. *Id.* at 1021.

"assistance" in controlling corruption of public officials. Because states have laws regulating the conduct of their officials that are adequate to protect themselves from those officials' racketeering acts, "[i]t is simply untenable to argue that Congress, without saying so, intended to federalize crimes involving the acts of a public official in conducting the government of a state."[91] The court added that without a clear indication of congressional intent, courts should be reluctant to broadly construe a criminal statute so as to transform matters of local concern into federal felonies.

The final reason given for the *Mandel* court's conclusion centered on application of the doctrine of *ejusdem generis*, the basis of an argument rejected by the court in *United States v. Frumento*.[92] The *Mandel* court noted that the list of entities in section 1961(4) is comprised of common legal forms used by business and labor groups to carry out their private functions and that no public entities are included. "The more general references to 'any legal entity' and 'any group of persons associated in fact although not a legal entity' must be construed to be limited to the same type and class entities which preceded it in statutory definition."[93] Accordingly, the court concluded that "enterprise" is limited to private entities and therefore excludes the State of Maryland.

C. *Legitimate Business vs. Illegitimate Business*

While some courts were addressing the issue whether the racketeer-infiltrated enterprise could be public as well as private, a far greater number of courts were facing the issue of whether the racketeering activities must be connected with any legitimate organization, public or private. A clear majority of these courts have held that there need be no such connection with a legitimate organization and that the enterprise can be the racketeering "organization" through which the racketeering is conducted.[94] The majority position has the net effect of erasing any practical distinction between "enterprise" and "racketeering activities" because a racketeering "organization" would appear to be prohibited only because of its racketeering activities.[95]

Five of the six circuits to address the question have interpreted

91. *Id.*

92. *See* note 68 and accompanying text *supra*.

93. 415 F. Supp. at 1021.

94. *See, e.g.*, United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978) (prostitution); United States v. Morris, 532 F.2d 436 (5th Cir. 1976) (interstate gambling); United States v. Castellano, 416 F. Supp. 125 (E.D.N.Y. 1975) (loan sharking).

95. *See* note 155 and accompanying text *infra*.

RICO in this way[96] and the remaining circuit may soon join the others.[97] One district court has also ruled contrary to the five circuits.[98]

The two courts comprising the minority position have held that RICO only prohibits the infiltration of legitimate business by persons engaged in racketeering activity. This view, therefore, requires more than a racketeering "organization." The racketeering activity, and implicitly the racketeering "organization," must be sufficiently linked to a legitimate concern before a RICO violation can be committed.

In order to understand how the majority and minority positions arrive at their respective conclusions, a review of the arguments of each is necessary.

1. The Majority Rationale.

The rationale underlying the majority position can be broken down into four distinct arguments: (1) a "plain meaning" reading of sections 1961 and 1962 compels the conclusion that illegitimate enterprises are not excluded from RICO prohibitions, (2) legislative history presents no evidence that Congress intended that "enterprise" be limited to legitimate business, (3) section 904(a) mandates a broad construction of the RICO provisions, and (4) the weight of authority supports the inclusion of illegitimate enterprises within the meaning of "enterprise."

Because the majority position is represented by numerous cases[99] and each relies upon at least one of the aforementioned arguments, the discussion of the majority rationale will focus upon the arguments rather than the individual cases.[100]

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96. *See* note 17 *supra*.

97. *See* note 20 and accompanying text *supra*.

98. *See* United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975). Because the Second Circuit in United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977), has held that a RICO "enterprise" is not limited to legitimate business, *Moeller* is no longer good law in the Second Circuit. For the purpose of this comment, *Moeller* will be relied upon only for its discussion of the minority position rationale.

99. To date, approximately fourteen cases comprise the majority position. Added to those court of appeals decisions listed in note 17 *supra* are United States v. Fineman, 434 F. Supp. 189 (E.D. Pa. 1977); United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976); United States v. Castellano, 416 F. Supp. 125 (E.D.N.Y. 1975). Another relevant case is United States v. Hansen, 422 F. Supp. 430 (E.D. Wis.), *aff'd*, 583 F.2d 325 (7th Cir. 1976), *cert. denied*, 439 U.S. 912 (1978). The *Hansen* court did not address the issue of whether an illegitmate "organization" could be a RICO "enterprise," but it upheld an indictment charging "a conspiracy and a racketeering organization to torch inner city properties and to collect insurance proceeds by use of the mails." *Id.* at 434.

100. Because the cases comprising the majority position tend to rely on the arguments made by the other majority courts, the issues are not extensively discussed

The primary argument presented by the majority position is that the RICO language is clear and unambiguous. The conclusion, at least implicitly, is that the plain meaning "rule" of statutory construction should be followed.[101] The essence of the rule is that the courts should only interpret legislation when there is some ambiguity in the language or conflict between the provisions. When the language plainly and clearly expresses the intent of the legislature, that language should be applied as read.[102]

The majority of courts assert that the definition of "enterprise" in section 1961(4) and as used in section 1962, clearly expresses congressional intent. In *United States v. Altese*[103] the court stated:

> We first note that each of the four paragraphs of section 1962 begins with the all inclusive phrase: 'It shall be unlawful for any person . . .' who has received *any* income derived from *any* pattern of racketeering activity, etc., to use *any* part of such income in the acquisition of '*any* enterprise engaged in . . . interstate or foreign commerce.' (emphasis supplied). The word 'any' is explicit. In addition, we note that in Section 1961 the Congress in defining the words 'person' and 'enterprise' again uses the word '*any*.' In light of the continued repetition of the word 'any' we cannot say that 'a reading of the statute' evinces a Congressional intent to eliminate illegitimate businesses from the orbit of the Act. On the contrary we find ourselves obliged to say that Title IX in its entirety says in clear, precise unambiguous language - the use of the word 'any' - that all enterprises that are conducted through a pattern of racketeering activity of collection of unlawful debts fall within the interdiction of the Act.[104]

The court in *United States v. Cappetto*[105] was more succinct in stating the majority view: "There is nothing in the language of subsection (b) or (c) [§ 1962] or in the definition section of the Act, Section

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in each decision. Therefore, only the more representative cases will be referred to in this section of the comment.

101. *See* United States v. Rone, 598 F.2d 564 (9th Cir. 1979); United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977); United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

102. *See generally* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.01 (4th ed. 1973).

103. 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). The court reversed an order of the district court which had dismissed two counts of an indictment charging the defendants with conducting a gambling business through a pattern of racketeering activity and with the collection of unlawful debts in violation of RICO section 1962(c).

104. *Id.* at 106.

105. 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The court held that an illegal gambling business falls within the defintions of "racketeering activity" and "enterprise" as contemplated by the prohibitions of RICO section 1962(b).

1961, to suggest that the enterprise must be a legitimate one."[106] The conclusion of these courts, therefore, is that no further investigation into congressional intent is required. "When no ambiguity is apparent on the face of a statute, an examination of the legislative history is inappropriate."[107]

Although the issue seemingly is resolved by reading and applying the "plain meaning" of the statute, the courts have looked to legislative history despite its apparent irrelevancy. They agree that even upon such an inspection, nothing can be found to alter their reading of RICO.[108]

The court in *United States v. Rone*[109] admitted that "a significant purpose of the legislation 'was to address the problems of infiltration of legitimate business by persons connected with organized crime.' "[110] It was not willing to admit, however, that recognition of that particular purpose by Congress necessitated a finding that there must be actual infiltration. The court looked to the "prophylactic aims" of RICO - "arresting the infiltration of regular commerce by organized crime,"[111] - to determine that "[b]y prohibiting the functioning of illegitimate enterprises, participants in them are denied the sources of income used to invest in legitimate businesses."[112] Thus, the court concluded, by prohibiting illicit enterprises from functioning, the goals of RICO would ultimately, albeit indirectly, be served.

Some of the decisions rely on the general goals behind the OCCA to justify a broad interpretation of RICO. In *Altese* the court quoted the congressional statement of purpose of the OCCA[113] and concluded that "[t]hese new penal prohibitions, enhanced sanctions, and new remedies clearly extend to an illegitimate business as well as a legitimate one."[114]

The court in *Cappetto* supported its position that illegal enterprises are included within section 1961(4) by quoting a statement, found in

106. *Id.* at 1358.
107. United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979).
108. *Id. See also* United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied,* 429 U.S. 1039 (1977); United States v. Castellano, 416 F. Supp. 125 (E.D.N.Y. 1975).
109. 598 F.2d 564 (9th Cir. 1979). The court affirmed the conviction under RICO section 1962 of two persons who had engaged in a pattern of racketeering activity that included murder and extortion. The court held that the "enterprise" concept under RICO encompasses illicit enterprises, including an enterprise to commit extortion.
110. *Id.* at 569.
111. *Id.*
112. *Id.*
113. *See* note 1 *supra.*
114. 542 F.2d at 106.

the OCCA legislative history, made in reference to section 1955.[115] The court implicitly reasoned that because the Senate report referred to a need to prohibit "substantial business enterprises of gambling" under section 1955, Congress must also have intended to include organized gambling activities within the section 1961(4) definition of "enterprise."

In sum, the general argument that legislative history indicates a RICO prohibition of even wholly illegitimate entities is based upon two findings: (1) a lack of direct evidence that Congress specifically did not intend such a prohibition, and (2) such an interpretation is compatible with the overall thrust of the OCCA.

The third rationale behind the majority position is based upon section 904(a) of title IX which indicates that Congress intended RICO to be construed liberally.[116] As stated in *United States v. Altese*, Congress "inserted a clause providing that the provisions of Title IX 'be liberally construed to effectuate its remedial purposes.' We cannot - in light of such language - hold that Congress did not say what it meant nor meant [sic] what it said."[117]

Finally, as a fourth rationale, the courts often rely on each other in support of their broad construction of RICO. In holding that the "enterprise" concept of RICO includes unlawful as well as lawful business, the District Court for the Eastern District of Pennsylvania[118] stated that the argument that section 1961(4) is limited to legitimate enterprises "is foreclosed by such cases as *U.S. v. Cappetto* . . . and *U.S. v. Parness* . . . which hold that unlawful as well as lawful businesses are included within the 'enterprise' concept embodied in RICO."[119]

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115. Section 1955 is the codified version of title VIII of the OCCA. It prohibits the operation of illegal gambling businesses. The *Cappetto* court stated:

> Congress' intention to include an illegal gambling business in the categories of 'racketeering activity' and 'enterprise' appears not only from the language of the statute but from the Senate Committee Report:
>
> > 'Despite the best efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers - as it can do under existing statutes - but also to prohibit directly substantial business enterprises to gambling . . . .' Sen. Rep. 91-617, pp. 72, 73 (1969).

502 F.2d at 1358.

116. *See* note 15 *supra*.

117. 542 F.2d at 106.

118. United States v. Fineman, 434 F. Supp. 189 (E.D. Pa. 1977).

119. *Id.* at 193. Although the court in *Parness* stated that section 1962 is to be construed broadly, it did not address the issue of whether a RICO "enterprise" must be a legitimate organization. *See* note 25 *supra*.

2. The Minority Rationale.

The minority view, represented only by *United States v. Moeller*[120] and *United States v. Sutton*,[121] have countered the majority position by arguing: (1) the "plain meaning" given sections 1961 and 1962 by the majority courts does not acknowledge "enterprise" as an element of the prohibitions, (2) legislative history clearly shows that Congress only intended for RICO to reach infiltration of legitimate business, and (3) regardless of a congressional mandate for liberal construction, the statute must be read within certain limitations. The *Moeller* court held that an "enterprise" under section 1962 must be a legitimate activity and therefore could not be a group of individuals associated for the purpose of burning and destroying buildings.[122] The court in *Sutton* similarily stated that RICO "enterprise" is an entity acting for some ostensibly lawful purpose, either formally or informally recognized. The court also explained that "[s]ection 1962 is violated whenever any person associated with such an enterprise conducts its 'affairs,' *i.e.*, undertakes any activity on behalf of or relating to the purposes of the enterprise, by committing at least two criminal acts constituting a 'pattern of racketeering' as defined in section 1961(5)."[123]

In *Moeller* the court supported its holding by first looking to the legislative history of RICO.[124] It noted that in the section-by-section analysis of RICO by Senate Report 91-617, section 1962 was quoted as establishing "a threefold prohibition aimed at the infiltration of *legitimate* organizations."[125]

The second reason given by the *Moeller* court for its holding centered on the civil remedies provided for in section 1964.[126] The

120. 402 F. Supp. 49 (D. Conn. 1975). *See* note 98 *supra*.

121. 605 F.2d 260 (6th Cir. 1979). The *Sutton* decision has been vacated and therefore only its rationale is referred to as representative of the minority view. *See* notes 18 and 20 and accompanying text *supra*.

122. A portion of count eight of the indictment against the appellant alleged that the appellants constituted an enterprise engaged in interstate commerce, "to wit: a group of individuals associated in fact for the purpose of burning and destroying buildings [and] did unlawfully, wilfully and knowingly conduct and participate in the affairs of such enterprise through a pattern of racketeering activity . . . , to wit: arson . . . , and kidnaping [sic]." 402 F. Supp. at 57.

123. 605 F.2d at 270.

124. The court noted that the "[t]he statutory definition of 'enterprise' contains no words of limitation concerning the lawfulness of activities. § 1961(4). The legislative history, however, provides the clearest indication that Congress intended 'enterprise' to mean legitimate business." 402 F. Supp. at 58. The Court gave no indication as to why a facial reading should not govern the construction of the language.

125. *Id.*

126. *See* note 83 *supra*.

Senate report states that these remedial provisions were aimed at the "reform of corrupted organizations."[127] According to the *Moeller* court, "[t]hat comment can have reference only to a legitimate business corrupted by racketeering money or activity."[128]

Finally, the court gave two reasons why any doubt about the scope of RICO should be resolved in favor of a narrow construction. "First is the traditional canon of resolving ambiguities in criminal statutes in favor of lenity."[129] The court's second concern was "grounded in principles of federalism, not to give federal criminal laws a broad construction that 'would alter sensitive federal-state relationships' or 'transform relatively minor state offenses into federal felonies.'"[130]

In *Sutton* the court supported its holding with the same general arguments as were discussed in *Moeller*. The *Sutton* court, however, addressed an issue which was avoided by the *Moeller* court. "Our analysis begins with the language of the statute."[131]

The court stated that the government's literal reading[132] of the section 1961(4) definition of "enterprise" was deceptive. "What parades under the guise of rigorous fidelity to the text turns out, upon examination, to read the 'enterprise' element entirely out of the statute."[133] According to the court, if "the enterprise [is] 'for the purpose of defrauding insurance companies by the use of the mails and committing acts of arson,' and the racketeering activity [consists] of defrauding insurance companies through the mails and arson," the "enterprise" element of the crime becomes redundant.[134] Under such a construction, "every 'pattern of racketeering activity' becomes an 'enterprise' whose affairs are conducted through the 'pattern of racketeering activity.' Plainly, that is not the statute Congress has written."[135]

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127. S. REP. NO. 91-617, 91st Cong., 1st Sess. 160 (1969).

128. 402 F. Supp. at 59.

129. *Id.* (citing Rewis v. United States, 401 U.S. 808 (1971) and Bell v. United States, 349 U.S. 81 (1955) for the proposition).

130. 402 F. Supp. at 59. *See* notes 178-182 and accompanying text *infra*.

131. 605 F.2d at 264.

132. The government contended that because section 1961(4) defines "enterprise" as "any individual, partnership, corporation, association, or other legal entity" and because the appellants were "a group of individuals associated in fact," thereby forming a "single enterprise - operated for the purpose of making money from repeated criminal activity," the appellants' activities were encompassed by RICO. *Id.* (quoting from the Brief for the United States at 23, United States v. Sutton, 605 F.2d 260 (6th Cir. 1979)).

133. 605 F.2d at 265.

134. *Id.* The court used the facts in United States v. Hansen, 422 F. Supp. 430 (E.D. Wis.), *aff'd*, 583 F.2d 325 (7th Cir. 1976), *cert. denied*, 439 U.S. 912 (1978) in its example.

135. 605 F.2d at 266.

Although the *Sutton* decision was vacated and set for rehearing *en banc*,[136] it provides the most thorough and comprehensive treatment of any decision addressing sections 1961 and 1962 of RICO. The *Moeller* decision also contains an extensive discussion of the legitimate versus illegitimate issue. Both decisions, therefore, are useful in evaluating the majority position and will be referred to in the following discussion.

IV. ANALYSIS

More than a concern for linguistic consistency is involved in the differing judicial interpretations of RICO. The two separate readings, in effect, create two different statutes. A far greater number of potential violaters can be reached under a "liberal" reading because those who "merely" engage in racketeering activities can be prosecuted under the statute. Under a "strict" reading, a separate offense, infiltration of a legitimate business by the racketeer, must be committed. Presumably only those racketeering operations which are extensive enough to attempt "take-overs" of legitimate businesses will be within the reach of RICO under a "strict" reading. The small-time operator will need to be dealt with by other laws.[137]

The following analysis will attempt to illustrate the flaws in the rationale supporting the "liberal" majority position. Although this "liberal" view is represented by a far greater number of courts, the position taken by the minority courts appears to be based upon stronger reasoning and a more thorough analysis of the issue.

Each aspect of the rationale supporting the majority position contains flaws which detract from its persuasiveness. Upon close inspection one finds that the meaning of the statutory language is really not so plain, the legislative history does not appear to support the construction given RICO by the courts, and the section of title IX calling for a liberal construction is limited in its impact. These and other reasons combine to compel the conclusion that RICO has been applied in ways not contemplated by Congress.

A. Plain Meaning

The majority position relies heavily on the plain meaning "rule" to support a broad application of RICO. This canon of statutory construction has been criticized as unwarranted, if not impossible to implement.[138]

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136. *See* note 20 and accompanying text *supra*.

137. RICO only prohibits a "pattern" of offenses chargeable under other state and federal laws. *See* note 37-40 and accompanying text *supra*.

138. *See* Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 U. DAY. L. REV. 31 (1979). Judge Merz argues that the nature of human language requires constant in-

One critic has offered an alternative approach: If it can be agreed that legislation is always a purposive act, then the value of an approach which emphasizes first the general purpose of the statute should be clear. If we ask ourselves first of all what it was the legislature was trying to accomplish by the statute, we shall have the most important clue to understanding what they meant when they enacted certain language.

Once the court has attributed a general purpose to the legislature, it should proceed to interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either a meaning they will not bear or a meaning which would violate any established policy of clear statement.[139]

This view deems the plain meaning approach to be an inappropriate means of reading statutory language. Even assuming the approach to be valid, however, there appear to be limitations to its application. An often cited authority on statutory construction states that "[t]he literal interpretation of the words of an act should not prevail if it creates a result contrary to the apparent intention of the legislature and if the words are sufficiently flexible to admit of a construction

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terpretation. People develop linguistically by attaching meaning to words based upon referents to which they have been exposed. Because no two people have been exposed to the same referents for each word they have learned, no two meanings for any given word are exactly alike. When a person hears a word he or she must attempt to match referents with the speaker in order to share a common meaning. This process is facilitated by "context." If the listener understands that the speaker's set of referents, or context, is the front room of a house, he or she may interpret the word "chair" in a different way than if the listener believes the speaker's context to be that of an auditorium. Words can create the context from which we understand other words. Applied to statutory construction, this approach calls for first understanding the legislature's context or purpose before giving meaning to its words.

The court in *Sutton* expressed this perspective on statutory construction in discussing the language of the section 1961(4) definition of "enterprise":

> Section 1961(4) catalogues the kinds of organizational units that may, for statutory purposes, qualify as an 'enterprise' - anything from legal entities such as corporations or partnerships, to entities without formally recognized legal personalities such as 'any union or group of individuals associated in fact,' even to 'any individual.' However, the statutory definition is silent regarding what attributes or activities these units assume or undertake before they may be deemed an 'enterprise' in any meaningful sense. Obviously, every 'individual' or 'group of individuals,' considered in the abstract, is not an 'enterprise.' Individuals and groups do not become 'enterprises' except in relation to something they do. The statutory definition of 'enterprise' contained in section 1961(4) is incomplete because it does not tell us what that 'something' is.

605 F.2d at 265.

139. Merz, *supra* note 138, at 39-40.

which will effectuate the legislative intention."[140] Based upon this standard, the "liberal" interpretation of section 1962 should not prevail. As will be discussed later in this comment,[141] the literal construction given section 1962 by the majority position does not appear to effectuate the intent of Congress.

Assuming, *arguendo*, that the plain meaning approach is appropriate in construing RICO, its application to section 1962 seems to compel a conclusion contrary to the majority position.

The stance taken by the majority fails because the courts assume that anything that fits the definition of "enterprise" in section 1961 will automatically fit into section 1962.[142] This will usually work in instances where the enterprise is distinct from the racketeering activity. Such is the case in *Parness, Frumento,* and *Grzywacz* where facially the statute makes sense regardless of whether the enterprise is interpreted to be public or private.[143]

Although it is easy to read the plain meaning of a section 1961 enterprise to include the same illegal activities as comprise the racketeering activity,[144] the meaning of the statute becomes less obvious when such a definition of enterprise is read into section 1962. This can be illustrated by inserting into section 1962 "gambling activity" in place of "racketeering activity" and "organized gambling" in place of "enterprise." Subsection (a) would then read: "It shall be

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140. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.07 (4th ed. 1973).

141. *See* discussion in section IV *B infra.*

142. *See* notes 103-106 and accompanying text *supra.* Although the courts note that sections 1961(4) and 1962 individually contain no words of limitation, they do not address the way the sections interact.

143. Using the facts in *Parness,* for example, the insertion of "theft and deception" into section 1962(a) for "racketeering activity" and "foreign corporation" for "enterprise" creates the following reading of section 1962(a): "It shall be unlawful for any person who has received any income . . . from a pattern of theft and deception . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, a foreign corporation which is engaged in . . . interstate or foreign commerce." *Cf.* note 16 *supra* (text of section 1962 (a)). *See also* Judge Swygert's dissenting opinion, United States v. Aleman, 609 F.2d 298, 311 (7th Cir. 1979) (Swygert, J., dissenting), *petition for cert. filed,* 48 U.S.L.W. 3539 (Feb. 19, 1980) (No. 79-1009). Judge Swygert, who also dissented in *Grzywacz,* stated: "To urge, as the Government did in *Grzywacz,* that a police department is an 'enterprise' within the meaning of the statute, although farfetched and impermissible by any reasonable interpretation of the statute, has some semblance of logic to it." *Id.*

144. This statement assumes that the *ejusdem generis* "rule" of statutory construction is not applied to the language. *See* note 62 *supra.* In United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), the district court applied this doctrine to section 1961(4) and concluded that "enterprise" is limited to private entities. *See* notes 92-93 and accompanying text *supra.*

unlawful for any person who has received any income . . . from a pattern of gambling activity . . . to use or invest . . . any part of such income . . . in acquisition of any interest in, or the establishment or operation of, organized gambling [through which the gambling activity is conducted] which is engaged in interstate or foreign commerce."[145] The major problem of reading the subsection this way is one of redundancy. In one way it is "internally" redundant in that it would seem to prohibit organized gambling from infiltrating itself. If the pattern of gambling activity is what creates the organized gambling, then a proscription against one is a proscription against the other. Furthermore, reading the subsection in this manner is redundant in another way. If the net effect of the subsection is the prohibition of gambling businesses, and consequently their activities, there appears to be little difference between section 1962 and section 1955 which also prohibits gambling businesses.[146]

Subsections (b) and (c) of section 1962 fare no better. Subsection (b) would read: "It shall be unlawful for any person through a pattern of gambling activity . . . to acquire or maintain . . . any interest in or control of organized gambling which is engaged in . . . interstate or foreign commerce."[147] Subsection (c) would read: "It shall be unlawful for any person employed by or associated with organized gambling . . . to conduct or participate . . . in the conduct of the organized gambling's affairs through a pattern of gambling activity . . . ."[148] Although it is possible to construe section 1962 this way, such a reading raises doubts that Congress clearly intended this result.

In looking at the statute in the way illustrated above, it appears that, at the very least, two distinct activities are required to keep the "enterprise" element separate from the "racketeering activity" element, even if the enterprise is an illegal one. In *United States v. Elliott*,[149] the court upheld the RICO conviction of a group of individuals who were found to have formed an organization to engage in diversified criminal activities.[150] The court analogized the group to "a

145. *Cf.* note 16 *supra* (text of section 1962(a)). For comparison with a section 1962(a) reading with a distinct, legitimate organization inserted for "enterprise," see note 143 *supra*.

146. This statement applies only to a criminal prosecution under section 1962. Civil remedies are provided for under RICO section 1964, but are not available under section 1955. *See* note 23 *supra*.

147. *Cf.* note 16 *supra* (text of section 1962(b)).

148. *Id.* (text of section 1962(c)).

149. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

150. The illegal acts in *Elliott* included arson, counterfeiting titles, auto theft, and narcotics trafficking. *See also* United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978); United States v. Hawes, 529 F.2d 472 (5th Cir. 1976). In *Malatesta*, the indictment

large business conglomerate,"[151] with officers, departments, and committees. "The thread tying all of these departments' activities and individuals together was the desire to make money."[152] The existence of trucks, airplanes, and a warehouse combined with a semi-formal organizational hierarchy led the court to the conclusion that an enterprise had been established. Interrelated with, but independent of, the enterprise as an organization were the acts of arson, car theft, fencing stolen goods, murder, and narcotics dealing which comprised the pattern of racketeering activity.

The *Elliott* decision is arguably not in accord with the legislative history of RICO,[153] but at least it makes an effort to comply with what the *Sutton* court termed a "common sense" facial reading.[154] Section 1962 includes two separate terms, "enterprise" and "racketeering activity," each with a different definition. The logical conclusion to be

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alleged a conspiracy to conduct the day-to-day operation of an enterprise (an illegal scheme to obtain money, marijauna, and cocaine) through a pattern of racketeering activities including extortion, kidnapping, and robbery. The convictions from the indictment were affirmed, but the court did not address the issue of whether the illegal scheme constituted an enterprise under RICO. In *Hawes,* the "enterprise" was a gambling business through which three individuals conducted the distribution of illegal gambling devices. Although the court held that the illegal business was within the scope of RICO section 1962, the overall business consisted of formal, jointly owned companies (distributing and leasing companies and night clubs) separate from the individuals themselves.

It is notable that the aforementioned cases, all of which appear to recognize a concern for keeping the concept of "enterprise" distinct from that of "racketeering activity," are from the Fifth Circuit.

151. 571 F.2d at 898. This aspect of the *Elliott* rationale was referred to in United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), *cert. denied,* 100 S.Ct. 1345 (1980), which upheld the conviction of:

> 'a group of individuals associated in fact to plan and commit robberies, to carry away stolen goods and to divide among themselves the stolen goods and all proceeds derived therefrom, [who] unlawfully, wilfully, and knowingly did conduct and participate, directly and indirectly in the conduct of such enterprise's affairs through a pattern of racketeering activity, to wit, the commission of robberies.'

Id. at 302. In analogizing the robbery "enterprise" with the "business conglomerate" concept of *Elliott,* the *Aleman* court stated:

> Perhaps such an impressive organization was the ambition of the defendants in the present case. At the time it was closed down, however, at least so far as the evidence reveals, it could only be regarded as a small business. Aleman was the proprietor. The business office was the Survivor's Club. Their investment in equipment was negligible as the cars they used were stolen. The payroll was limited. Perhaps given more time, their business would have successfully grown into a conglomerate at the expense of their victims, but fortunately for the public the defendants were put out of business.

Id. at 305.

152. 571 F.2d at 898.

153. *See* notes 163-173 and accompanying text *infra.*

154. 605 F.2d at 266.

drawn from this fact is that Congress intended to prohibit the interrelationship of two separate activities in section 1962.

The court in *Sutton* recognized this flaw in the government's reading of the statute. "[I]t would have us treat section 1962(c) as a purposeless circumlocution, written in terms of 'enterprises,' and persons 'employed' by them to conduct their 'affairs,' but in reality directed at anyone who commits two acts of racketeering."[155] The *Sutton* court went further, however, and attacked the concept of "criminal enterprise" described in *Elliott* as an "amoeba-like infrastructure that controls a secret criminal network."[156] The court stated that if such an entity is proscribed by RICO, greater precision of statutory language is required to avoid violating due process and notice considerations:

> Although government prosecutors may be trained nowadays to recognize an 'amoeba-like infra-structure' when they see one, our instincts are not so keenly developed, and we think even racketeers are entitled to know before the fact at what point their criminal activities will be deemed sufficiently 'amoeba-like' to transgress the statute.[157]

The *Sutton* court decided that clearer standards than those provided by the statutory language are necessary to discern the scope of RICO's applicability. The court investigated RICO's legislative history to find these clearer standards. It would seem that the majority position's construction of section 1962 creates enough doubt about congressional intent to warrent such an investigation.

B. Congressional Intent

The courts have looked to two statutory aids to support the position that section 1962 applies to illegitimate enterprises. The first is the statement of findings and purpose which precedes the text of the OCCA.[158] The second is the legislative history of RICO.

In relying on the statement of findings and purpose to support their position, the courts have confused the overall goals and purpose of the OCCA with those of RICO. RICO is but one title out of the

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155. *Id.* *See* Judge Swygert's dissent in *Aleman* in which he stated: "Under the facts and the majority's reasoning based upon those facts, the enterprise and the racketeering are one and the same. The racketeering defines the enterprise and the enterprise comprises the racketeering." 609 F.2d at 311 (Swygert, J., dissenting). *See also* notes 192-93 and accompanying text *infra*.

156. 571 F.2d at 898.

157. 605 F.2d at 266. Although the courts have rejected vagueness challenges to RICO's language, *see* note 14 *supra*, the statements made by the *Sutton* court may indicate that the constitutional issues are not yet completely resolved.

158. *See* note 1 *supra*.

twelve that comprise the entire Act. The court in *United States v. Altese*[159] quoted the statement of purpose of the OCCA[160] and concluded that "these new penal prohibitions, enhanced sanctions, and new remedies clearly extend to an illegitimate business as well as a legitimate one; to read the Act otherwise does not make sense since it leaves a loophole for illegitimate business to escape its coverage."[161]

Although the *Altese* court may be accurate in stating that the new penal prohibitions, sanctions, and remedies extend to illegitimate business, the assertion does not explain what illegitimate business is covered, or how it is covered, by RICO. It can probably be assumed that all of the titles which comprise OCCA have some role in effectuating its general purpose. The problem becomes one of investigating the legislative history further to determine how Congress intended the RICO provisions to specifically contribute to the overall goal. With the exception of *Moeller* and *Sutton*, the courts have been reluctant to address this problem.

Determining the role Congress had in mind for RICO is not difficult. In reviewing the hundreds of pages of OCCA legislative history, numerous discussions of RICO can be found.[162] Proponents and op-

159. 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

160. *See* notes 28-29 and accompanying text *supra*.

161. 542 F.2d at 106-07. This statement begs the question. The court appears to be saying that the RICO provisions clearly extend to wholly illegitimate business because, otherwise, wholly illegitimate business will escape RICO. The problem is caused by the court's wholesale substitution of the question of OCCA's reach for the particular question of RICO's reach. The salient question, however, is not really whether OCCA applies to illegitimate business, but rather, whether it should reach illegitimate business *by way of RICO* in the manner in which it is now applied by the courts.

162. *See, e.g.*, H.R. REP. NO. 91-1549, 91st Cong., 2d Sess., *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 4007. The House Report referred to section 1962 of title IX as establishing "a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations." *Id.* at 57, U.S. CODE CONG. & AD. NEWS at 4033.

In discussing the section 1962(a) prohibition against investing funds from a pattern of racketeering activity, the report stated that "[a]n exception has been provided for the purchase on the open market of less than 1 percent of a *company's securities* where there is no degree of control in law or in fact to the investor." *Id.* (emphasis supplied).

Referring to subsection (b), the report stated:

> There is no 1 percent limitation here as in subsection (a) because (a) focuses on *legitimate acquisition* with illegitimate funds. Subsection (b) focuses on illegitimate acquisition with illegitimate funds. Subsection (b) focuses on illegitimate acquisition through the proscribed pattern of activity or collection of debt. Consequently, any acquisition meeting the test of subsection (b) is prohibited without exception.
>
> Subsection (c) prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt. Again, the prohibition is without exception.

Id. (emphasis supplied).

The report explicitly referred to the infiltration of legitimate business and noted the

ponents were unanimous in their perception of RICO's purpose. All referred to title IX as providing prohibitions and sanctions for infiltration of legitimate businesses. No other purpose was mentioned.[163]

In *United States v. Rone*,[164] the court admitted that "a significant purpose of the legislation 'was to address the problems of infiltration of legitimate business by persons connected with organized crime.'"[165] In *United States v. Castellano*,[166] the court stated, after noting the basic purpose of the OCCA, that "[w]hile the legislative history demonstrates that one of the targets of Congress in enacting this law was the infiltration of legitimate business by racketeers, it was, as indicated above, not its only concern."[167] These statements represent two errors in the reasoning behind the majority position: (1) a confusion about the general purpose of RICO and (2) reference to the infiltration of legitimate business as only one of the targets when RICO legislative history reveals no reference to any other target.[168]

The court in *United States v. Moeller*[169] extensively discussed the legislative history of RICO. It found that Congress clearly intended

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distinction between legitimate and illegitimate acquisition. Three questions about the majority position's interpretation of RICO arise from reading the House Report: (1) How can an illegitimate enterprise be legitimately acquired with illegitimate funds? (2) How can an illegitimate enterprise acquire itself, legitimately or illegitimately, with illegitimate funds? (3) Although subsection (c) prohibits conduct and not acquisition, if the "enterprise" concept of subsection (c) is intended to be any more expansive, or different in any other way than "enterprise" as used in the other subsections, why is there no indication of that intent?

Judge Swygert, in his dissenting opinion in *Aleman,* addressed the concern underlying the second question above. He stated:

> In order to reach the majority's conclusion that such an enterprise exists, we are required to assume that the defendants were infiltrating their own unlawful enterprise through a 'pattern of racketeering activity.' To my way of thinking, this assumption is absurd. To infiltrate an enterprise, that is 'to conduct or participate . . . in the conduct of such enterprise's affairs [section 1962(c)],' the enterprise must preexist before it is infiltrated by racketeering. Under the facts and the majority's reasoning based on those facts, the enterprise and the racketeering are one and the same.

609 F.2d at 311 (Swygert, J., dissenting).

163. *See* notes 171-173 and accompanying text *infra*.

164. 598 F.2d 564 (9th Cir. 1979).

165. *Id.* at 569 (quoting S. REP. No. 91-617, 91st Cong., 1st Sess. 76 (1969)).

166. 416 F. Supp. 125 (E.D.N.Y. 1975).

167. *Id.* at 127.

168. *See* notes 171-173 and accompanying text *infra*. In referring to RICO, Senator John McClellan, co-author of the OCCA, stated that "title IX of S. 30, the Organized Crime Control Act of 1969, . . . is *expressly aimed* at removing the baneful influence of organized crime from our *legitimate commercial endeavors* that are all too often today conducted in an illegitimate manner by the forces of organized crime." 116 CONG. REC. 8670 (1970) (emphasis supplied).

169. 402 F. Supp. 49 (D. Conn. 1975).

"enterprise" to mean legitimate businesses. The Senate Report was quoted as stating that "Title IX 'has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce.'"[170] The court additionally noted that "[t]he Report's discussion of Title IX repeatedly refers to 'legitimate' organizations as the ones to be protected, lists a number of illustrations, and at no point remotely suggests that Title IX is intended to penalize investing in, acquiring, or conducting the affairs of unlawful enterprises."[171] In a footnote the court further elaborated its inspection of legislative history: "Nor is there one word in the House floor debates over the Organized Crime Control Act that would indicate that any member of Congress thought Title IX would reach anything but legitimate business."[172] Seven congressmen were specifically noted as having expressed the opinion that title IX was intended to prevent infiltration of legitimate businesses, "and none ever discussed the statute in terms that might be thought to have contemplated the government's use of § 1962."[173]

The importance of limiting the scope of RICO to infiltration of legitimate businesses lies in maintaining the integrity of the role of Congress to enact laws and the role of the courts to enforce them as Congress intended when the laws were enacted.[174] By applying RICO in a manner outside of that intended by the members of Congress when they enacted the statute, the courts would appear to be acting as legislatures. This practice is no less inappropriate when the target of the law is organized crime.[175]

C. Section 904(a) and Liberal Construction

The one explicit statement of congressional intent to which the courts have been rigorously faithful is section 904(a) of RICO. The section reads: "The provisions of this title shall be liberally construed to effectuate its remedial purpose."[176] As with the other aspects of the

170. *Id.* at 58 (quoting S. REP. NO. 91-617, 91st Cong., 1st Sess. 76 (1969)).
171. 402 F. Supp. at 59.
172. *Id.* at 58 n.8.
173. *Id.* The court noted the remarks of Representatives Celler, St. Germain, McCulloch, Kleppe, Railsback, Anderson, and Poff.
174. The Supreme Court, in United States v. American Trucking Ass'ns, 310 U.S. 534 (1940), stated that "[i]n the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *Id.* at 542.
175. In *Sutton* the court stated: "It is for Congress, not the courts, to amend the statute to expand its coverage, if that is what an effective policy against organized crime requires." 605 F.2d at 269.
176. *See* note 15 *supra.*

statute, the courts may have taken unwarranted advantage of what they have been given.[177]

Two considerations act to limit the effect of section 904(a). The first is grounded in federalism principles. By its current application, RICO transforms many state offenses into federal felonies once a "pattern" of two state offenses has been established.

That Congress has the authority to reach criminal activities in this manner is not questioned.[178] The question becomes whether Congress clearly intended this result. "[U]nless Congress conveys its purpose clearly, it will not be deemed to have sufficiently changed the federal-state balance."[179] As was discussed previously,[180] the statutory language of section 1962 as construed by the majority courts creates some doubts about what Congress may have intended. These doubts are resolved after a thorough investigation of RICO's legislative history. When members of Congress specifically referred to RICO provisions, they consistently spoke in terms of infiltration of *legitimate* business. Based upon these factors, one would expect the courts to construe the RICO provisions liberally as per section 904(a), but only to the point of effectuating the clear and specific intent of Congress to prohibit the infiltration of organized crime into legitimate enterprises.

In a strong dissent in *United States v. Altese*,[181] Judge Van Graafeiland expressed his concern for unwarranted incursions by the federal criminal law into areas generally left to the states:

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177. The court in *Sutton* stated that:

> [a]lthough Congress has declared that RICO's provisions should be 'liberally construed to effectuate its remedial purpose,' we do not read that directive as authorizing us to write a new and substantially different law. Appellants' construction fully serves the statute's remedial purpose as revealed by all of the guides to legislative intent.

605 F.2d at 269.

178. In United States v. Nardello, 393 U.S. 286 (1969), the Supreme Court held that because the congressional purpose behind the Travel Act, now codified at 18 U.S.C. § 1952 (1976), was to assist local law enforcement officials to battle interstate organized crime activities which violated state laws, the generic terms used in the Travel Act referred to general conduct prohibited by the states and not to the specific labels used by a particular state to classify its prohibitions. Presumably the same rationale would apply to the generic incorporation of state offenses in section 1961(1) of RICO.

179. United States v. Bass, 404 U.S. 336, 349 (1971). The Supreme Court stated that section 1202(a)(1) of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.) does not make clear "whether or not receipt or possession of a firearm by a convicted felon has to be shown in an individual prosecution to have been connected with interstate commerce," and therefore, the section was held to require a nexus between the offense and interstate commerce. *Id.* at 336.

180. *See* discussion in section IV A *supra*.

181. 542 F.2d 104, 107 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

> Without a clear and precise direction from Congress, we have created a statute making it a federal felony for any group, association or conspiracy to violate any state's murder, kidnapping, gambling, arson, robbery, bribery, extortion or narcotics statutes in any manner which utilizes or affects interstate commerce. The disruptive effect of our holding on federal-state relationships and on the limited enforcement and judicial resources of the federal government is every bit as great as that of the expansive interpretation of the Travel Act, 18 U.S.C. § 1952, condemned by the Supreme Court in *Rewis v. United States* . . . .[182]

The second limitation on the scope of section 904(a) comes from section 904(a) itself. "Provisions of this title shall be liberally construed to effectuate *its remedial purpose.*" The wording would appear to indicate that for the purposes of effectuating the remedial goals of RICO, its provisions are to be liberally construed. The negative implication would be that for the purposes of effectuating the penal goals of RICO, its provisions are not to be liberally construed.

The law has long recognized the distinction between penal laws and civil, or remedial, laws. In *Huntington v. Attrill*,[183] the Supreme Court noted that penal laws have the purpose of punishment and deterrence of wrongs against the community. Civil laws, on the other hand, give a private right of action.[184] The section headings of the RICO provisions themselves make this distinction. Section 1963 is titled "Criminal penalties" and section 1964 is titled "Civil remedies." Congress apparently recognized the difference in the causes of actions provided by RICO. Section 904(a) mandates a liberal construction only to effectuate RICO's *remedial* purpose. It is difficult to imagine how a liberal construction of section 1962 in a section 1963 criminal or "penal" proceeding will effectuate the remedial purpose of RICO.[185] It would ap-

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182. *Id.* at 109-110 (Van Graafeiland, J., dissenting). *See also* United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979) (Ely, J., dissenting).

183. 146 U.S. 657 (1892).

184. *Id.* at 666-69. Moreover:

> [t]he underlying test to be applied in determining whether a statute is penal or remedial is whether it primarily seeks to impose an arbitrary, deterring punishment upon any who might commit a wrong against the public by a violation of the requirements of the statute, or whether the purpose is to measure and define the damages which may accrue to an individual or class of individuals, as just and reasonable compensation for a possible loss having a causal connection with the breach of the legal obligation owing under the statute to such individual or class.

BLACK'S LAW DICTIONARY 1163 (5th ed. 1979).

185. A case which addressed RICO issues other than the legitimate versus illegitimate enterprise question held that RICO is a remedial statute and therefore should be read broadly. United States v. Pray, 452 F. Supp. 788, 800 (M.D. Pa. 1978). The case involved a criminal indictment under section 1962(c). The court did not explain how a statute upon which a criminal prosecution is based can be wholly remedial in nature.

pear, therefore, that the congressional "liberal construction" mandate applies to other RICO provisions, including section 1962, only when the complaining party is seeking civil remedies under section 1964.[186]

For all of the aforementioned reasons, the statement in section 904(a), regarding a liberal construction of RICO provisions, gives little guidance as to whether or not "enterprise" as defined in section 1961(4) and as used in section 1962, is limited to legitimate business.

D. Self Reliance

The courts which hold that a RICO "enterprise" is not limited to legitimate business often cite each other to support their position. A case which only discussed the applicability of RICO to foreign corporations has also been cited as supporting the inclusion of illegitimate organizations within the concept of "enterprise."[187] Because of this cross-referencing between cases the majority view is now represented by a deceptively persuasive number of cases with little in the way of extensive and thorough substantive analysis.[188] The minority position, as represented by the *Moeller* decision, is outnumbered by the majority position, and will continue to be so even should the *Sutton* decision again align itself with the district court. Both *Moeller* and *Sutton*, however, have analyzed the "enterprise" issue much more extensively than have any of the majority courts.

One example of the majority's somewhat cursory treatment of the issue can be seen in its reading of the statutory language. The majority states that because the section 1961(4) definition of "enterprise" contains no language to limit the concept to legitimate business, the section 1962 prohibition against infiltrating an "enterprise" must include illegitimate organizations.[189]

In *Sutton* on the other hand, the court did not assume that what fits into section 1961(4) will necessarily fit into section 1962.[190] Instead, section 1962 was read with the government's definition inserted. The

186. Nearly all of the cases in which RICO has been given the "liberal construction" have been criminal proceedings. In United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), the government chose to exercise a civil remedy under section 1964, but this option has been selected infrequently. *See* note 21 *supra*.

187. *See* note 119 and accompanying text *supra*.

188. *Altese* and *Cappetto* are the cases which are cited to most often by the other majority courts. *See* note 17 *supra*.

189. *See* notes 103-106 and 142 and accompanying text *supra*.

190. The *Sutton* court stated: "It requires no great insight to recognize that applying the statute in this fashion renders the 'enterprise' element of the crime wholly redundant and transforms the statute into a simple proscription against 'patterns of racketeering activity.'" 605 F.2d at 265. *See also* note 142 and accompanying text *supra*.

court decided that such a reading created doubts about whether Congress intended the statute to be applied against racketeering "organizations" being conducted by way of racketeering activities.[191]

Another example of the majority's less than thorough analysis can be seen in its investigation of legislative history. Although there is nothing wrong with looking to the general purpose of the OCCA as an indication of the intended purpose of RICO, the investigation would appear to be incomplete without going further to look at what Congress specifically had to say about RICO. The *Sutton* and *Moeller* courts examined RICO legislative history and decided that Congress explicitly stated its intent to only reach infiltration of legitimate business by racketeering activity.[192] The majority position essentially infers that Congress intended "enterprise" to include illegitimate business based upon the broad goals of the OCCA.[193] It would seem that a factor as important to statutory interpretation as legislative history would be examined thoroughly enough so that mere inference of congressional intent would not be necessary. From reading the various opinions of both the majority and minority positions, it appears that the *Sutton* and *Moeller* courts have reached a conclusion that, even if not an accurate assessment of RICO's purpose, is at least based upon a more thorough analysis of the available evidence.

E. Section 1964

An argument that Congress only intended to prohibit the infiltration of legitimate business can be found in the "public versus private" cases[194] and appears to be equally applicable to the "legitimate versus illegitimate" issue. The argument is based upon section 1964,[195] which outlines the civil remedies available to the courts and to those injured by section 1962 violations.

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191. The court stated:

> Common sense, not to mention the first principle of statutory construction, leads us to reject the government's reading and to seek a construction that gives some content to each element of the crime set forth in the text. The plain meaning of the words in context indicates that the reference to 'enterprise' was included to denote an entity larger than, and conceptually distinct from, any 'pattern of racketeering activity' through which the enterprise's 'affairs' might be conducted. If the 'enterprise' element of the crime is to have independent meaning, but is still to encompass 'criminal enterprises' as the government contends, then a 'criminal enterprise' must involve something more than simply an individual or group engaged in a pattern of racketeering activity.

605 F.2d. at 266.

192. *See* notes 169-173 and accompanying text *supra*. *See also* United States v. Sutton, 605 F.2d 260, 266-68 (6th Cir. 1979).

193. *See* notes 113-115 and accompanying text *supra*.

194. *See* notes 83 and 90 and accompanying text *supra*.

195. *See* note 83 *supra*.

Under section 1964 the district courts may order a violator to divest himself or herself of any interest obtained in the enterprise. They may also restrict any future activities or investments relating to the enterprise or may reorganize or completely dissolve the enterprise. It seems unlikely that Congress would take the time and effort to give the courts jurisdiction to order the divestment of a narcotics dealer of his or her interest in the narcotics ring. Divestiture implies that the organization from which the violator is to be divested will continue. It can be assumed that one of the purposes of divestiture is to protect the remaining interests. The same can be said for prohibiting future investments in the enterprise. Dissolving or reorganizing the corrupted enterprise, and "making due provision for the rights of innocent persons,"[196] also lead to the conclusion that Congress only had legitimate businesses in mind in fashioning remedies.[197]

The purpose of section 1964 is apparently to prohibit future influence by racketeers and to reform the corrupted organization. Arguably, the section indicates that Congress intended for RICO to be applied against those illegal activities which infiltrate legitimate businesses, thereby requiring the reorganization and reform of the corrupted business.[198] This interpretation of section 1964 is consistent with the statements made by Congressmen concerning their understanding of RICO's purpose.[199]

V. CONCLUSION

The decisions which have attempted to resolve the question whether the "enterprise" concept under RICO is limited to legitimate business can be viewed from two different perspectives. Numerically, the weight of authority is, at this time, overwhelmingly on the side of a "liberal" RICO construction. The persuasiveness of authority,

196. 18 U.S.C. § 1964(a) (1976).

197. Noting the fact that the section 1964 remedies appear to be aimed at legitimate business is not meant to imply that section 1964 precludes the possibility that Congress could have intended illegitimate "organizations" to be encompassed by the enterprise concept of sections 1961(4) and 1962. The purpose of noting this fact is to further indicate that Congress apparently had the protection of legitimate business in mind when it enacted RICO. The point is not that Congress could not have had anything else in mind, but rather that there seems to be no evidence that it intended anything else.

198. In *Moeller,* the court noted the reference to the RICO civil remedies by the Senate Report: "These civil remedies, says the Report, are 'broad remedial provisions for reform of corrupted organizations.' That comment can have reference only to a legitimate business corrupted by racketeering money or activity." 402 F. Supp. at 59 (citations omitted).

199. *See* notes 169-173 and accompanying text *supra.*

however, in terms of thorough and comprehensive investigation of why Congress enacted RICO, appears to be with *Moeller* and *Sutton*.

The conclusion reached by the majority position appears to rest ultimately upon the determination that nothing in the statutory language of RICO or in its legislative history *prohibits* reading section 1962 as proscribing racketeering organizations. The *Sutton* and *Moeller* courts took what appears to be a more positive approach to the statute by basing their decisions upon evidence of the reading Congress intended, rather than the reading Congress failed to foreclose.

The controversy created by the *Sutton* decision will likely be resolved in one of two ways. Upon rehearing *en banc*, the Sixth Circuit may align itself with the position taken by the other circuits and the authority split will, at least temporarily, disappear. Should the Sixth Circuit again hold that a RICO "enterprise" must be a legitimate business, the resulting conflict will probably be resolved at some point by the Supreme Court.

A less likely, but perhaps preferable means of resolution is a congressional effort to rewrite RICO so that no conflict would exist between one facial reading supported by OCCA legislative history on one side and another facial reading supported by RICO legislative history on the other.

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