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Jeff Atkinson

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"RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS," 18 U.S.C. §§ 1961-68: BROADEST OF THE FEDERAL CRIMINAL STATUTES

JEFF ATKINSON*

I. INTRODUCTION

Title IX of the Organized Crime Control Act of 1970, "Racketeer Influenced and Corrupt Organizations (RICO),"[1] is the most sweeping criminal statute ever passed by Congress.[2] It incorporates by reference twenty-four separate types of federal crimes and eight types of state felonies.[3] RICO prohibits "racketeering activities," which are defined by the incorporated federal and state crimes.[4] RICO does not create a new type of substantive crime since any acts which are punishable under RICO also are punishable under existing federal and state statutes. The statute instead takes a variety of state and federal crimes and declares that if a person commits two of these offenses, the person is then guilty of "racketeering activity" and is subject to severe penalties.

Often the penalties for a violation of RICO are more severe than the penalties for the crimes which constitute the definition of "racketeering activity." The RICO penalties include fines of up to $25,000, imprisonment for as long as twenty years and forfeiture of interests acquired or maintained in violation of RICO.[5] In addition, the statute pro-

* Member, Illinois Bar; B.S., Northwestern University; J.D. *summa cum laude*, DePaul University. Mr. Atkinson is an attorney with the firm of Jenner & Block, Chicago.

[1] 18 U.S.C. §§ 1961-68 (1970).

[2] Title IX is one of 12 substantive titles of the Organized Crime Control Act of 1970. The purpose of the act is to eliminate organized crime "by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 923. The other titles are: Title I, Special Grand Jury, 18 U.S.C. §§ 3331-34; Title II, General Immunity, *id.* at §§ 6001-05; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826; Title IV, False Declarations, 18 U.S.C. § 1623; Title V, Protected Facilities for Housing Government Witnesses, *id.* at § 3481; Title VI, Depositions, 18 U.S.C. 3503; Title VII, Litigation Concerning Sources of Evidence, 18 U.S.C. § 3504; Title VIII, Syndicated Gambling, 18 U.S.C. § 1511; Title X, Dangerous Special Offender Sentencing, *id.* at §§ 3575-78; Title XI, Regulation of Explosives, *id.* at §§ 841-48; Title XII, National Commission on Individual Rights, *id.* at § 3331 note, 84 Stat. 960.

[3] For a list of the crimes, see the definition of "racketeering activity," note 4 *infra*.

[4] "Racketeering activity" is defined as:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment or 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 investigations), 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 paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the 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 offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States. . . .

18 U.S.C. § 1961(1) (1970).

[5] (a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

18 U.S.C. § 1963(a) (1970).

vides broad civil remedies, modeled after the antitrust laws. Although prosecutors maintain they only will indict a person under RICO for major crimes,[7] minor offenses also fall within the scope of the law. For example, the manufacture or delivery of ten grams of marijuana, the taking by threat of property valued at less than $150, or the holding of a poker party where money is gambled in one's own home are all chargeable under RICO.[8]

RICO separately lists four types of offenses involving racketeering activity.[9] In summary form, the elements of the RICO offenses are:

1. That a person[10]
2. through a pattern[11]
3. of racketeering activity[12]
   or
   collection of unlawful debt[13]
4. directly or indirectly—
   (a) invests in, or
   (b) maintains an interest in, or
   (c) participates in
5. an enterprise[14]
6. the activities of which affect interstate commerce.

All elements of a RICO offense, including the two or more state or federal offenses which constitute "racketeering activity," must be proved beyond a reasonable doubt.[15]

The main purpose of RICO and the Organized Crime Control Act was "to seek the eradication of organized crime in the United States."[16] As will

[6] See text accompanying notes 143-49 *infra*.

[7] See text accompanying notes 131-32 *infra*.

[8] The section on "Criminal Penalties" will discuss how these offenses meet the definition of "racketeering activity." See text accompanying notes 127-30 *infra*.

[9] 18 U.S.C. § 1962 (1970) provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(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.

[10] "Person" is defined as "any individual or entity capable of holding a legal or beneficial interest in property." *Id.* at § 1961(3).

[11] "Pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.* at § 1961(5).

[12] For definition of "racketeering activity," see note 4 *supra*.

[13] "Collection of unlawful debt" is defined as:

[A] debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate. . . .

18 U.S.C. at § 1961(6).

[14] "Enterprise" is defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* at § 1961(4).

[15] No case has specifically held that all elements of a criminal RICO offence must be proved beyond a reasonable doubt, but since it is a criminal statute, that standard of proof can be assumed. *Cf.* United States v. Kaye, 556 F.2d 855, 860 (7th Cir. 1977) (quoting United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974)) (holding that the interrelationship between predicate acts of racketeering activity must be proved beyond a reasonable doubt).

[16] Statement of Findings and Purpose of the Organized Crime Control Act, 84 Stat. 923.

be shown, however, the statute applies to anyone who commits the proscribed acts, regardless of whether or not the individual is a member of "organized crime."[17] Indeed, few of the cases specifically indicate whether the defendants were members of this difficult to define group.[18]

The statute is exceptional in many respects. It is unusual not only because of its sweeping nature, its incursions into state law and its severe penalties, but also because it attempts to alter a traditional principle of statutory construction. This principle is that penal statutes shall be subject to strict interpretation, or, at very least, that their words be given no more than their normal meaning.[19]

[17] In selecting the offenses which make up the definition of "racketeering activity," the drafters of the statute tried to include all crimes which are commonly engaged in by members of "organized crime." Telephone interview with G. Robert Blakey, Chief Counsel to the Senate Sub-Committee on Criminal Laws and Procedures (Washington, D.C., July, 1976). Mr. Blakey is one of the main drafters of the Organized Crime Control Act. Of course, the crimes which make up the definition of "racketeering activity" also are commonly committed by persons who are not members of "organized crime."

[18] In three recent cases, the courts' comments on the facts of the case imply possible involvement with organized crime. United States v. Frumento, 563 F.2d 1083, 1090 n.14 (3d Cir. 1977) (involving cigarette bootlegging); United States v. McLaurin, 557 F.2d 1064, 1067-68 (5th Cir. 1977) (involving a prostitution ring); United States v. Brown, 555 F.2d 407, 413-14 (5th Cir. 1977) (involving gambling, prostitution and illicit whiskey).

[19] "[T]his being a criminal statute, it must be strictly construed, and any ambiguity resolved in favor of lenity." United States v. Emmons, 410 U.S. 396, 411 (1973) (holding the Hobbs Act does not reach the use of violence to achieve legitimate union objectives such as higher wages). *See also* United States v. Campos-Serrano, 404 U.S. 293, 297 (1971) (holding that possession of a counterfeit alien registration receipt is not punishable under a law which prohibits possession of documents required for entry into the United States); Rewis v. United States, 401 U.S. 808, 812 (1971) (holding that conducting of a gambling operation frequented by out-of-state bettors does not, without more, constitute a violation of the Travel Act); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 38-41 (2d ed. 1947). In a district court decision construing RICO in which it was held that a state government was not an "enterprise" as defined by RICO, the court said: "In the absence of clear Congressional intent, courts traditionally should be reluctant to give a broad construction to a criminal statute which would transform matters primarily of local concern into federal felonies." United States v. Mandel, 415 F. Supp. 997, 1021 (D. Md. 1976). *Contra*, U.S. v. Frumento, 46 U.S.L.W. 1042 (Sept. 20, 1977) (holding that a state agency is an "enterprise" for the purposes of 18 U.S.C. § 1962(c)).

RICO, on the other hand, specifically provides that "provisions of this title shall be liberally construed to effectuate its remedial purpose."[20] How far this liberal construction can be stretched remains to be seen. Regardless of the eventual application of this clause, its language is an ominous and imprecise way in which to draft a criminal statute.

As of this writing between 100 and 200 cases have been decided under RICO,[21] and thirty-seven have been reported. Several have been decided by circuit courts of appeals, but none has been heard by the Supreme Court. This article will discuss the developing law under RICO and the issues which remain to be resolved. I will argue that the terms and history of RICO generally support its broad construction, but if the statute is stretched too far, it will exceed constitutional limitations. The article will conclude with a recommendation for a modification of the statute which will help prevent unnecessary incursions into state power and abusive application against individual defendants.

II. CONSTITUTIONALITY

RICO has been subject to four constitutional challenges: vagueness, lack of authority under the commerce clause, violation of the prohibition against ex post facto laws, and violation of the protection against double jeopardy. None of the challenges has been sustained. A fifth possible constitutional challenge—that the penalties, at least in some circumstances, are violative of the eighth

[20] Title IX § 904(a), 84 Stat. 947.

[21] Telephone interview with John Dowd, Attorney in Charge of Department of Justice Strike Force 18 (Washington D.C., Oct. 4, 1977) [hereinafter cited as Dowd Interview]. Mr. Dowd's Task Force specializes in RICO cases and he reviews all RICO indictments before they are issued. Although RICO became effective in 1970, very few cases were brought under the act until 1975. RICO was a complicated new statute with which prosecutors were apparently unfamiliar. Beginning in 1975, Mr. Dowd began a 20 month trip around the country, lecturing to United States Attorneys and their assistants on the use of RICO. Since then, indictments under RICO have increased markedly. *Id.* The following is a list of the number of RICO cases reported each year since passage of the statute:

1970—0	1974 — 3
1971—0	1975 — 7
1972—1	1976 —10
1973—2	1977*—14

* As of December 12, 1977.

amendment's proscription of cruel and unusual punishments—will be considered in the section on *Criminal Penalties.*[22]

A. Vagueness

If one of the key elements of a RICO violation, "pattern of racketeering activity," were left undefined, the statute probably would be void for vagueness.[23] That, however, is not the case. "Racketeering activity," as noted, is defined as any offense chargeable under thirty-two separate types of state and federal felonies,[24] and a "pattern of racketeering activity" is defined as two acts of racketeering activity which occurred within ten years of each other.[25] Thus, those terms have specific definitions which place persons on notice as to what conduct is prohibited. All courts which have considered challenges on vagueness, including four circuit courts of appeals, have upheld the statute.[26]

Although no decisions have found the statute unconstitutionally vague on its face, RICO still could be unconstitutionally applied in individual instances. Three of the four types of RICO offenses contain numerous disjunctives. This results in a variety of combinations of conduct which are prohibited by RICO. By selecting a certain combination of "or's," the prohibited activity can be quite specific and provide adequate notice. For example: "It shall be unlawful for any person employed by . . . any enterprise . . . to conduct, directly . . . such enterprise's affairs. . . . "[27] On the other hand, a different combination of "or's" can result in a very indefinite statement of prohibited activity:[28] "It shall be unlawful for any person . . . associated with any enterprise . . . to . . . participate . . . indirectly, in the conduct of such enterprise's affairs. . . . "[29] In the latter instance, "associated," "participate" and "indirectly" are left undefined. A person reading the statute would have real doubt in determining how closely he must be associated with an enterprise before he would run afoul of RICO. Such lack of notice could make the statute unconstitutionally vague as applied. For example, if a student buys ten grams of marijuana from a stranger about whom he knows nothing, and that stranger turns out to be a member of "organized crime," does that mean the student can be indicted under RICO because he has indirectly participated in the affairs of organized crime? Similarly, if a man is invited to the house of a friend of a friend for a cash poker game, and some of the gamblers are members of the "syndicate," does this make the man a "racketeer" too?

Since RICO is a criminal statute with very severe penalties, courts should impose an element of scienter. Before being convicted of association with an enterprise, the prosecution should have to prove that the defendant was aware of the nature of the enterprise with which he was associated.[30] It would

[22] See notes 133-38 *infra* and accompanying text. Arguments that RICO has been improperly used to circumvent statutes of limitations are discussed in text accompanying notes 44-58 *infra.*

[23] United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied sub nom.,* Grancich v. United States, 423 U.S. 1050 (1976).

The standard for unconstitutional vagueness is that a penal statute "must be sufficiently explicit to inform those who are subject to it what conduct will render them liable to its penalties" and that if "'men of common intelligence' must guess at the meaning of the statute, the statute violates due process of law." Connally v. General Construction Co., 269 U.S. 385, 391 (1926). *See also* Palmer v. Euclid, 402 U.S. 544, 545 (1971).

[24] For definition of "racketeering activity," see note 4 *supra.*

[25] For full definition of "pattern of racketeering activity," see note 11 *supra.*

[26] United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (holding that RICO gives adequate notice that "enterprise" includes persons who participate in their own organization); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied sub nom.,* Grancich v. United States, 423 U.S. 1050 (1976) (construing "pattern of racketeering activity"); United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975) (construing § 1964); United States v. Parness, 503 F.2d 430, 441-42 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975) (construing § 1962); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975) (holding that RICO gives adequate notice that "enterprise" includes legitimate as well as illegitimate enterprises); United States v. Scalzitti, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975) (construing § 1962(c)); United States v. White, 386 F. Supp. 883-84 (E.D. Wis. 1974) (construing §§ 1961-62); United States v. Stofsky, 409 F. Supp. 609, 612-13 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976) (construing § 1961(c) and stating: "This may be broad, but it is not vague.").

[27] 18 U.S.C. § 1962(c) (1970).

[28] In United States v. Rubin, 559 F.2d 975, 990 (5th Cir. 1977), the court said, "the language of § 1962(c) is less than pellucid, and appellant's attempt to illumine has appeal." The comment arose in a discussion of whether the word "through" in the phrase "through a pattern of racketeering activity" means "by means of." The court found it unnecessary to resolve the issue.

[29] 18 U.S.C. § 1962(c) (1970).

[30] *See* United States v. Stofsky, 409 F. Supp. 609, 613 (S.D.N.Y. 1973), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976) (holding that a person who violates RICO need not be acting in furtherance of the

be unfair to convict persons when they have no knowledge or notice of what they are involved in.

Prosecutors, however, will be able to circumvent the problem and still charge such persons with a RICO offense. This can be accomplished by redefining the enterprise involved. Instead of charging a defendant with association with a large organization, such as "organized crime," the prosecutor can allege that the individual defendant constituted his own enterprise and engaged in small-scale illegal activity, of which the defendant obviously was aware.[31] As will be discussed, the term "enterprise" is defined very broadly.[32] "Enterprise" includes not only traditional organizations such as corporations and partnerships, but also "any individual ... or group of individuals associated in fact although not a legal entity."[33] With such a broad definition, prosecutors have great flexibility in meeting the "enterprise" element of RICO.

Another vagueness problem arises in the criminal forfeiture provisions of section 1963(a), which provide that anyone who violates RICO shall:

> [F]orfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, ... or property or contractual right of any kind affording a source of influence over any enterprise which he has ... participated in the conduct of, in violation of section 1962.[34]

The scope of the interests or property rights to be forfeited is not clear. It most likely would include physical assets and money invested in a major criminal enterprise. The "factory" and bank accounts of an illegal drug operation or the assets of a business taken over by "organized crime" probably would be included.

Yet, application of these forfeiture provisions to other areas is uncertain. For example, how far should the terms "acquired" and "maintained" be stretched? If a person takes the cash proceeds of racketeering activity and mixes them with money derived from legitimate sources and then that common fund is used to operate a legitimate business, should all, or any part of, the legitimate business be subject to forfeiture? What if the money acquired in violation of section 1962 changes form several times before forfeiture proceedings begin? Should the court order forfeiture of assets only in such proportions as the assets were derived from racketeering activity?

Other vagueness issues are raised in determining what is an "interest" or "property right." The Fifth Circuit has held that a person's position as an officer in a union is an "interest" subject to forfeiture under RICO.[35] The court limited its decision by holding that although the defendant's current position was subject to forfeiture, the trial court could not bar him from union management forever since the defendant did not have a present interest in future positions he might hold.[36] The court admitted, "The scope of the statute is indeed without precise boundaries."[37] While a person reading section 1963 might be put on notice that employment positions as well as assets are subject to forfeiture, courts must guard against abuse of the statute by imposing some limits on liability. The limits could be similar to those applied in tort law, prohibiting forfeiture if the interest which the government seeks to forfeit is too remote from the racketeering activity. In order for a forfeiture to occur, there should be a reasonably foreseeable or intentional link between the racketeering activity and the interest subject to forfeiture.

B. Lack of Authority Under the Commerce Clause and Incursions into State Power

It may be argued that since RICO incorporates so many state crimes into a federal felony statute, it disturbs delicate state/federal relationships and that the statute lacks authority under the commerce clause. The response of the courts has been that it is "long settled" that Congress has the power to prohibit activities made unlawful by state law as long as the activity affects interstate commerce.[38] RICO itself incorporates the interstate

enterprise with which he is associated); United States v. Field, 432 F. Supp. 55, 58 (S.D.N.Y. 1977). In United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir. 1977), the court reversed a trial court's holding that the term "associated with" refers to parties "inside" the enterprise rather than those "outside."

[31] For discussion of how an individual can constitute his own enterprise, see text accompanying notes 122-24 *infra*.

[32] See section on "The Meaning of 'Enterprise'" *infra*.

[33] 18 U.S.C. § 1961(4) (1970).

[34] For full text of § 1963(a), see note 5 *supra*.

[35] United States v. Rubin, 559 F.2d 975, 990-92 (5th Cir. 1977) (the defendant's RICO charge was based on embezzlement of union and employee welfare benefit plan funds).

[36] *Id.* at 992-93.

[37] *Id.* at 992.

[38] In United States v. Cappetto, 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), the court said, "The power of Congress to prohibit activities made unlawful by state law which take place in, or affect, interstate commerce has long been settled." In upholding the constitutionality of RICO under the commerce

requirement by specifying that the enterprise which is involved in racketeering activity must be one which "is engaged in, or the activities of which affect, interstate or foreign commerce."[39] Thus, RICO has been held to be a valid exercise of power under the commerce clause. Further, the statute can apply to individuals whose own activities do not have a demonstrable effect on interstate commerce, but who participated in a crime which did have such an effect.[40] It might be argued that since RICO makes such a sweeping incorporation of crimes which formerly were exclusively within the states' domain, that offenses charged under the statute should have an appreciable, and not just a minimal, effect on interstate commerce. Such an argument is not likely to succeed, especially in view of the considerable precedent allowing the federal government to punish criminal conduct which has any effect on interstate commerce.[41]

More generally, RICO raises disturbing constitutional and policy questions about the roles of the federal government vis a vis the states in law enforcement. In an effort to catch all possible members of organized crime and to avoid the constitutional problem of making a crime of the status of being a member of organized crime, Congress passed a sweeping Act which appears to intrude on state power and has great potential for abuse against individual defendants.

Generally, Congress has made some attempts to keep federal law enforcement out of matters of primarily local concern. For example, when it has legislated against gambling, it did not allow federal intervention in violation of state gambling laws unless the gambling was on a moderately large scale, as where five or more people were involved in a business which had been in operation for more than thirty days, or had gross revenue of $2,000 in a single day.[42] Under RICO, however, there are no *de minimis* requirements regarding the number of persons, amounts or duration of the operation. RICO only requires that there be two violations of a state gambling law which are punishable by more than one year imprisonment. In addition to gambling, RICO makes similar incursions into the states' authority to regulate or prohibit murder, kidnapping, arson, robbery, bribery, extortion and the use of narcotics and dangerous drugs. The only limits of federal domination of enforcement of these traditionally state-prosecuted crimes are the limits of federal resources and prosecutorial discretion. If the federal government wished to assume the primary role for enforcing most criminal laws, RICO is the vehicle by which this can be done.[43] This may be constitutionally permissible, as long as there is some minimal effect on interstate commerce. The necessity or wisdom of such a policy is, however, questionable.

C. *Violation of the Prohibition Against Ex Post Facto Laws and Circumvention of Statutes of Limitations*

Defendants have argued that Congress did not intend to have RICO apply to acts committed prior to the effective date of the statute, October 15, 1970, and that if RICO were construed to apply to pre-1970 acts, the statute would be unconstitutional as *ex post facto* legislation. Three courts have held against defendants on both arguments.[44]

While it is true that RICO could cover acts committed prior to the effective date of the statute, the statute is apparently saved by the definition of "pattern of racketeering activity," which requires, "at least two acts of racketeering activity, *one of which occurred after the effective date of this chapter* and the last of which occurred within ten years (excluding any period of imprisonment) after commission of a prior act of racketeering activity."[45]

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clause, *Cappetto* cited a series of cases which upheld the validity of the federal gambling statute, 18 U.S.C. § 1955, and the federal loan shark statute, 18 U.S.C. §§ 891-96 under similar challenges. 502 F.2d at 1356. United States v. Castellano, 416 F. Supp. 125, 131 (E.D.N.Y. 1975), also upheld RICO's power under the commerce clause, saying, "it has long been recognized that Congress has the power to prohibit activities made unlawful by state law which take place in or in any way affect interstate commerce without disturbing the delicate state and federal relationship."

[39] 18 U.S.C. § 1962 (1970).

[40] United States v. Cappetto, 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (citing United States v. Hunter, 478 F.2d 1019, 1021 (7th Cir. 1973), *cert. denied*, 414 U.S. 857 (1973)). *Cf.* United States v. Fineman, 434 F. Supp. 189, 195 (E.D. Pa. 1977) (holding that even a minimal impact on interstate commerce, such as making payments in interstate commerce, is sufficient to withstand a motion to dismiss the indictment).

[41] See note 38 *supra*.

[42] 18 U.S.C. § 1955.

[43] The few major state crimes which RICO does not cover include assault, rape, forgery, unlawful use of a weapon, theft and treason.

[44] United States v. Campanale, 518 F.2d 352, 363-65 (9th Cir. 1975), *cert. denied sub nom.*, Grancich v. United States, 423 U.S. 1050 (1976); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[45] 18 U.S.C. § 1961(5) (1970) (emphasis supplied). For a complete definition of "pattern of racketeering activity," see note 11 *supra*.

In *United States v. Field*,[46] the defendant made several illegal payments to union officials. Some were before 1970 and some were after 1970. The defendant argued that a RICO charge, based on all the illegal payments, would violate the constitutional ban on *ex post facto* laws. The court disagreed, explaining,

> [The statute] creates a separate and distinct crime, comprised of the commission of at least two previously defined illegal acts, which is not complete until the second act is done.... One who has committed acts of racketeering activity prior to that (effective) date is on notice that the commission of a further such act (after the effective date) ... will subject him to liability for a new offense.[47]

Although it is permissible to convict a person partially on the basis of acts committed before RICO became effective, the indictment must specify that at least one act of racketeering activity took place after the effective date of the act. Failure to do so can result in a finding of plain error in violation of due process.[48] It can also constitute grounds for reversal if instructions to the jury do not state that a defendant can be convicted under RICO only if the jury finds that he committed an act of racketeering activity after the effective date of the statute.[49]

An issue analogous to the prohibition against *ex post facto* laws is RICO's relationship to the statute of limitations. Both issues involve time limits on prosecuting persons for past conduct. Prosecutors have used RICO to circumvent federal and state statutes of limitations. Persons have been convicted under RICO for acts on which the statute of limitations would have *expired* had the crimes been indicted under the predicate offenses.[50]

For example, a member of the Pennsylvania House of Representatives was convicted of accepting large sums of money from parents in exchange for obtaining admission for their children into state university medical and veterinary schools.[51] By the time the charges were brought, the state statute of limitations for bribery and extortion had expired. Nonetheless, using the state bribery and extortion statute as the predicate offense, the government filed a RICO charge and obtained a conviction. The defendant cited the definition of racketeering activity, which includes various crimes which are "chargeable under state law,"[52] and argued that since the statute of limitations had expired, the offense was no longer "chargeable under state law." Therefore, the defendant argued that the alleged offense should not have been used as a predicate offense for a RICO indictment. The court did not accept the argument. It reasoned that Congress used state crimes to define "racketeering activity" only for the purpose of incorporating the substance of the offense and not the statute of limitations. "Any other construction would render the definition of 'pattern' essentially meaningless, and would render the state statutes of limitation paramount over the federal provisions."[53]

In another case, a prosecutor was able to avoid the federal five-year statute of limitations[54] by bringing a RICO charge.[55] The court held the government could prosecute conduct which occurred more than five years ago as long as at least one act of racketeering activity took place within the five-year general limitation period. The court said, "The language of the Act ... 'clearly contemplates a prolonged course of conduct.' "[56] It also made analogy to a Supreme Court case which held the statute of limitations runs from the date of the last overt act.[57]

The decisions of these courts seem correct. In

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[46] 432 F. Supp. 55 (S.D.N.Y. 1977).

[47] *Id.* at 59. Congressional intent on the subject is expressed in the Senate Judiciary Report:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has been engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.

S. REP. NO. 91-617, 91st Cong. 1st Sess. 158 (1969).

[48] United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977) (holding that an indictment was fatally defective when it alleged that a RICO conspiracy began before 1970, but failed to allege when the conspiracy ended).

[49] *Id.*

[50] A predicate offense is one of the 32 federal and state crimes which make up the definition of "racketeering activity." For definition of "racketeering activity," see note 4 *supra*.

[51] United States v. Fineman, 434 F. Supp. 189 (E.D. Pa. 1977). The bribes ranged from $11,000 to $15,000 per student.

[52] See note 4 *supra*.

[53] 434 F. Supp. at 194-95.

[54] 18 U.S.C. § 3282 (1970) (applicable to non-capital offenses).

[55] United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977).

[56] *Id.* (quoting Toussie v. United States, 397 U.S. 112, 115 (1970)).

[57] Grunewald v. United States, 353 U.S. 391, 396-97 (1957).

addition to the reasons given by the courts speaking to this issue, it would be anomalous to have unequal enforcement of a federal statute because of variations between the statutes of limitation in force in the various states. If, however, the government attempts to use RICO to try a person for acts committed so long ago that the defendant is unable to prepare his defense properly, then principles of due process should bar a RICO prosecution.[58]

In cases in which the defendant is not prejudiced by delay, the general five-year federal statute of limitations combines with the definition of "pattern of racketeering activity" to allow prosecutions if: (1) the most recent acts of racketeering activity occurred within five years prior to the indictment or information, and (2) at least one other act of racketeering activity occurred within ten years of the most recent one (excluding any period of confinement). RICO does not provide a clear cut-off point for past conduct which is beyond the reach of the statute. The definition of "pattern of racketeering activity," however, implies that RICO can reach *any* past conduct as long as the most recent two acts of racketeering activity occurred within ten years of each other. Obviously, the further back in time the government attempts to reach, the greater the possibility of prejudice to the defendant.

D. Double Jeopardy and Multiplicity

Anyone who has been convicted of a RICO offense, by the definition of "racketeering activity," also will have committed the predicate offenses on which the RICO charge was based. By illustration, if the predicate offenses of a RICO charge are two acts of mail fraud, and the defendant is found guilty, then the defendant has not only committed a RICO offense, but he has also committed two acts of mail fraud. It is common practice to indict persons for both the RICO offenses and the predicate offenses, using separate counts for each. This raises the issue of whether such a conviction violates the constitutional rule against double jeopardy[59] or the rules against multiplicity.[60]

Five courts have considered the double jeopardy or multiplicity issues. All held that it is permissible to charge a defendant with both the RICO offense and the predicate offenses.[61] The most common rationale is that even though both charges arise out of the same conduct, the RICO offense has the added element of a "pattern"—the government must prove at least two separate instances of racketeering activity. Since the elements of each offense are not exactly the same, the courts have been satisfied that double jeopardy and multiplicity were not problems.[62] A majority of a panel on the Third Circuit, with one vigorous dissent, recently held that defendants who had been acquitted in state court of bribery, extortion, and conspiracy in connection with a scheme to avoid payment of the Pennsylvania cigarette tax, could be re-indicted in federal court for the same activities.[63] In so holding, the majority followed the Supreme Court's 1959 decision of *Abbate v. United States*,[64]

[58] *See* United States v. Marion, 404 U.S. 307, 324–26 (1971). In *Marion*, the Court said a delay between the conclusion of an offense and indictment for the offense could violate due process. In this case, however, the Court found the due process claim was premature and remanded the case for determination by the trial court of whether the defendant actually was prejudiced. The Court also noted the fact that the case was brought within the statute of limitations does not automatically dispose of a claim that due process was violated by a delay. *Id.*

[59] "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . " U.S. CONST. amend. V.

[60] "Multiplicity" is the charging of a single offense in several counts. It is distinguished from "duplicity," which is the joining of a single count of two or more distinct and separate offenses.

[61] United States v. Frumento, 563 F.2d 1083, 1089 (3d Cir. 1977). The trial court in *Frumento* reached the same conclusion, 409 F. Supp. 136, 139–40 (E.D. Pa. 1976). *See also* United States v. Hansen, 422 F. Supp. 430, 433–34 (E.D. Wis. 1976); United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617–18 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

[62] The court in United States v. Stofsky, 409 F. Supp. 609, 617–18 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), stated:

> [T]he issue of multiple punishment for the same criminal acts will not ripen unless and until guilty verdicts are returned on the alleged overlapping counts, or unless and until it becomes obvious at trial that the evidence with respect to the contested counts is, in fact, the same. In that event, this Court will be required to examine more intensely the congressional intent underlying § 1962(c), and strike certain counts, or require the government to elect, or use other remedies available.

[63] United States v. Frumento, 563 F.2d 1083, 1089 (3d Cir. 1977) (Rosenn & Hunter, J.J.) (Aldisert, J., dissenting).

[64] 359 U.S. 187 (1959). *See also* Bartkus v. Illinois, 359 U.S. 121 (1959) (holding that a state prosecution for bank robbery was not barred under the due process clause of the fourteenth amendment because of a prior acquittal for a federal offense on substantially the same evidence).

which upheld a federal conviction for destroying communication facilities operated by the United States, even though the defendants previously had been convicted for the same misconduct in state court.

Recent Supreme Court cases suggest that the Court might be ready to modify or reverse *Abbate*.[65] If so, the government could not simultaneously prosecute a person for a RICO violation and the predicate offenses. The government would have to elect which charges to pursue or it would face having some of the counts dismissed. Similarly, the government could not indict an individual under RICO, if he had already been tried in state court for the same conduct.

III. Is RICO Limited to Activities Involving Organized Crime?

Several defendants indicted under RICO have argued that the RICO charges should be dismissed because the statute was intended to apply only to persons involved in "organized crime." In effect, the argument is that one of the elements of a RICO offense is membership in "organized crime." Presumably, under this argument, membership in "organized crime" is implied in the definition of "racketeering activity." Absent such an allegation and proof, the indictment should be dismissed. Four courts have ruled on the question. Three held that RICO is not limited to defendants involved in organized crime,[66] while one held that it is so limited.[67] The majority view seems to be the correct interpretation of the statute.

There is no dispute that RICO was intended to deal primarily with organized crime. The title under which RICO was passed is "The Organized Crime Control Act." The Statement of Findings and Purpose of the Act contained five points, all of which dealt exclusively with organized crime.[68] The concluding paragraph of the statement begins, "It is the purpose of this act to seek the eradication of organized crime in the United States . . . ."[69] Also, the opening statements made in introducing the Act in the House of Representatives,[70] and the debates which followed,[71] all focused on the evils of organized crime and the need to eradicate them. The one court which held that application of RICO is limited to members of organized crime relied on the legislative history's "frequent reference to 'racketeers,' 'organized crime,' . . . as well as 'syndicate,' 'mafia,' and 'cosa nostra.' "[72]

The majority view has looked to the statutory language of RICO and has found that the statute does not restrict itself to organized crime.[73] RICO proscribes specific conduct. It does not proscribe the status of being involved in organized crime. "Racketeering activity" is defined in terms of violation of federal and state statutes.[74] Nowhere in RICO or the Organized Crime Control Act is there a definition of "organized crime." From this it can

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[65] *See, e.g.*, Brown v. Ohio, 97 S. Ct. 2221 (1977) (holding that a prior conviction under state law for joyriding—taking a vehicle without the owner's consent—prohibited a subsequent prosecution for auto theft—joyriding with the intent permanently to deprive the owner of possession). Under this reasoning, a court could say that the predicate acts of racketeering activity are lesser included offenses of the RICO charge, and, therefore, the double jeopardy clause should block prosecution for both. In Abney v. United States, 97 S. Ct. 2034, 2041 (1977), the Court said that "the double jeopardy clause is a guarantee against being twice put to *trial* for the same offense" (emphasis in original). Although speaking of the double jeopardy protection in broad terms, *Abney* held that the double jeopardy clause did not bar a retrial on a conspiracy charge after reversal on evidentiary grounds when it was clear the defendant was convicted and not acquitted of the conspiracy charge at his first trial. *See also* United States v. Frumento, 563 F2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting).

[66] United States v. Campanale, 518 F.2d 352, 363-64 (9th Cir. 1975), *cert. denied sub. nom.*, Grancich v. United States, 423 U.S. 1050 (1976); ("[T]he words of the statute are general. They contain no restriction to particular persons.") United States v. Mandel, 415 F. Supp. 997, 1018-19 (D. Md. 1976); United States v. Amato, 367 F. Supp. 547, 548 (S.D.N.Y. 1973). *Cf.* United States v. McLaurin, 557 F.2d 1064 (5th Cir. 1977) (rejecting defendants' argument that RICO was only intended to reach infiltration by organized crime of legitimate business enterprises and holding that the statute covers enterprises organized for illegitimate purposes); United States v. Roselli, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971) (holding that 18 U.S.C. § 1952, another racketeering statute, applies to anyone who commits the proscribed conduct).

[67] Barr v. WUI/TAS, 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (civil action against a telephone answering service in which it was claimed rates were increased arbitrarily in violation of RICO).

[68] 84 Stat. 922, 923.

[69] *Id.*

[70] *Hearings on S. 30 and Related Proposals Before Sub-Comm. No. 5 of the House Comm. on Judiciary*, 91st Cong., 2d Sess. 77-80 (1970) (statements by Sub-committee Chairman Celler and Congressmen McCulloch and Poff).

[71] 116 Cong. Rec. 602 (1970) (Sen. Hruska); *id.* at 603 (Sen. Allott); *id.* at 607 (Sen. Byrd); *id.* at 819-20 (Sen. Scott); *id.* at 35191 (Rep. Fisk); *id.* at 35196 (Rep. Celler); *id.* at 35200 (Rep. St. Germain).

[72] 66 F.R.D. 109, 111 (S.D.N.Y. 1975).

[73] See cases cited in note 65 *supra*.

[74] See note 4 *supra*.

be inferred that Congress did not intend to prohibit organized crime per se, but rather it intended to prohibit conduct which is associated with organized crime as well as conduct associated with other criminal activity. Indeed, as one court has observed, if conviction under RICO depended on membership in organized crime, the statute would probably be unenforceable or unconstitutional.[75] Such a statute would make its violation, a matter of status and would probably be a denial of equal protection. Additionally, it would be most difficult to formulate a satisfactory and precise definition of "organized crime."

The drafters of RICO recognized this problem. Senator McClellan, chairman of the sub-committee which wrote the statute, stated in a law review article published soon after RICO's passage, "It is impossible to draw an effective statute which reaches most of the commercial activity of organized crime, yet does not include offenses commonly committed by persons outside of organized crime as well."[76] Representative Poff, who served on the House sub-committee which considered RICO, said on the floor of the House:

> [E]ven as to Titles of S. 30 needed primarily in organized crime cases, there are very real limits on the degree to which such provisions can be strictly confined to organized crime cases. . . . S. 30 must, I suggest, stand or fall on constitutional questions without regard to the degree to which it is limited to organized crime cases.[77]

Ironically, senators and representatives who opposed RICO provide some of the most explicit legislative history for the proposition that RICO is not limited to organized crime. Senators Hart and Kennedy in their minority statement said, "[T]he reach of this bill goes beyond organized crime activity. . . . "[78] Representatives Conyers, Mikva and Ryan, in opposing the House bill in committee, said, "Granted we may welcome an organized crime member's conviction, but the titles make no discreet segregation of mobsters. It is a tool to be employed for all."[79]

RICO's application to activity other than organized crime also can be implied from the language of other titles of the Organized Crime Control Act. Title VI, dealing with depositions, is specifically applicable only to cases where the Attorney General certifies "that the legal proceeding is against a person who is believed to participate in organized criminal activity."[80] Title IX of the Act (RICO) is not by its language exclusively limited to organized crime. If Congress had wished to limit RICO to organized crime, it could have done so, as it did with Title VI. Since Congress did not, it can be inferred that RICO's scope extends beyond organized crime.

Finally, to the extent it can, or should, be given effect,[81] the liberal construction clause of RICO[82] will expand, not narrow, the scope of the statute.

IV. The Meaning of "Pattern of Racketeering Activity"

In order to obtain a conviction under RICO, the government must show that the defendant engaged in a "pattern of racketeering activity." "Pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . ."[83] By the definition alone, the term "pattern" does not require that there be a relationship between the two acts of racketeering activity. Nonetheless, the legislative history and judicial construction of the term show that such a connection is necessary.

The Senate Report on RICO explained, "The target of Title IX is thus not sporadic activity.

[75] United States v. Mandel, 415 F. Supp. 997, 1019 (D. Md. 1976).

[76] McClellan, *The Organized Crime Act (S. 30) or its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law 55, 143-44 (1970).

[77] 116 Cong Rec. 35344 (1970) (Rep. Poff's comments were directed to the organized Crime Control Act in general and Title I—grand juries—in particular). The Senate Judiciary Committee, in discussing Title IX, makes an apparent differentiation between organized crime and racketeering. The Committee said the purpose of Title IX is "the elimination of the infiltration of organized crime and racketeering activity into legitimate organizations operating in interstate commerce." S. Rep. No. 91-617, 91st Cong., 1st Sess. 76 (1969). Since the report used the terms "organized crime *and* racketeering activity," it can be inferred that the terms are not synonimous (emphasis supplied). Thus, one can engage in the prohibited racketeering activity without being a member of organized crime.

[78] S. Rep. No 91-617, 91st Cong., 1st Sess. 215 (1969).

[79] H. R. Rep. No. 91-1549, 91st Cong., 2d Sess. 187 (1970).

[80] 18 U.S.C. § 3503(a) (1970). For a list of the other titles of the Organized Crime Control Act, see note 2 *supra*.

[81] See text accompanying notes 116-19 *infra*.

[82] Title IX, § 904(a), 84 Stat. 947.

[83] 18 U.S.C. § 1961(5) (1970).

The infiltration of legitimate businesses normally requires more than one "racketeering activity" and the threat of continuing activity to be effective. It is this factor of continuity, plus relationship, which combine to produce a pattern."[84]

Courts which have considered the issue have held "the racketeering acts must have been connected with each other by some common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts."[85] It also has been held that "'the government must prove such an interrelatedness beyond a reasonable doubt.'"[86] Probably no single test will evolve to determine the presence of the necessary interrelationship between acts of racketeering activity. Connection can be established in many ways. In addition to common motive, courts will or have considered proximity in time of the acts in question, their method of commission, commonality of participants and similarity of victims.[87]

Assuming that an interrelationship between acts is necessary, the issue arises of whether a pattern can exist when the acts are so closely linked that they can be viewed as part of the same transaction. The district court in *United States v. Moeller*[88] said common sense and the canon of narrow construction of penal statutes should require that the "pattern" of acts occur in "*different criminal episodes* . . . that are at least somewhat separated in time and place yet still sufficiently related in purpose to demonstrate a continuity of activity."[89] Nonetheless, the same court, referring to an opinion in its circuit, found that a "pattern" can be established "by two acts occurring on the same day in the same place and forming part of the same criminal episode."[90]

The case to which the district court referred is *United States v. Parness*.[91] In *Parness*, there was a single scheme to take over a hotel. In furtherance of that scheme, a person was sent out of state to pick up two cashier's checks. The checks were then transported out of state, one to repay a loan and the other to pay the lender's attorney. From these acts, the prosecutor alleged three predicate offenses of a RICO violation. One act was the causing a person to travel in interstate commerce in furtherance of a scheme to defraud. Two additional illegal acts derived from the interstate transportation of stolen property. Even though the acts were part of a single scheme with a single purpose,[92] the Second Circuit held this was enough to invoke the harsh provisions of RICO.

Parness is an example of the sweeping nature and potential abuse of RICO. Almost any criminal activity can involve a combination of at least two of the thirty-two federal and state offenses which make up the definition of "racketeering activity." This is especially true when the incorporated federal and state statutes are aimed at the same conduct, such as extortion, gambling, robbery and drug offenses. Thus, application of the Second Circuit's approach to, for example, a single act of

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[84] S. REP. No. 91-617, 91st Cong., 1st Sess. 158 (1969).

[85] United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) (holding that 15 separate instances, within a one and one-half year period, of unlawfully accepting payments from union-shop manufacturers in return for permitting these manufacturers to sub-contract work to non-union shops constituted a pattern). *See also* United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (holding that several rigged card games which occurred over a 19 month period constituted a pattern); United States v. Fineman, 434 F. Supp. 189, 193 (E.D. Pa. 1977) (holding that acceptance of four bribes over a two and one-half year period from parents who wanted their children admitted to graduate school appeared to be a sufficient enough pattern to warrant a trial on the merits); United States v. Moeller, 409 F. Supp. 49, 58 (D. Conn. 1975) (stating in dictum that "[a] 'pattern' can apparently be established in this Circuit by two acts occurring on the same day in the same place and forming part of the same criminal episode"). *Cf.* United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977). In *Ladmer*, the court said a common scheme was necessary, but there was not a pattern of racketeering activity because the allegedly illegal lavish union conventions "did not relate to the essential functions of that union." The court's requirement that the act of racketeering activity relate "to the essential functions" of the enterprise is not supported by the language of the statute or legislative history. *Id.* at 1245.

[86] United States v. Kaye, 556 F.2d 855, 860 (7th Cir. 1977) (quoting United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974)).

[87] In determining the inter-relationship between acts of racketeering activity, courts can be guided by the definition of "pattern of criminal conduct" as used in the title of the Organized Crime Control Act relating to special offenders. 18 U.S.C. § 3575 (1970) provides that "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."

[88] 402 F. Supp. 49 (1975) (holding that a venture to burn a single building is not an "enterprise" within the meaning of RICO).

[89] *Id.* at 57.

[90] *Id.* at 58.

[91] 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[92] *Id.* at 434-35, 441-42.

gambling or extortion could result in a RICO prosecution merely on the basis that the single act is punishable under state and federal laws both of which were incorporated in the definition of "racketeering activity." Even if the two predicate acts which make up a RICO offense are not chargeable under parallel federal and state statutes, it is often easy to allege a state violation as one predicate offense and throw in a catch-all federal violation, such as interstate transportation of stolen goods or mail fraud, as the second predicate offense.[93]

Given the legislative history of RICO which focuses on attacking major criminal operations and the principle of narrow construction of criminal statutes, the *Moeller* approach seems preferable. RICO is too heavy-handed a tool for enforcing the law against a single criminal episode.[94] No matter how terrible that single crime may be, there are ample federal and state statutes to deal with it.

V. The Meaning of "Enterprise"

A key element of a violation of RICO is the existence of an "enterprise" with which the defendant has some connection. In addition to proving a pattern of racketeering activity or collection of unlawful debt, it must be shown that the defendant invested in, maintained an interest in, was employed by, or associated with an enterprise which affected interstate commerce.[95] The statute defines enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[96] Despite the broad definition, several arguments have been made to narrow the meaning of "enterprise."[97] Specifically, it has been urged that "enterprise," and, therefore, RICO, should not apply to illegal enterprises, governmental units, foreign corporations, and individuals who are not associated with a formal organization.

A. Illegal Enterprises

The argument against including illegal activities within the definition of "enterprise" is similar to the argument that RICO should be restricted to "organized crime." Both arguments focus on the main purpose of RICO—"the elimination of the infiltration of organized crime and racketeering into *legitimate organizations* operating in interstate commerce."[98] However, upon a closer examination of the statute and its legislative history, the assertion that "enterprise" does not include illegal activity fails as does a similar argument narrowly construing "racketeering activity."

Eight courts, including three circuit courts of appeals, have considered this issue and have held that "enterprise" includes illegal activities.[99] Only one court has held that "enterprise" applies only to legitimate business,[100] and that decision has been overruled by a subsequent decision.[101] The majority of courts have noted that the definition of "enterprise" contains no restriction limiting its coverage to legitimate entities.[102] It has been argued that had Congress wished to include such a restriction, it would have been easy to do so.[103]

[93] It is not necessary to indict a person specifically for a predicate offense in order to charge the person under RICO, although it is necessary to specify the predicate offense in the RICO indictment. *Id.* at 441. For example, if a person engages in a fraud scheme for which two acts of mail fraud are the predicate offenses, it is not necessary to issue a three-count indictment charging two counts of mail fraud and one RICO count; a single count under RICO will be sufficient. In practice, prosecutors usually indict for predicate offenses as well as for RICO.

[94] As previously discussed, RICO does have a clause which states the statute shall be liberally construed. Although the clause is indicative of Congress' intent to have a broad statute, the clause should not be given effect when it conflicts with the constitutional principle that a criminal statute must be narrowly construed or that its words be given no more than their plain meaning. See text accompanying notes 115-17 *infra* and notes 19 & 23 *supra*.

[95] 18 U.S.C. § 1962 (1970).

[96] 18 U.S.C. § 1961(4) (1970).

[97] The meaning of the word "enterprise" has been the most litigated issue under RICO. As of this writing 17 of the 37 reported cases have discussed the subject.

[98] S. Rep. No. 91-617, 91st Cong., 1st Sess. 80 (1969) (emphasis supplied).

[99] United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977) (prostitution ring); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (gambling); United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (rigged card games); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (gambling); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (gambling); United States v. Fineman, 434 F. Supp. 189, 193 (E.D. Pa. 1977) (taking bribes); United States v. Winstadt, 421 F. Supp. 295, 296 (N.D. Ill. 1976) (gambling); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975) (usury).

[100] United States v. Moeller, 402 F. Supp. 49, 58-60 (D. Conn. 1975) (burning buildings).

[101] United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (gambling).

[102] *See, e.g.*, United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

[103] United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976).

Legislative history supports the broad interpretation of "enterprise." The Statement of Findings and Purpose contained in the Organized Crime Control Act speaks of the need "to seek the eradication of organized crime."[104] It does not limit its scope to infiltration of legitimate businesses. Further, the Senate Report on RICO indicated that one of the statute's purposes was to eliminate illegal gambling operations.[105]

B. Governmental Units

Several recent RICO cases have involved corrupt activity of public officials. To meet the "enterprise" requirement of the statute, the prosecution has asserted that government is an "enterprise" within the meaning of RICO. Finding that a governmental unit is an "enterprise" has special significance. Not only would conviction under RICO make a public official subject to fines and imprisonment, but also, the statute can be construed to require forfeiture of the official's public office.

The criminal penalties section provides that whoever violates RICO "shall forfeit ... (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in ... any enterprise ... which he has ... participated in ... in violation of section 1962."[106] Assuming that a government is an "enterprise" and that an official's illegal conduct related to his public office (*e.g.*, accepting bribes), the public office would seem to be subject to forfeiture. That office is an interest in an enterprise maintained in violation of section 1962. The penalty provisions, like the proscriptions, are written broadly, and there is no indication that forfeitable interests are confined to physical assets or money. As yet, no reported cases have dealt with the issue of forfeiture of public office. The Fifth Circuit, however, has held that a union official who violated RICO had to forfeit his various offices within the union and his employee welfare benefit plans.[107] A similar holding could be expected regarding forfeiture of public offices.[108]

Three cases have dealt with the issue of whether a governmental unit is an "enterprise." Two circuit courts have held that a governmental unit is an enterprise. One district court has held that it is not. In *United States v. Brown*,[109] the court found that the actual language of the statute is very broad, encompassing any "legal entity," including public entities such as a police department. The court also relied on a portion of the Statement of Findings and Purpose of the Organized Crime Control Act which states that "organized crime" uses its illegally obtained money "to subvert and corrupt our democratic processes."[110] *United States v. Frumento* focused on the "devastating effects" of racketeering activity on the American economy and found that Congress must have meant to include governments within the definition of "enterprise" since governments regulate and have a major effect on the economy.[111] In *Frumento*, the governmental unit involved was the Pennsylvania Bureau of Cigarette and Beverage Taxes, some employees of which were bootlegging large quantities of untaxed cigarettes.

If the dictionary definition of "enterprise" provided the applicable standard, the government probably would not meet the requirement since "enterprise" is normally associated with business or making money.[112] The statute, however, provides a broader definition. It contains no restrictions regarding business or profit-making purpose. Applying the words of the statute alone, government meets the requirement of being "any ... corporation ... or other legal entity."[113] Further, from a policy standpoint, the need to remove racketeering activity from government is as great or greater than the need to remove racketeering from private business. Corruption within a government entity does more to undermine democratic institutions and public confidence than does corruption of business.

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[104] 84 Stat. 923.

[105] S. REP. NO. 91-617, 91st Cong., 1st Sess. 72-73 (1969).

[106] 18 U.S.C. § 1963(a) (1970).

[107] United States v. Rubin, 559 F.2d 975, 990-93 (5th Cir. 1977). *Rubin* held, however, that although current offices were subject to forfeiture, the trial court could not order that the defendant could be barred from such offices forever since the defendant did not yet have an "interest" in future offices.

[108] A state official convicted under RICO could argue that a federal statute requiring forfeiture of a state office is an infringement on state sovereignty. In most instances, the issue would be moot since convicted felons are usually removed from office automatically. The forfeiture provisions of RICO will be discussed further in the section on "Criminal Penalties," *infra*.

[109] 555 F.2d 407, 415 (5th Cir. 1977).

[110] *Id.* (quoting 84 Stat. 923).

[111] 563 F.2d 1083, 1089 (3rd Cir. 1977). The district court also held that the governmental units met the definition of "enterprise." United States v. Frumento, 405 F. Supp. 23, 29-30 (E.D. Pa. 1975), *followed in* United States v. Frumento, 426 F. Supp. 797, 801-03 (E.D. Pa. 1976).

[112] AMERICAN HERITAGE DICTIONARY 436 (New College ed. 1976).

[113] 18 U.S.C. § 1961(4). For full definition, see text accompanying note 96 *supra*.

The only case which has held that governmental units are not "enterprises" within the meaning of RICO is *United States v. Mandel*,[114] in which the governor of Maryland and others were charged with mail fraud and racketeering. The court directly criticized the district court decision in *Frumento*[115] and ruled that the State of Maryland is not an "enterprise." Unlike the courts in *Brown* and *Frumento*, the Court in *Mandel* refused to apply RICO's liberal construction clause.

> While Congress may instruct courts to give broad interpretations to civil provisions, it cannot require courts to abandon the traditional canon of interpretation that ambiguities in criminal statutes are to be construed in favor of leniency. To do so would be to violate the principles of due process on which the canon of interpretation rests.[116]

The court said the legislative history and forfeiture remedies indicated that RICO was meant to apply only to commercial entities. In addition, the Court reasoned that states—unlike private businesses—have their own resources with which to fight internal corruption and that courts "should be reluctant to give a broad construction to a criminal statute which would transform matters primarily of local concern into federal felonies."[117]

Mandel is correct in refusing to apply the liberal construction clause. The Supreme Court has consistently held that criminal statutes should be strictly construed and that their words should be given no more than their plain meaning.[118] Although Congress has intended that RICO have broad scope, the statute's reach and remedies cannot exceed the plain meaning of its words. If RICO is to have broad application, the application must be based on the words of proscription and not on stretched interpretations utilizing the liberal construction clause. To do otherwise would result in persons convicted of crimes without proper notice of what conduct is prohibited, and that would be violative of due process.[119]

Even though the *Mandel* court was properly concerned with the liberal construction clause and intrusions into state power, the fact remains that "enterprise" has been given an especially broad definition which appears to include governmental units.

C. Foreign Corporations

A third attempt to limit the meaning of "enterprise" was made by a defendant who engaged in fraud and racketeering activities in the United States in order to obtain an interest in a gambling hotel located in a foreign country. The defendant argued that RICO was not intended to reach investments in foreign corporations. The Second Circuit disagreed, holding that RICO was intended to reach effects on the American economy regardless of whether the enterprise was located in the United States. "[T]he salutary purpose of the act would be frustrated by such construction. It would permit those who ravage the American economy to escape prosecution simply by investing the proceeds of their ill-gotten gains in a foreign enterprise."[120]

D. Individuals

Finally, it has been argued that individuals do not constitute an enterprise. More specifically, persons who by their associations constitute an enterprise should not be indicted for associating with that enterprise.[121] However, in this instance, as before, the statutory definition of enterprise requires a different result. "Enterprise" includes "any individual ... or other legal entity, and ... any group of individuals associated in fact although not a legal entity."[122] If one applies the ordinary meaning of "enterprise," it could be assumed that enterprises are analogous to normal businesses which deal in products or services for their own profit. The statute, however, is not so restrictive. Thus, the words of the statute referring to "individuals," combined with the majority view that "enterprise" encompasses illegitimate activity, leads to the conclusions that an individual robber,

[114] 415 F. Supp. 997 (D. Md. 1976). Governor Marvin Mandel is the most famous person to be convicted under RICO. He was found guilty by a jury Aug. 23, 1977, of one RICO count and 15 counts of mail fraud. The court dismissed the other two counts—one each for RICO and mail fraud. Governor Mandel was sentenced Oct. 7, 1977, to four years imprisonment for each count for which he was convicted. The terms are to be served concurrently. He faced a maximum sentence of 105 years imprisonment and a $42,000 fine. Although he is not currently serving as governor, he has not resigned his post and, therefore, can reclaim the governorship if his convictions are overturned on appeal. N.Y. Times, Oct. 8, 1977, § 1, col. 1.

[115] 405 F. Supp. 23, 29-30 (E.D. Pa. 1975).

[116] 415 F. Supp. at 1022 (citations omitted).

[117] *Id.* at 1021.

[118] *See* note 19 *supra*.

[119] *Id.*

[120] United States v. Parness, 503 F.2d 430, 439 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[121] United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976).

[122] 18 U.S.C. § 1961(4) (1970).

briber, extortionist, or gambler can be an enterprise within the meaning of RICO. Using a commercial analogy, it could be said that the robber or briber is a sole proprietor or independent contractor engaged in the business of crime for personal profit. In the one published case where this issue was raised, the Fifth Circuit, without discussion, concluded that individuals engaged in gambling constitute an enterprise.[123]

VI. Criminal Penalties

There are three criminal penalties for violation of RICO, all of which may be used simultaneously. These include a fine of not more than $25,000, imprisonment for not more than twenty years and forfeiture of any interest acquired or maintained in violation of the statute.[124] These penalties are severe, and, in many cases, exceed the penalties for the individual crimes underlying the RICO violation. For example, a person who commits two acts of mail fraud would be subject to a maximum sentence of a $2,000 fine and ten years imprisonment, with no forfeiture.[125] This is the maximum penalty, and it assumes that the sentences are to be served consecutively, which is not usually the case.

RICO can even apply to persons who commit two misdemeanors under federal labor law. One of the offenses which make up the definition of "racketeering activity" is a violation of 29 U.S.C. § 186, which prohibits union representatives from receiving money, other than normal wages, from an employer.[126] The maximum penalty for each

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[123] United States v. Morris, 532 F.2d 436, 442 (5th Cir. 1976) (holding that a group of individuals who arranged rigged card games constituted an enterprise); United States v. Hawes, 529 F.2d 472, 479 (5th Cir. 1976) (holding that two individuals constituted a gambling enterprise). Other RICO cases involving gambling have appeared to treat the gambling enterprise as an entity separate from the individuals who made it up. *See* United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). Those cases, however, did not hold that the individuals associated with the illegal operation could not in and of themselves constitute an enterprise.

[124] 18 U.S.C. § 1963(a) (1970). The forfeiture provisions raise many issues, some of which have been discussed already. See text accompanying notes 34-37 (vagueness) and notes 106-09 (type of interests subject to forfeiture) *supra.*

The statute allows district courts to enter restraining orders and prohibitions in connection with property and interests which are subject to forfeiture. 18 U.S.C. § 1963(b). Two reported cases have considered an application for injunction under § 1963(b). In United States v. Mandel, 408 F. Supp. 679, 682-84 (D. Md. 1976), the court considered by analogy four factors used in determining whether a preliminary injunction should issue in a civil case:

(1) Has petitioner made a strong showing that he is likely to prevail on the merits at trial?
(2) Has irreparable harm in the absence of relief been shown?
(3) Would the issuance of the injunction substantially harm other parties interested in the proceedings?
(4) Where does the public interest lie?

Id. at 682. The court refused to issue an injunction which would have prohibited transfer of any property subject to forfeiture. The court noted there was no showing that the defendants were attempting to dispose of such property and that non-defendants had interests in the same property which would be impaired if an injunction were issued. While not foreclosing the possibility of an injunction in some cases, the court said that an injunction based in part on a finding that the Government was likely to succeed on the merits "would be incompatible with the presumption of innocence defendants enjoy until such time, if ever, as a jury finds them guilty beyond a reasonable doubt." *Id.* at 683.

In the second case, the defendant also argued that an injunction would deprive him of his presumption of innocence. Here, however, the court issued an injunction prohibiting the defendant from transferring his business assets. The court said, "[T]he restraining order serves only to maintain the status quo and thus is neither illegal nor unconstitutional." United States v. Scalzitti, 408 F. Supp. 1014, 1015 (W.D. Pa. 1975). The judge added that the restraining order might be removed if the defendant received a good faith offer to buy his business. *Id.*

In addition to *Scalzitti,* two other cases have held that the forfeiture provisions are constitutional. United States v. Parness, No. 73 Cr. 157 (S.D.N.Y. 1973), *aff'd,* 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975); United States v. Amato, 367 F. Supp. 547, 549 (S.D.N.Y. 1973).

In order for the government to obtain forfeiture of interest under RICO, it must give notice in the indictment or information of its intent to do so. Fed. R. Crim. P. 7(c) (2) provides: "When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture." The Rule was adopted in 1972. The Advisory Committee notes explained that it was added, along with Rule 31(e) and 32(b)(2), primarily to provide procedures for implementing the forfeiture provisions of RICO and 21 U.S.C. § 848(a) (2) (1970) (providing the forfeiture of interests acquired through participation in a narcotics enterprise). In United States v. Hall, 521 F.2d 406 (9th Cir. 1975), the court ordered dismissal of an indictment because the indictment failed to identify the interests subject to forfeiture.

[125] 18 U.S.C. § 1341 (1970).

[126] In United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977), the Government brought a civil action under RICO claiming that union officers embezzled union funds by attending lavish conventions at union expense. The court dismissed the counts on the grounds

commission of that misdemeanor, assuming the defendant is not also being prosecuted under RICO, is one year imprisonment and a $10,000 fine. Similarly, there are several state offenses which could constitute a RICO offense where the maximum state penalties would be substantially less than the RICO penalties, such as the manufacture or delivery of ten to thirty grams of cannabis,[127] the theft of property by threat (extortion) where the property is valued at less than $150[128] or the keeping of a gambling place.[129] Each of these offenses, under Illinois law, is punishable by imprisonment for one to three years[130]—about one-seventh the term of imprisonment under RICO for exactly the same conduct.

While a true member of organized crime who engages in acts of violence or major financial crimes may well deserve the maximum penalties, the same cannot be said for the small-time operator who engages in petty gambling, drug dealing, or extortion. If such persons deserve punishment at all, the state's penalty appears more appropriate than the federal penalty.

The Department of Justice does not have any written guidelines for determining when a RICO prosecution should be initiated instead of charging only the lesser predicate offense.[131] The chief of the Justice Department task force in charge of RICO cases has said, "We're not going to power rape nickle and dime cases. It's just common sense ... and good judgment.... We will only hit substantial conduct."[132] The task force chief explained that proposed RICO prosecutions are reviewed several times before an indictment is handed down. The review requires approval not only by the local United States Attorney and his assistants, but also by several of the Justice Department officials in Washington, including the chief of the unit in charge of organized crime and racketeering activity.

Despite the avowed good intentions of the Justice Department and the several levels of review, the potential for abuse exists. If the government begins to prosecute small-time violators under RICO, it could be argued that the defendants are being subjected to cruel and unusual punishment in violation of the eighth amendment.[133] While courts generally will sustain a sentence if it conforms to the statutory scheme,[134] the Sixth Circuit has held that "[a] sentence which is disproportionate to the crime for which it is administered may be held to violate the Eighth Amendment solely because of the length of imprisonment imposed."[135] The court took the action in a case in which an Ohio defendant had been sentenced to a mandatory ten to twenty year term for sale of a small quantity of marijuana. The Supreme Court later vacated and remanded the case, to be considered in light of a subsequently passed Ohio statute which imposed less severe penalties.[136] The Supreme Court of California, applying a state constitutional provision prohibiting cruel and unusual punishment, also has found disproportionate sentences to be cruel and unusual.[137] The court said the validity of a

that a misuse of union funds was not shown and that a pattern of racketeering activity was not established.

[127] ILL. REV. STAT. ch. 38, § 705(c) (1975).

[128] *Id.* at § 16-1.

[129] *Id.* at § 28-3.

[130] All three offenses are Class 4 felonies, which carry a one to three year sentence. *Id.* at § 1005-8-1(b) (5).

[131] Dowd Interview, *supra* note 21.

[132] *Id.*

[133] Although the Supreme Court has never heard a case involving RICO, it has observed that RICO and other sections of the Organized Crime Control Act contain "relatively severe penalty provisions." Iannelli v. United States, 420 U.S. 770, 786-87 & n.19 (1975) (involving gambling conspiracies indicted under 18 U.S.C. §§ 371 & 1955 (1970)). The Court offers some hope that it will not always look favorably on attempts to impose double prosecutions and sentences for the same conduct:

> [W]e do not imply that the distinct nature of the crimes of conspiracy to violate and violation of § 1955 should prompt prosecutors to seek separate convictions in every case, or judges necessarily to sentence in a manner that imposes an additional sanction for conspiracy to violate § 1955 and the consummation of that end. Those decisions fall within the sound discretion of each, and should be rendered in accordance with the facts and circumstances of a particular case.

420 U.S. at 791. This view could have application to RICO cases in which the Government seeks conviction and sentencing on both the predicate offense and the RICO charge, and both offenses arise out of the same conduct.

[134] Note, *The United States Courts of Appeals: 1974-1975 Term Criminal Law and Procedure*, 64 GEO. L.J. 167, 574 (1975).

[135] Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975), *vacated and remanded*, Perini v. Downey, 423 U.S. 993 (1975).

[136] 423 U.S. 993 (1975).

[137] *In re* Lynch, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1971) (holding that a life sentence for second offense indecent exposure is cruel and unusual). *See also In re* Grant, 18 Cal. 3d 1, 553 P.2d 590, 132 Cal. Rptr. 430 (1976) (holding that a drug statute which proscribed the transportation and sale of marijuana and imposed a minimum 10-year sentence with no parole constituted cruel and unusual punishment under the state constitution). *But cf.* People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338 371 N.Y.S. 2d 471 (1975)

particular sentence should be determined by "whether the maximum term of imprisonment permitted by the statute ... exceeded the constitutional limit, regardless of whether a lesser term may be fixed in [a] particular case."[138]

An argument similar to the eighth amendment challenge is that it would be an abuse of prosecutorial discretion to charge someone under RICO if the illegal conduct is relatively minor in nature. The defense might agree that the alleged misconduct warrants some charge, but it could still argue that a RICO indictment is abusive if the conduct complained of is not substantial. A defense based on abuse of prosecutorial discretion would be hard to win. Cases where the defense has been successful have usually involved government abuse on the basis of race[139] or exercise of free speech.[140] Neither of these abuses is usually at issue in RICO prosecutions. Rather, the government might abuse RICO because it regards the statute as a useful tool against any criminal, major or minor, or because it wishes to convict a target defendant even though the specific conduct for which the person is charged is minor in nature.

Even if abuse under RICO is not based on the more traditional factors of race or exercise of free speech, courts should be willing to examine challenges based on the eighth amendment or abuse of prosecutorial discretion.[141] Among the factors which should be weighed are the severity and number of offenses, injury to victims and, perhaps, the defendant's association with organized crime.[142] Among the most basic notions of due process are that a punishment should fit the crime and that the government should be fair in its prosecutions. Case-by-case analysis by the courts may be difficult, but necessary, in order to avoid abusive application of RICO.

VII. Civil Remedies and Discovery

One of the features which makes RICO most unusual among criminal statutes, is its provision for civil remedies and discovery. Modeled after the antitrust laws, RICO allows actions by the government as well as private treble damage actions by persons injured by racketeering activities.[143] In order to prevent and restrain violations of RICO, district courts may issue orders including, but not limited to:

> (1) ordering any person to divest himself of any interest, direct or indirect, in any enterprise;
> (2) imposing reasonable restrictions on the future activities of investments of any person, ...
> (3) ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[144]

A civil proceeding to enjoin violations of RICO is not rendered criminal in character by the fact that the same acts also are punishable as crimes.[145] Although injunctions traditionally are an equitable remedy, it has been held that it is not a prerequisite for injunction that there be inadequate remedy at law or "irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962."[146]

An advantage to the government in seeking civil as opposed to criminal remedies is that it is faced with a lesser burden of proof. The statute does not specify what degree of proof is necessary before ordering divestiture, dissolution or restrictions, but the legislative history indicates that "preponderance of the evidence" will suffice.[147]

(holding that drug laws mandating life imprisonment and, therefore, lifetime parole if on parole release, did not constitute cruel and unusual punishment).

[138] 8 Cal. 3d at 419, 503 P.2d at 926, 105 Cal. Rptr. at 222.

[139] *See, e.g.,* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that an ordinance regulating laundries which was fair on its face was nonetheless illegally enforced when it was used principally against Chinese).

[140] *See, e.g.,* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (holding in a prosecution for failing to possess a draft card, the defendant had made a showing that the prosecution had been initiated because he had exercised his right of free speech, and that the case should be remanded for a hearing at which the Government would have the burden of proving the prosecution was non-discriminatory). *But cf.* Oyler v. Boles, 368 U.S. 448, 456 (1962) (the "conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation").

[141] In United States v. Falk, 479 F.2d at 624, the court stated: "[W]e wish to note our disapproval of the apparently too frequent, and often too easy, practice of dismissing all allegations of illegal discrimination in the enforcement of criminal laws.... "

[142] The defendant's association with organized crime, like his association with a conspiracy, would tend to show the severity of the crime and surrounding circumstances. Caution should be taken, however, not to convict someone solely on the basis of the status of being a member of "organized crime."

[143] 18 U.S.C. § 1964(c) (1970).

[144] *Id.* at § 1964(a) (1970).

[145] United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

[146] *Id.* at 1358-59.

[147] *Hearing on Measures Related to Organized Crime Before the Sub-Comm. on Criminal Laws and Procedures of the Senate*

Because the proceedings are civil in nature, the government or private complainant is entitled to discovery. If the subject of investigation balks at discovery, the court can use its contempt powers. In addition to normal discovery, RICO also provides for a "Civil Investigative Demand," under which the Attorney General, prior to institution of criminal or civil proceedings, may require any person or enterprise to produce "any documentary materials relevant to a racketeering investigation."[148] Such a demand may not require production of documents when the demand would otherwise be held to be unreasonable or the material would be privileged if requested in a subpoena duces tecum issued by a federal court.[149] Although the fruits of an investigative demand would be about the same as those gained through normal discovery, the demand gives the Attorney General more autonomy without court supervision.

VIII. Conclusion

RICO was passed by Congress with a laudable motive: the elimination of organized crime. But in an effort to catch all possible members of organized crime and to avoid the constitutional problem of making a crime out of the status of being a member of organized crime, Congress passed a sweeping Act which intrudes on state power and has great potential for abuse against individual defendants.

No constitutional challenges to RICO have, as yet, been upheld. Constitutional challenges may, however, still be mounted on several grounds. These grounds include vagueness, double jeopardy and cruel and unusual punishment. Such challenges are more likely to be successful the more abusive a particular RICO prosecution appears to be.

Substantively, RICO does not create any new crimes. All offenses which constitute a RICO violation already are offenses under state and federal law. What is new under RICO are the harsh penalties, including forfeiture, and antitrust-type civil remedies. Such remedies may be quite justified and effective against members of organized crime and persons who commit very serious felonies, but they are abusive if applied against individual defendants who commit relatively minor offenses and have no connection to organized crime. Unfortunately, the statute makes no distinction between serious and minor offenders.

An initial step to improve the statute would be to restrict RICO's application so that it would apply only to felonies involving physical injury or financial crimes which involve a large amount of money, such as $100,000. To be sure, there may be some members of organized crime who, under the proposed modification, would not be covered by RICO, but they still would be covered by the thirty-two types of federal and state crimes which make up the definition of "racketeering activity." More importantly, such restrictions would limit the potential for the statute's abusive use against minor offenders. Until such revisions of RICO are made, we will have to rely upon prosecutorial discretion and upon careful review by the courts.

Comm. on the Judiciary, 91st Cong., 1st Sess. 388 (1970) (testimony of Assistant Attorney General Wilson). Without specifying the standard of proof, the Seventh Circuit in United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975), said, "[T]he standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering."

[148] 18 U.S.C. § 1968 (1970).

[149] *Id.*