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RICO: THE CRIME OF BEING A CRIMINAL, PARTS I & II*

*Gerard E. Lynch***

One of the most controversial statutes in the federal criminal code is that entitled "Racketeer-Influenced and Corrupt Organizations," known familiarly by its acronym, RICO.¹ Passed in 1970 as title IX of the Organized Crime Control Act of 1970,² RICO has attracted much attention because of its draconian penalties, including innovative forfeiture provisions; its broad draftsmanship, which has left it open to a wide range of applications, not all of which were foreseen or intended by the Congress that enacted it; and the sometimes dramatic prosecutions that have been brought in its name.³

RICO's complexity has attracted several efforts to unscramble the many issues of interpretation it poses.⁴ The potency of its sanctions and the procedural advantages it bestows on prosecutors have drawn polemics of praise⁵ and criticism⁶ from practitioners and scholars with

* These are the first two parts of a four part Article. Parts III and IV will appear in the next issue of the Columbia Law Review.

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1. 18 U.S.C. §§ 1961-1968 (1982 & Supp. III 1985).

2. Pub. L. No. 91-452, 84 Stat. 941 (1970).

3. In the Southern District of New York alone, RICO has been used to prosecute members of the Black Liberation Army for a series of armed bank robberies, *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), cert. denied, 106 S. Ct. 124 (1985); a band of Croatian terrorists for bombings and extortion, *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983) and *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); the heads of New York's "Five Families" of organized crime for constituting the ruling "Commission" of the Mafia, see Lubasch, *Mob's Ruling "Commission" to Go on Trial in New York*, N.Y. Times, Sept. 7, 1986, at 51, col. 1; several of New York City's most powerful politicians for corrupting the award of contracts by its Parking Violations Bureau, see Meislin, *Friedman Trial Opens as Judge Advises Jurors*, N.Y. Times, Sept. 23, 1986, at B1, col. 3; and international commodities trader Marc Rich and associated entities and individuals for evasion of federal energy regulations and "the largest known criminal scheme to avoid paying taxes in history," A. Copetas, *Metal Men 199-202* (1985).

4. See, e.g., Bradley, *Racketeers, Congress and the Courts: Analysis of RICO*, 65 Iowa L. Rev. 837 (1980) [hereinafter Bradley, RICO].

5. See, e.g., Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237 (1982) [hereinafter Blakey, RICO Civil Fraud]; Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980) [hereinafter Blakey & Gettings, Basic Concepts]; Blakey & Goldstock, "On the Waterfront": RICO and Labor Racketeering, 17 Am. Crim. L. Rev. 341 (1980).

6. See, e.g., Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 Ford-

ties to law enforcement or defense practice. Yet there has been little discussion of the fundamental questions RICO poses concerning some of our basic assumptions about criminal law and procedure.

One reason for this lack of discussion may be that the uses of RICO that most starkly raise the issues I have in mind were not contemplated in the congressional debates about the statute and have become more clearly dominant with the passage of time. Congress viewed RICO principally as a tool for attacking the specific problem of infiltration of legitimate business by organized criminal syndicates.⁷ As such, RICO has hardly been a dramatic success. Few notable RICO prosecutions have dealt directly with this sort of criminal activity.⁸

Instead, prosecutors have seized on the virtually unlimited sweep of the language of RICO to bring a wide variety of different prosecutions in the form of RICO indictments. All but ignoring those subsections of RICO that directly prohibit the act of infiltrating legitimate business by investment of illicit profits or by illegitimate tactics,⁹ prosecutors have relied principally on the expansive prohibition of the operation of an enterprise through a pattern of racketeering activity¹⁰ to strike at those—whether or not they fit any ordinary definition of “racketeer” or “organized criminal”¹¹—who commit crimes in conducting the affairs of businesses, labor unions, and government offices.

More importantly, a large proportion of RICO prosecutions, and the greatest number of the most visible ones, have been directed at the operations of illegitimate criminal enterprises themselves. Through an expansive (though quite literal) interpretation of section 1962(c), prosecutors have moved directly against “organized crime” itself, in both

ham L. Rev. 165 (1980) [hereinafter Tarlow, RICO: The New Darling]; Tarlow, RICO Revisited, 17 Ga. L. Rev. 291 (1983) [hereinafter Tarlow, RICO Revisited].

7. See *infra* notes 77–83 and accompanying text. The Senate Report accompanying the bill that became RICO expressly stated its purpose to be “the elimination of the infiltration of organized crime and racketeering into legitimate organizations operated in interstate commerce.” Senate Comm. on the Judiciary, Report on Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969); see also Bradley, RICO, *supra* note 4, at 852 & n.83 (purpose of bill was to prevent infiltration of legitimate business).

8. See *infra* notes 270–294 and accompanying text.

9. 18 U.S.C. §§ 1962(a), (b) (1982).

10. 18 U.S.C. § 1962(c) (1982).

11. As will be seen below, one of the difficulties of drafting, administering, or interpreting a scheme that aims at “organized crime” is defining the target. “There is no agreement on what organized crime is and, consequently, on precisely whom or what the Government is fighting.” Comptroller General of the United States, Report to the Congress: War on Organized Crime Faltering—Federal Strike Forces Not Getting the Job Done i (1977). As a proper noun, “Organized Crime” means to most people a formally structured criminal syndicate, or even more specifically, the Sicilian-derived “La Cosa Nostra” or “Mafia.” In a broader, common noun use, “organized crime” may be taken literally to mean any criminal activity that is “organized,” that is, any crimes committed by a relatively structured continuing group of individuals devoted to crime as a profession.

the narrow and broad senses of the term. In cases of this sort, defendants have been tried for engaging with others in series of crimes having looser connections than have traditionally been permitted even in conspiracy prosecutions.¹² Although particular "predicate acts" must be proven, such prosecutions tend to focus not on the defendant's particular anti-social acts, hut on whether an examination of broad stretches of the defendant's criminal career and those of his associates reveals that he has associated himself with a criminal combine. Necessarily, RICO prosecutions put before the jury charges that a particular defendant engaged in not just one but several, often very loosely related, crimes, and frequently also present an equally ill-assorted set of charges against co-defendants.¹³

These creative uses of the statute present a number of interesting questions. First, how did a statute originally conceived to serve a particular, relatively narrow purpose come to be drafted and interpreted as an all-purpose prosecutorial tool? Part I of this Article suggests that the answer is to be found in the practical and theoretical deficiencies of the original RICO idea, and in a legislative dynamic by which the problems of draftsmanship caused by those deficiencies were solved by repeated expansion of the statutory coverage. Second, what in fact have prosecutors done with such a flexible instrument? Part II argues that, given a weapon that could be used against virtually any kind of criminal behavior, prosecutors have responded by using RICO in a few identifiable patterns, which correspond to what law enforcement officials apparently believe to be substantive and procedural gaps in the federal criminal code.

Part III¹⁴ addresses what I believe is the most innovative and questionable feature of RICO, its use as an expanded conspiracy statute to prosecute members of criminal enterprises for an assortment of criminal offenses. That part of the Article asks whether the statute represents a departure from traditional models of criminal law and procedure, and whether the model it adopts should be perpetuated. Part III concludes that this use of RICO represents a continuation and expansion of trends visible in federal conspiracy law that move away from a traditional concentration on assessing conduct in specific transactions and toward the presentation of broader patterns of conduct and association in criminal proceedings. It is argued that such RICO prosecutions should not be understood simply as illegitimate departures from accepted norms. Rather, the prosecutorial and judicial expansion

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

13. See, e.g., *United States v. Castellano*, 610 F. Supp. 1359 (S.D.N.Y. 1985), discussed in Lynch, *infra* note 14, at notes 53-62 and accompanying text.

14. Parts III and IV appear as Lynch, *RICO: The Crime of Being a Criminal*, Parts III and IV, 87 *Colum. L. Rev.* (forthcoming June, 1987) [hereinafter Lynch].

of RICO is a product of the greater knowledge of the nature of organized criminal activities that results from modern investigatory methods.

Overall, the Article concludes that the principal uses of RICO have been appropriate and valuable, but that its major benefits can be captured by a series of specific amendments to the federal criminal code, obviating the need for a statute that sweeps under one heading, with a single penalty structure, everything from illegal dice games to business fraud to terrorism and murder. More tentatively, the Article concludes that to the extent that RICO is not fully consistent with our traditional notions of what constitutes a crime, such inconsistency does not automatically discredit the statute, but rather constitutes reason to reexamine those notions.¹⁵ Part IV summarizes these conclusions and makes specific suggestions for statutory reform.

I. THE STRANGE EVOLUTION OF RICO

A. *The Uses of History*

There are several reasons for constructing a detailed account of the history of RICO's legislative development and judicial interpretation. First, the legislative history of the statute has been a source of controversy. Though careful commentators have concluded that Congress intended RICO as a specific response to the problem of criminal infiltration of legitimate enterprises,¹⁶ courts, including the Supreme Court of the United States,¹⁷ and at least one highly influential commentator¹⁸ have found in the legislative history much broader purposes and have used their findings to justify sweeping interpretations of the statute. Since the latter view, which has had considerable influence on the development of the law, is wrong,¹⁹ and the commentators who criticize it²⁰ have presented their conclusions in rather summary form, a careful review of the evidence is necessary to set the record straight.

Second, the story of how RICO came to be what it is has implica-

15. This Article does not directly address the burgeoning use of the private civil remedies provided by RICO, which since about 1970 have generated a tremendous wave of federal lawsuits. See, e.g., Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 460-62 (1986); Pickholz, *The Firestorm Over Civil RICO*, A.B.A. J., Mar. 1985, at 78-79. An excellent compilation of fact and opinion about the uses and abuses of civil RICO can be found in *Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess., Serial No. J-99-37* (1985).

16. See, e.g., Bradley, *RICO*, supra note 4, at 852 & n.83; Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 Va. L. Rev. 109, 116 (1979).

17. *Russello v. United States*, 464 U.S. 16, 26-29 (1983); see *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

18. Blakey, *RICO Civil Fraud*, supra note 5, at 253-80; Blakey & Gettings, *Basic Concepts*, supra note 5, at 1014-21.

19. See *infra* notes 84-98 and accompanying text.

20. See *supra* note 16.

tions for our assessment of the statute. Prior readings of the legislative history have addressed the subject as an aid to interpretation of the statute's proper application in controversial cases. Those controversies have mostly been settled by judicial decision; moreover, legislative amendments in 1984 either specifically or by implication ratified the expansive judicial interpretations, whether or not those decisions accurately reflected the original legislative intent.

But an accurate reading of the legislative history, and of the judicial reaction to that history, has significance beyond the answers to specific issues of interpretation. The radically contingent nature of the drafting, adoption, and interpretation of RICO tells us something about the way in which important concepts enter our law. The history of RICO, moreover, should make us eager to reassess its utility and fairness. If, as I argue below, the broad consequences of RICO are essentially by-products of a failed legislative effort to address a highly specific problem, it becomes all the more urgent to ask whether those consequences are desirable in their own right. At the same time, an understanding that the most significant current uses of RICO were undertaken by prosecutors and legitimated by courts virtually in the teeth of a narrow legislative purpose should give us a healthy respect for the power of the forces motivating those uses.

Third, an examination of this history is instructive about how both the legislature and the judiciary respond to crime. RICO is only the most recent initiative in a long process of federal action against organized criminal activity. As Professor Bradley has shown, the federal role in prosecuting organized crime has consistently expanded for over 100 years, fueled by the political popularity of anything that can be marketed as part of a crusade against a shadowy and threatening enemy.²¹ The history of RICO confirms that when pressure to produce crime legislation is present, drafting choices tend to be made in an expansionist direction, and careful consideration of the precise scope of proposed legislation is rare. In the case of RICO, the vagueness of early proposals to address the infiltration of legitimate business was avoided not by refinement of the original concepts, still less by serious debate about whether the effort was worthwhile, but instead by expanding the concept until it was virtually all-encompassing.

21. Bradley, *Racketeering and the Federalization of Crime*, 22 *Am. Crim. L. Rev.* 213 (1984) [hereinafter Bradley, *Racketeering*]. Of course, the steady growth of the role of the federal government in dealing with all sorts of problems once regarded as intrinsically local has been a fundamental trend in constitutional law and politics in the same period. But the almost complete lack of political and judicial opposition to federalization of law enforcement contrasts sharply with the long judicial and political defense of states' rights in areas such as economic regulation and civil rights. Whether deeply held beliefs about the importance of local autonomy were abandoned in the face of the threat of organized crime or whether states' rights arguments are taken seriously only when significant political constituencies oppose the policies being pursued by the federal government on the merits is unclear.

The judiciary is under equally severe pressure to expand the reach of criminal statutes. Even assuming that judges, unlike legislatures, are immune to the effects of public clamor to do something about crime (not necessarily an accurate assumption), the internal pressure on judges to affirm convictions for serious crimes must be enormous. In the area of criminal procedure, the Warren Court developed a series of doctrines that emphasized the importance of defending certain principles even at the cost of reversing an occasional conviction. But substantive criminal law too often has been treated in the federal courts as a matter of "mere" statutory interpretation. Without a firm body of constitutional principles to rely on, the tendency to stretch the scope of criminal statutes to the breaking point to accommodate prosecutions has met little resistance.

Finally, and not least, the story of RICO is a good story, which deserves telling for its own sake. Today, RICO is, among other things, the federal government's principal statutory weapon against organized crime. And yet, the whole thing began with a study commission identifying a problem to which it *didn't* think a new substantive crime was the solution.

B. *The President's Crime Commission*

The legislative history of RICO begins with the report of the President's Commission on Law Enforcement and Administration of Justice (the Katzenbach Commission) in 1967.²² Belying the conventional wisdom about presidential commissions and blue ribbon panels, the recommendations of the Katzenbach Commission were highly fruitful in producing significant legislation (if not in controlling crime). Many of the Commission's recommendations for federal legislation were adopted.²³

22. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) [hereinafter *Commission Report*]. The Commission was created by President Lyndon Johnson in 1965. See Exec. Order No. 11,236 (July 23, 1965). Several commentators have noted the significance of the Commission and prior investigations in building public concern about organized crime. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1014-15 (1980); Nagel & Plager, *RICO, Past and Future: Some Observations and Conclusions*, 52 U. Cin. L. Rev. 456, 456-67 (1983). These authors have not, however, explored how significant the ideas in the Commission's report were for the development of RICO.

23. Among the Commission's recommendations enacted in the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), were the creation of the Law Enforcement Assistance Administration, title I, 82 Stat. at 197, creation of a right of appeal by the prosecution from pre-trial suppression orders, title VIII, 82 Stat. at 237, and gun control legislation, titles IV, VII, 82 Stat. at 225, 236. Compare these enactments with the Commission's recommendations, *Commission Report*, supra note 22, at 140 (right of appeal); *id.* at 242-43 (gun control); *id.* at 284-88 (enforcement assistance). Many of the Commission's recommendations for state and local action, administrative reform, and changes in procedural rules were also highly influential.

The Organized Crime Control Act of 1970,²⁴ of which RICO was a part, was largely based directly on the Commission's recommendations.²⁵ Its findings about organized crime are therefore important to understanding the history of RICO.²⁶ The three aspects of the report most particularly relevant to RICO are its understanding of what organized crime is, its emphasis on the danger of organized crime's infiltration of legitimate institutions, and its recommendations for dealing with the problem.

In defining organized crime, the Commission wavered between two ideas. Dominating the report is the Commission's apparent acceptance of the idea of a single nationwide crime syndicate.²⁷ The opening paragraph of the chapter, citing the Kefauver Committee's report as support, stresses the image of a highly structured, unitary organization: "Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments."²⁸

This perception of organized crime is not invariant in the report, however. In describing organized crime's activities, the Commission on several occasions refers loosely to "[c]riminal groups"²⁹ or to "[o]rganized criminal groups"³⁰ in ways that suggest a focus on multi-

24. Pub. L. No. 91-452, 84 Stat. 922 (1970).

25. Among the Commission's recommendations enacted in the Act were expanded use of investigative grand juries, title I, 84 Stat. at 923, a general immunity statute, title II, 84 Stat. at 926, expansive reform of the law of contempt, title III, 84 Stat. at 932, and perjury, title IV, 84 Stat. at 932, creation of a witness protection program, title V, 84 Stat. at 933, and sentence enhancement for certain categories of dangerous offenders, title X, 84 Stat. at 948. Compare these enactments with the Commission's recommendations, Commission Report, supra note 22, at 200-04. Statutory authorization for court-ordered wiretapping and electronic surveillance, recommended by a majority of the Commission, see *id.* at 201-03, had already been adopted as title III of the 1968 Act, 82 Stat. at 211.

26. The Commission's discussion of organized crime, Commission Report, supra note 22, at 187-209, was also printed, with footnotes and consultants' papers but without photographs, as a separate publication. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime (1967) [hereinafter Task Force Report]. Further citations will be to both sources.

27. In this respect, the Commission's conclusions are similar to those of the Kefauver Committee investigations of 1950 and 1951. See Senate Special Committee to Investigate Organized Crime in Interstate Commerce, [First] Interim Report, S. Rep. No. 2370, 81st Cong., 2d Sess. (1950); Second Interim Report, S. Rep. No. 141, 82d Cong., 1st Sess. (1951); Third Interim Report, S. Rep. No. 307, 82d Cong., 1st Sess. (1951); Final Report, S. Rep. No. 725, 82d Cong., 1st Sess. (1951).

28. Commission Report, supra note 22, at 187, Task Force Report, supra note 26, at 1. The paragraph in the Task Force Report ends with a footnote citation to the Kefauver Committee's Third Interim Report, supra note 27, at 150.

29. Commission Report, supra note 22, at 188, 190, Task Force Report, supra note 26, at 2, 4.

30. *Id.* at 191, Task Force Report at 5.

ple local organizations, not necessarily unified under a single hierarchy.³¹ Indeed, the Commission acknowledged that “[s]ome law enforcement officials define organized crime as those groups engaged in gambling, or narcotics pushing, or loansharking, or with illegal business or labor interests.”³²

But the Commission itself rejected this definitional “focus exclusively on the crime instead of on the organization,”³³ preferring instead to define “organized crime” as a single invisible empire, analogous to a criminal corporation or cartel, indeed to a private government. The Commission made quite clear that when it referred to “organized crime,” it was talking about an entity with particular members, a defined hierarchy, and even an official name:

Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively Italian, they are in frequent communication with each other, and their smooth functioning is ensured by a national body of overseers. . . . FBI intelligence indicates that the organization as a whole has changed its name from the Mafia to La Cosa Nostra.³⁴

While the Commission’s picture of a single enemy monolith is perhaps overdrawn,³⁵ the existence and influence of the traditional Mafia

31. For example, in reporting on the widespread impact of organized crime, the Commission reports that “[o]rganized criminal groups are known to operate in all sections of the Nation,” citing a Commission survey of police departments in which a large proportion of departments in cities over 100,000 in population reported that “organized criminal groups exist in their cities.” *Id.* at 191, Task Force Report at 5. One might well expect that the different police departments responding had differing definitions of “organized criminal groups,” at least some of which included entirely local organizations, and that the Commission did not mean to suggest that branches of a unitary “Mafia” existed in all those cities.

32. *Id.* at 191, Task Force Report at 6.

33. *Id.* at 192, Task Force Report at 6.

34. *Id.* The Commission then proceeds to outline the familiar “Mafia” structure and workings, complete with bosses and *consiglieri*, codes of silence and “ritualistic initiation.” *Id.* at 191–96, Task Force Report at 6–10.

Although the FBI and its long-time director, J. Edgar Hoover, had at one time downplayed the notion of a national crime syndicate, see V. Navasky, Kennedy Justice 8–9 (1971), by the time the Katzenbach Commission wrote, Hoover had apparently seen the bureaucratic advantages to the Bureau of emphasizing the national scope of the organized crime problem and was encouraging the view that there was indeed a nationwide Mafia requiring a national investigative and enforcement effort to control. *Id.* at 9; see Commission Report, *supra* note 22, at 192, Task Force Report, *supra* note 26, at 6–7.

35. It is interesting to note the convergence of the imagery used concerning organized crime and Communism in the early 1950s. Professor Bradley quotes a newspaper column making the connection explicit: “The subtle black stain of a hoodlum super-government, well protected politically, is slowly but surely spreading itself over the population centers of the United States. Like communism . . . it is superbly concealed, well-organized, and in some cases, it has adopted the robes of legitimacy.” *Considine*,

was hardly a fantasy. But the definitional issue lurking in the report is important. As we will see, this tension between the idea of a single Mafia and that of multifarious local syndicates as the target of "organized crime" control would surface again in the drafting and interpretation of the RICO statute.³⁶

The second aspect of the Commission's report that is relevant to the development of RICO is its discussion of organized crime's activities. Part of the subject can be dealt with briefly, for the litany of crimes is familiar: gambling ("the greatest source of revenue for organized crime"), loansharking, narcotics (at the importation and largest wholesale levels), and, to a "small and declining" extent, prostitution and bootlegging.³⁷ But the Commission gives equal prominence to another aspect of organized crime, less familiar from the days of Elliot Ness: the infiltration of legitimate business.

Once again, this theme is apparent at the very outset of the chapter. Its second paragraph summarizes the later discussion:

The core of organized crime activity is the supplying of illegal goods and services—gambling, loan sharking, narcotics, and other forms of vice—to countless numbers of citizen customers. But organized crime is also extensively and deeply involved in legitimate business and in labor unions. Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out of control lawful ownership and leadership and to exact illegal profits from the public.³⁸

The Commission's fuller discussion of the problem of organized crime's involvement in legitimate business and labor treats issues that would later become significant to the RICO statute. The Commission gave special prominence to this problem by giving it essentially the same space and weight in its report as the more traditional problem of the specifically criminal activities of organized crime. This provided the impetus for the legislative proposals that would evolve into RICO.³⁹

Hoodlum Empire, *Int'l News Serv.*, Feb. 13, 1950, quoted in Bradley, *Racketeering*, supra note 21, at 236. The rhetorical strategy and indeed the very title of Robert Kennedy's book on organized crime, *The Enemy Within* (1960), are probably the most prominent example of this phenomenon; see also V. Navasky, supra note 34, at 12 (quoting Robert Kennedy as saying that there is a need for an "intelligence group to attack organized crime as we deal with Communism").

36. See *infra* notes 119–25 and accompanying text.

37. Commission Report, supra note 22, at 188–89, Task Force Report, supra note 26, at 2–4.

38. *Id.* at 187, Task Force Report at 1 (footnotes omitted).

39. The problem of organized crime's involvement in legitimate business had been noted by the Kefauver Committee. See, e.g., Kefauver Committee, *Third Interim Report*, supra note 27, at 170–81. But the problem was given little emphasis by that body, which devoted most of its attention to the traditional, purely criminal activities of organized crime and made no proposals for dealing with infiltration. The greater prominence of the infiltration issue in the Katzenbach Commission's report may be in part the product of investigations in the late 1950s by the McClellan Committee, for which Robert

The Commission's discussion of the harm to the public of such infiltration is important to understanding the rationale for prohibiting the infiltration: "Criminal cartels can undermine free competition" through unfair tactics like price cutting financed by tax evasion and cash reserves from illegal business, labor corruption, and violent coercion of suppliers and customers. Moreover, acquisition of legitimate enterprises gives organized criminals the opportunity to engage in new types of ("white collar") crime, such as bankruptcy fraud.⁴⁰ Finally, the Commission's analysis of how organized crime acquires legitimate business interests would be critical in constituting the specific prohibitions of RICO.⁴¹

The third aspect of the Commission's report that bears on the development of RICO is its recommendations. Particularly in light of the fact that the Commission's recommendations with respect to organized crime formed the core of the act of which RICO is a part,⁴² it is noteworthy that RICO itself did *not* flow directly from a Commission recommendation.

The Commission's recommendations were generally concerned with providing new investigative tools for law enforcement, rather than with reform of the substantive criminal law. This emphasis is reflected in a major study prepared for the Commission by G. Robert Blakey, a scholar and law enforcement expert later to become the draftsman and a principal exponent of RICO.⁴³ Professor Blakey explicitly concluded that "[e]xisting substantive criminal theory is adequate to deal with organized criminal activity."⁴⁴ This was so because prosecutors already had at their disposal a powerful and appropriate tool in statutes penal-

Kennedy served as Chief Counsel, into the domination of labor unions by criminal elements, see Senate Select Comm. on Improper Activities in the Labor and Management Field, Final Report, S. Rep. No. 1139, 86th Cong., 2d Sess. (1960), and of academic attention to the issue in the early 1960s, see, e.g., Johnson, *Organized Crime: Challenge to the American Legal System*, 53 *J. Crim. L. Criminology & Police Sci.* 399, 406-07 (1962); Peterson, *Chicago: Shades of Capone*, 347 *Annals* 30, 32-39 (1963); Woetzel, *An Overview of Organized Crime: Mores versus Morality*, 347 *Annals* 1, 6-7 (1963). The McClellan Committee's investigation was the only significant federal examination of organized crime between the Kefauver Hearings and the Kennedy Administration, and may be seen as the first step in the increasing wave of public concern about organized crime that culminated in the 1970 legislation.

40. Commission Report, *supra* note 22, at 190, Task Force Report, *supra* note 26, at 4.

41. "Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion." *Id.* at 190, Task Force Report at 4. For the significance of this analysis in the drafting of RICO, see *infra* notes 102-104 and accompanying text.

42. See *supra* note 25 and accompanying text.

43. Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, Task Force Report, *supra* note 26, app. C, at 80-113.

44. *Id.* at 80.

izing conspiracy, and "there is no question that existing conspiracy theory is equal to the challenge of organized crime."⁴⁵ The difficulty, rather, was in the inadequacy of investigative devices.⁴⁶ Professor Blakey's analysis appears to have persuaded the Commission; its legislative recommendations followed his conclusions in most respects.⁴⁷

Conspicuous by its absence from the Commission's recommendations is anything like RICO. The Commission proposed neither legislation criminalizing the involvement in organized criminal activity as such, nor a statute outlawing organized crime penetration of legitimate business or labor enterprises. Indeed, the Commission advocated the creation of no new crimes at all.⁴⁸

With respect to the particular issue of organized criminal infiltration into legitimate business, which the Commission did so much to publicize as a problem area, the Commission's recommendations were notably cautious. In keeping with its conclusion that existing substantive criminal law was sufficient to deal with organized crime's activities, the Commission recommended no innovations in the penal code.

45. *Id.* at 82.

46. Accordingly, Professor Blakey devoted most of his attention to the need for legislation to increase the utility of grand jury investigations (such as revision of immunity and perjury statutes), *id.* at 83-91, and to authorize electronic surveillance under judicial supervision, *id.* at 91-106.

47. Thus, the Commission recommended expanded use of grand juries in organized crime investigations, a general witness immunity statute, abolition of rigid rules of proof in perjury prosecutions, and creation of a witness protection program, all of which were to become part of the Organized Crime Control Act of 1970. See *supra* notes 24-25. Professor Blakey's wiretapping recommendations were more divisive, however. Although a majority supported his scheme for court-ordered electronic surveillance, a minority argued for further study, so that the final black letter recommendation of the Commission was pallid: "Congress should enact legislation dealing specifically with wiretapping and bugging." Commission Report, *supra* note 22, at 203, Task Force Report, *supra* note 26, at 19. Nevertheless, the Commission's report made clear that a majority of the Commission favored legislation like that drafted by Blakey, and such legislation was precisely what emerged from Congress. Compare title III of the Omnibus Crime Control and Safe Streets Act of 1968, Wiretapping and Electronic Surveillance, Pub. L. No. 90-351, 82 Stat. 211 (codified as amended at 18 U.S.C. §§ 2510-2520) (1982 & Supp. III 1985) with the draft statute prepared by Professor Blakey for the Commission, Task Force Report, *supra* note 26, app. C, at 106-13: they are substantially alike.

48. The Commission's only recommendation bearing on the substantive law of crime and punishment was for the enactment of a sentence enhancement statute, calling for "extended prison terms where the evidence, pre-sentence report, or sentence hearing shows that a felony was committed as part of a continuing illegal business in which the convicted offender occupied a supervisory or other management position." Commission Report, *supra* note 22, at 203, Task Force Report, *supra* note 26, at 19. This recommendation also formed the basis for a portion of the Organized Crime Control Act: Dangerous Special Offender Sentencing, title X, Pub. L. No. 91-452, 84 Stat. 948 (codified as amended at 18 U.S.C. §§ 3575-3578 (1982 & Supp. III 1985)) (§§ 2575-2576 repealed and §§ 3577-3578 renumbered as §§ 3661-3662, effective Nov. 1, 1987). The enacted version included several other categories of offenders in the group eligible for sentence enhancement.

Rather, it saw the infiltration problem as one that could be dealt with most effectively through enforcement of existing civil and regulatory machinery against the illegal tactics of organized criminals in operating legitimate businesses.⁴⁹ At least in formulating its recommendations, the Commission appears to have understood the principal danger of organized criminal involvement in legitimate enterprises to be that racketeers would be more likely than other businessmen to engage in unethical or illegal business practices. Strict enforcement of regulations prohibiting such practices, coupled with intensive investigative efforts to uncover them in businesses believed to be operated by organized criminals, were recommended as the tools best suited to countering the problem.⁵⁰

In summary, the report of the Katzenbach Commission is significant in the legislative history of the Organized Crime Control Act of 1970, because so many of the provisions of the act find their origins in recommendations of that body and, in particular, in the analysis performed by its task force on organized crime. Three aspects of the Commission's response to organized crime are particularly notable. First, despite occasional recognition of the diffuse nature of "organized criminal groups," the Commission clearly conceived of organized crime as a single entity and directed its primary attention toward a single target: the Italian syndicate it believed controlled organized crime throughout the United States. Second, the Commission saw as a prime aspect of the threat posed by this syndicate its increasing tendency to involve itself in legitimate business and union activities. Finally, while the Commission's conception of the menace of organized crime is significant in understanding the thinking of those who drafted the RICO statute, the

49. For example, the Commission noted that

State income tax enforcement could be directed at organized crime's businesses. Food inspectors could uncover regulatory violations in organized crime's restaurant and food processing businesses. Liquor authorities could close premises of organized crime-owned bars in which illicit activities constantly occur. Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses.

Commission Report, *supra* note 22, at 208, Task Force Report, *supra* note 26, at 23.

50. It is thus misleading to suggest, as Professor Blakey does, that the civil remedies in RICO and its predecessor bills were designed "to implement aspects of the Katzenbach Commission's recommendations." Blakey, *RICO Civil Fraud*, *supra* note 5, at 253-54; see also Blakey & Gettings, *Basic Concepts*, *supra* note 5, at I015 n.25 (asserting that Commission's insight into the easier civil standard of proof, possibility of discovery and value of antitrust type remedies was "the origin of the two-track approach—criminal and civil—of RICO"). While the Commission strongly urged that regulatory and antitrust actions could be useful tools against organized crime, and particularly against the infiltration problem, the Commission was clearly referring to existing legal tools. On no fair reading can it be held that the Commission recommended *any* new substantive legislation—civil, criminal, or antitrust—or that it believed direct action against the act of infiltration (as opposed to its consequences) was a desirable approach.

Commission itself did not recommend enactment of anything resembling RICO.

C. *The Congressional Response*

Perhaps encouraged by the impending 1968 election season, in which public perceptions of increased crime and civil disorder would play a significant role, members of Congress were quick to introduce a variety of anticrime bills, including many that were specifically responsive to the Commission's recommendations. Included in the flurry of legislative activity were two bills introduced by Senator Roman Hruska that are generally considered ancestors of RICO.⁵¹ One of these bills, S. 2048, would have amended the Sherman Antitrust Act to prohibit the investment or use in one line of business of intentionally unreported income from another line of business.⁵² The second bill, S. 2049, created new civil and criminal penalties for the investment of income derived from various specified criminal activities in a business affecting interstate commerce.⁵³

No action was taken on the bills.⁵⁴ No doubt reflecting the priorities of the election campaign, Congress deferred action on most of the organized crime aspects of the pending bills and Commission recommendations, turning first to actions that could be packaged under the election-year title of the "Omnibus Crime Control and Safe Streets Act of 1968."⁵⁵ Although neither of the Hruska bills became law, several features of his suggestions are relevant to the evolution of RICO.

The first noteworthy aspect of Senator Hruska's proposals is their purpose. The Senator introduced his package of proposals with a lengthy speech concerning the "cancerous growth of organized crime in this country."⁵⁶ Like the Katzenbach Commission, Senator Hruska adopted the view that organized crime constituted "a tightly knit and strictly disciplined criminal cartel," known as *La Cosa Nostra*.⁵⁷ Even

51. Professor Blakey acknowledges the Hruska bills as precursors of RICO. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1015-16.

52. S. 2048, 90th Cong., 1st Sess. (1967); see also H.R. 11,266, 90th Cong., 1st Sess. (1967) (same bill introduced in House).

53. S. 2049, 90th Cong., 1st Sess. (1967); see also H.R. 11,268, 90th Cong., 1st Sess. (1967) (virtually identical bill introduced in House).

54. The Hruska bills were studied, however, by the Antitrust Section of the American Bar Association, which generally advised that crime control and regulation of competition be kept separate, and therefore preferred the independent approach of S. 2049. See Blakey & Gettings, *Basic Concepts*, supra note 5, at 1016-17 & nn.29, 32.

55. Pub. L. No. 90-351, 82 Stat. 197 (signed by President Johnson on June 19, 1968).

56. 113 Cong. Rec. 17,997 (1967). The cancer image had also been used by President Johnson in announcing the creation of his Crime Commission in 1965, President's Message to Congress, H.R. Doc. No. 103, 89th Cong., 1st Sess. 4 (1965), and would be used again by Senator McClellan in introducing the bill that is the immediate precursor of RICO, *infra* note 80 and accompanying text.

57. 113 Cong. Rec. 17,998 (1967).

more than the Commission, however, Senator Hruska devoted his principal attention not to the primary illegal activities of the syndicate, but to its penetration into legitimate business.⁵⁸ Thus, RICO's earliest ancestor was explicitly tied to the purpose of combatting organized crime infiltration into legitimate fields of business.

It is also worth noting, however, that even this early draft of what would one day grow to be RICO went well beyond this purpose. Nothing in either bill purported to define organized crime, or to limit the bills' scope to actions of the criminal cartel whose activities had called it forth.⁵⁹ Thus, S. 2048 applied to anyone who invested deliberately unreported income, regardless of the source of the income or the criminal status of the investor. The language of the bill covered a restaurateur who skimmed cash from his restaurant to invest in a hotel venture as much as the racketeer who used his narcotics profits for the same purpose, even though Senator Hruska was explicit that the "evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime."⁶⁰ Similarly, S. 2049, the more direct ancestor of RICO, applied, despite Senator Hruska's primary concern for the monolithic "Mafia," to anyone who invested income derived from designated criminal activities in a legitimate business, whether or not the investor was a member or affiliate of La Cosa Nostra.⁶¹ The only purported connection between the bill and the Mafia was that the specified crimes were "especially those criminal activities engaged in by members of organized crime families"⁶²—although clearly by other, disorganized criminals as well.⁶³

58. *Id.* at 17,998–99; see also *id.* at 18,001–02 (reproducing article from *U.S. News & World Rep.*, Mar. 30, 1964, indicating that "much of the criminal world's excess capital is flowing into legitimate fields [of business]").

59. As Professor Bradley points out, the failure of federal legislation ostensibly aimed at organized crime to limit its applicability to syndicate crime is a common historical pattern. Bradley, *Racketeering*, *supra* note 21, at 245–46.

60. 113 Cong. Rec. 17,999 (1967).

61. S. 2049, 90th Cong., 1st Sess. § 3 (1967).

62. 113 Cong. Rec. 17,999 (1967).

63. A slightly inaccurate characterization in Blakey & Gettings, *Basic Concepts*, *supra* note 5, makes S. 2049 seem even broader than it was. According to them, S. 2049 would have prohibited "(1) the acquisition of an interest in a business affecting interstate commerce with income derived from listed criminal activities . . . and (2) the agent of a corporation from authorizing the corporation to engage in any of the listed criminal activities . . ." *Id.* at 1015–16 n.27 (emphasis added). Blakey and Gettings' description thus makes it appear that, like RICO, S. 2049 would have imposed criminal sanctions on those who commit crimes in the operation of a business enterprise. In fact, § 3(b) of S. 2049 would have applied criminal penalties to an agent of a corporation who "authorized, ordered, or performed" not one of the "listed criminal activities," but "an act which constitutes . . . a violation of subsection (a) by such corporation." In other words, § 3(b) merely provided for individual liability for corporate officers who authorized a corporation to violate the statute by investing income from criminal activity in the acquisition of a business enterprise. No additional penalties were provided for a corporate officer who authorized the corporation to engage in criminal acts, and since the crimes

Senator Hruska's proposals went beyond the Katzenbach Commission's recommendations in proposing a direct legislative attack on the infiltration problem identified by the Commission, while the Commission itself believed that existing criminal, civil, and regulatory regimes were sufficient to combat the criminal consequences of infiltration.⁶⁴ Moreover, Senator Hruska's bills went beyond the specific problem he identified: the bills would have penalized intrusion into legitimate business of criminal capital other than that identified with "organized crime" as he himself understood that term, and indeed, extended even to investments of what would not generally be regarded as criminal proceeds at all. But nothing in the Hruska package contemplated further substantive criminal law reforms to increase the penalties or scope of laws prohibiting either the pre-infiltration racketeering acts that generated the income used to penetrate the legitimate business or the post-infiltration criminal activities in which the racketeer was expected to involve the infiltrated entity.⁶⁵

In any event, the legislative war on organized crime had to wait for the next Congress. Early in that Congress, Senator John L. McClellan introduced a major bill containing most of the organized crime recommendations of the Katzenbach Commission.⁶⁶ Senator McClellan supported the bill with a lengthy speech about the evils of organized crime and the legislative steps needed to combat them.⁶⁷ The speech, like the bill it supported, was taken largely from themes sounded by the Task Force Report on Organized Crime. Like the Commission, Senator McClellan saw the unitary structure of *La Cosa Nostra* as "epitomiz[ing], if it does not exhaust, the concept of organized crime."⁶⁸ Like the Commission, he gave prominent place to the evils of organized crime's infiltration of legitimate businesses and labor organizations, and its corruption of government activities.⁶⁹ And like the Commission, Senator McClellan took the view that of all the factors inhibiting the law enforcement response to organized crime, the single most important was the procedural and evidentiary difficulty of making cases.⁷⁰ Ac-

listed as predicates in S. 2049 were in any case not "white collar" crimes or other crimes commonly committed using corporate forms, the provision would not have applied to many business employees.

64. See *supra* notes 42-50 and accompanying text. As Professor Bradley notes, Senator Hruska's bill attacked only one of the four methods of infiltration identified by the Commission—investment of proceeds from illegal activities. See Bradley, *RICO*, *supra* note 4, at 840; *supra* note 41.

65. S. 2048 and S. 2049 were part of a broader package of anti-organized crime proposals, many of which ultimately became part of either the 1968 Omnibus Act or the 1970 organized crime package. None of these proposals, however, contained additional prohibitions or penalties against the primary illegal activities of organized crime groups.

66. S. 30, 91st Cong., 1st Sess. (1969).

67. 115 Cong. Rec. 5872-85 (1969).

68. *Id.* at 5872.

69. *Id.* at 5874-75.

70. *Id.* at 5877 (1969).

cordingly, his anticrime package included a variety of proposals in the areas of evidence and criminal procedure, most derived from the Commission's recommendations, but suggested no need for changes in the substantive law of crimes. His bill contained no counterpart to Senator Hruska's Ur-RICO.⁷¹

But Senator Hruska had not given up. He offered a new bill, combining his previous proposals into a coordinated whole, detached from the antitrust laws.⁷² This bill, identified as the "Criminal Activities Profits Act," would have made it a crime to invest any income derived from any of several enumerated federal offenses, or any intentionally unreported income, in any business enterprise affecting interstate commerce.⁷³

In introducing the bill, Senator Hruska made plain that it was "aimed specifically at racketeer infiltration of legitimate business."⁷⁴ Senator Hruska placed his greatest emphasis on the harm that organized criminals could do once entrenched in ordinary businesses. Racketeers, he feared, would use illegitimate tactics to secure monopoly power, with attendant anticompetitive damage to the economy. In addition, racketeer-run businesses would be expected both to utilize "all the techniques of violence and intimidation" for which racketeers are renowned and to turn their criminal talents to the white collar business crimes of embezzlement and consumer fraud.⁷⁵ Unlike the Katzenbach Commission or Senator McClellan, however, Senator Hruska would not have dealt with these ills by giving law enforcement agencies additional investigatory tools to uncover and prove crimes committed by racketeers, be they committed before the infiltration that produced the capital or after it through and for the benefit of the penetrated business. Instead, like its immediate predecessors, the bill directly prohibited the entry of criminal money into the legitimate economy.⁷⁶

Following hearings on the various anti-organized crime proposals, Senators Hruska and McClellan joined forces to introduce a more radical revision of the Hruska bill, which was now restyled the "Corrupt Organizations Act of 1969."⁷⁷ While the bill was amended in numer-

71. *Id.* at 5877-82. The bill did include a provision for sentence enhancement for special offenders, including organized crime leaders, along the lines of the Commission's recommendation. See *supra* note 48.

72. S. 1623, 91st Cong., 1st Sess. (1969). This change reflected the opposition of the antitrust bar to his previous bill to amend the Sherman Act. See *supra* note 54.

73. S. 1623, 91st Cong., 1st Sess. § 2 (1969).

74. 115 Cong. Rec. 6993 (1969).

75. *Id.*

76. Also like its predecessors, S. 1623 applied by its terms far more broadly than simply to racketeers infiltrating legitimate business, sweeping within its prohibition any person who used intentionally unreported income or criminal proceeds for business purposes.

77. S. 1861, 91st Cong., 1st Sess. (1969). Although the bill itself was entitled "Corrupt Organizations Act of 1969," the proposed new chapter to title 18 of the United

ous relatively minor respects as it passed through the Senate and House Judiciary Committees,⁷⁸ in its essentials the Corrupt Organizations Act was all but identical to the final version of S. 1861 that was enacted into law as title IX of the Organized Crime Control Act of 1970.

A proper understanding of the goals of S. 1861, therefore, is particularly important in understanding the goals of RICO. Fortunately, upon introducing the bill, Senator McClellan made its purposes emphatically clear:

The problem, simply stated, is that organized crime is increasingly taking over organizations in our country, presenting an intolerable increase in deterioration of our Nation's standards. Efforts to dislodge them so far have been of little avail. To aid in the pressing need to remove organized crime from legitimate organizations in our country, I have thus formulated this bill. . . . This bill is designed to attack the infiltration of legitimate business repeatedly outlined by investigations of various congressional committees and the President's Crime Commission.⁷⁹

The bill proposed to remove the "cancer" of organized crime penetration from the economy "by direct attack, by forcible removal and prevention of return."⁸⁰ This "most direct route to accomplish" the goal of "remov[ing] organized crime influences from legitimate organizations" was the exclusion of the racketeer from the infiltrated enterprise: "If an organization is acquired or run by the proscribed method, then the persons involved are removed from the organization."⁸¹ Again citing the antitrust precedent, Senator McClellan went on to note that the goal of these measures was the

protection of the public against parties engaging in certain types of businesses after they have shown that they are likely to run the organization in a manner detrimental to the public interest. In [this] spirit, . . . this provision . . . is based upon [the] judgment that parties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the pub-

States Code was called "Racketeer Influenced Organizations." The two titles were later combined to yield the present acronymic title. For a discussion of the significance of the title, see *infra* notes 88-92 and accompanying text.

78. For a concise description of the changes incorporated into RICO during the transition between S. 1861 and the finished title IX of the enacted statute, see Bradley, RICO, *supra* note 4, at 842-43 & nn.30-32.

79. 115 Cong. Rec. 9567 (1969).

80. *Id.*

81. *Id.* He went on to add that if an organization proves "so corrupt that divestiture does not provide an effective remedy, then the court is authorized to require dissolution" of the entity. *Id.* at 9568. The goal of removing racketeers from the legitimate enterprises they had infiltrated was to be the function of the statute's innovative forfeiture remedy. See *infra* notes 203-214 and accompanying text.

lic they must be prohibited from continuing to engage in this type of business in any capacity.⁸²

This emphasis on infiltration of legitimate organizations remained as the bill made its way through the legislative process. Both the Senate and House committee reports accompanying the final versions of the Organized Crime Control Act state that the purpose of RICO is "the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce."⁸³

The purpose of the revised bill was thus exactly the same as that of Senator Hruska's 1967 proposals. It is worth emphasizing this continuity of intention in such detail because it has not always been recognized by proponents of a broad interpretation of RICO. For example, Blakey and Gettings assert that "[w]hile RICO had its origins in previous attempts to curtail organized crime infiltration into legitimate business, S. 1861, when redrafted and introduced, had a broader purpose; it was directed at all forms of 'enterprise criminality.' It represented the rest of the Crime Commission's integrated package."⁸⁴ This assertion of a broadening of purpose is supported by no reference to any statement of the bill's purpose by any of its supporters. As the above detailed discussion of the origins of RICO shows, it could not be, since both parts of the quoted assertion are simply wrong.

First, no public description of the purpose of S. 1861 contained any indication whatever that the previous narrow understanding of the goals of the Hruska bills had been altered.⁸⁵ To the contrary, Senator McClellan repeatedly emphasized the same purposes for S. 1861 as Senator Hruska had set out for its precursors: a "direct attack" on the penetration of legitimate organizations by organized crime.⁸⁶ Second, as we have seen, the Katzenbach Commission's "integrated package" of proposals to strengthen law enforcement against organized crime included no recommendation for any substantive criminal law changes, either directed narrowly against infiltration of legitimate business or broadly against "enterprise criminality."⁸⁷

82. 115 Cong. Rec. 9568 (1969).

83. Senate Committee on the Judiciary, Report on Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969). Both Senate and House reports state, in identical language, that "Section 1962 [the section stating the basic prohibitions of RICO] establishes a threefold prohibition aimed at the infiltration of legitimate organizations." *Id.* at 159; H.R. Rep. No. 1549, 91st Cong., 2d Sess. 57 (1970), reprinted in 2 U.S. Code Cong. & Admin. News 4007, 4033 (1970).

84. Blakey & Gettings, *Basic Concepts*, *supra* note 5, at 1017 n.45.

85. My reading in this regard accords with Professor Bradley's. See Bradley, RICO, *supra* note 4, at 852 n.83.

86. See *supra* notes 79-82 and accompanying text.

87. See *supra* notes 42-50 and accompanying text. The caption of S. 1861 does not suggest that the bill was intended to serve radically broader purposes than its predecessors. S. 1861 was styled: "A bill [t]o amend title 18, United States Code, to prohibit the infiltration or management of legitimate organizations by racketeering activity or the proceeds of racketeering activity, where interstate or foreign commerce is affected, and

Elsewhere, Blakey and Gettings draw support for their view that the purpose of the Corrupt Organizations Act differed from that of its predecessors from a variety of sources. First, they argue that because title IX as eventually enacted was called "Racketeer Influenced (legitimate) and Corrupt (illegitimate) Organizations," the title of the Act reflects an expansion to include all forms of "enterprise" criminality.⁸⁸ The claim is, to say the least, strained. As Blakey and Gettings themselves acknowledge, the word "corrupt" is "ambiguous: a 'corrupt organization' could be . . . either the mob itself or a union taken over by it."⁸⁹ Their claim that the title of the Act was "therefore" changed from "Corrupt Organizations" to "Racketeer Influenced and Corrupt Organizations" for the purpose of "clarifying the ambiguity and drawing the crucial distinction explicitly"⁹⁰ is unpersuasive.⁹¹ The claim that the change in title reflects a change in purpose is decisively rebutted by the fact that the original "Corrupt Organizations Act" uses the two terms interchangeably.⁹²

Second, Blakey and Gettings note that the Organized Crime Control Act itself contains a broad statement of its purpose "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful actions of those engaged in organized crime."⁹³ While the particular language of this statement can perhaps be written off as describing the entire Act, and not merely the RICO provisions of title IX,⁹⁴ Blakey and Gettings correctly point out that S. 1861 itself contained a similar statement of purpose⁹⁵ to "eradicate the baneful influence of organized crime in the United States" and "to arrest and reverse the growth of organized crime in the United States,

for other purposes." S. 1861, 91st Cong., 1st Sess. (1969). Certainly it cannot be claimed that the innocuous final phrase was intended to provide notice of the fundamental shift in perspective Blakey and Gettings assert.

88. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1025 n.91; see also Blakey & Goldstock, supra note 5, at 354 & n.116.

89. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1026 n.91.

90. *Id.*

91. If any such purpose existed in Professor Blakey's own mind as the bill was being drafted, he kept it to himself (as he may also have kept to himself an alternative, more humorous significance to the title). See Blakey, *RICO Civil Fraud*, supra note 5, at 237 n.3 (declining to confirm that the acronym alludes to the character played by Edward G. Robinson in the film "Little Caesar"). Professor Blakey cites no occasion on which the purported significance of the change in title was brought to the attention of the legislators.

92. See supra note 77.

93. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1026 n.91 (quoting 18 U.S.C. § 1961 (1976)).

94. See Note, *Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 *Vand. L. Rev.* 441, 474 (1980).

95. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1026 n.91.

its infiltration of legitimate organizations, and its interference with interstate and foreign commerce."⁹⁶

This argument too is unpersuasive, however. Obviously, the purpose of all of the provisions then under consideration was to "eradicate" organized crime; this hardly suggests that each particular aspect of the package should be read to penalize all actions committed by anyone associated with "organized crime" in its broadest definition. As Senator McClellan pointed out in introducing S. 1861, RICO was not intended to accomplish the "eradication" of organized crime by itself.⁹⁷

Blakey and Gettings are correct that "[n]owhere in the legislative history does it say that the legislative history was exhaustive or that this purpose [to deal with the infiltration of legitimate business] was the *only* purpose."⁹⁸ But granting the absence of any such improbable disclaimer, it remains the case that nowhere in the legislative history is there even a glimmer of an indication that RICO or any of its predecessors was intended to impose additional criminal sanctions on racketeering acts that did not involve infiltration into legitimate business.

Blakey and Gettings are correct in one respect. If it cannot be documented that any member of Congress understood the bill in this way, the actual language of the Corrupt Organizations Act, and of RICO, its enacted successor, does indeed go far beyond its announced purpose. An examination of the structure of the statute will show that while the fundamental prohibitions of RICO still clearly reflect the purposes motivating Senators McClellan and Hruska in introducing it, the logic of expansion pushed the actual language of the statute much further.

D. *The Structure of the Statute*

As reintroduced by Senator McClellan, and as currently codified in title 18 of the United States Code, RICO is a statute of daunting complexity, comprising eight separate lengthy sections. But the length and complexity of the statute helps to mask a certain simplicity in the structure of the criminal prohibitions imposed.⁹⁹

The core of the statute, 18 U.S.C. § 1962, creates four new crimes. Under section 1962(a), it is a crime for any person to "use or invest" any income he has derived "from a pattern of racketeering activity or through collection of an unlawful debt" to establish, operate, or ac-

96. S. 1861, 91st Cong., 1st Sess. § 1 (1969).

97. [I]n introducing S. 30, I made it quite clear that neither the omnibus crime bill of 1968, nor S. 30, would be sufficient to remedy the crime problems facing our country. Nor will this bill completely solve the problem. But all of this legislation will be helpful in stamping out the organized crime parasites preying upon our society. We need even more imaginative legislation . . .

115 Cong. Rec. 9568 (1969).

98. Blakey & Gettings, *Basic Concepts*, supra note 5, at 1026 n.91.

99. For purposes of simplicity and clarity, references in the following discussion will be to the enacted version of RICO.

quire an interest in "any enterprise" engaged in or affecting interstate commerce.¹⁰⁰ Section 1962(b) prohibits acquiring or maintaining an interest in, or control of, any such enterprise "through a pattern of racketeering activity or through collection of an unlawful debt." Subsection (c) of section 1962 makes it a crime for any person "employed by or associated with any enterprise" in or affecting 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." Finally, section 1962(d) prohibits conspiracies to violate the other three prohibitions.¹⁰¹

This structure is neatly designed to deal with the congressional concern with organized criminal infiltration of legitimate business. Section 1962(a) prohibits acquisition of an interest in a legitimate business by the investment of "dirty money" derived from racketeering; section 1962(b) prohibits acquisition of such an interest by means of racketeering acts (as, for example, by extortion or loan-sharking); and section 1962(c) prohibits the operation of a legitimate business (however acquired) by means of unlawful racketeering behavior.

Indeed, the structure of these prohibitions corresponds perfectly to the analysis of organized criminal infiltration of legitimate enterprises presented by Senator McClellan in his speech on organized crime originally introducing S. 30. Thus, Senator McClellan commented that:

Control of business concerns has been acquired by the subrosa investment of profits acquired from illegal ventures [prohibited by section 1962(a)], accepting business interests in payment of gambling or loan shark debts [prohibited by section 1962(b)'s "unlawful debt" language, as defined in section 1961(6)], but, most often, by using various forms of extortion [prohibited by section 1962(b)'s "pattern of racketeering" language, which would outlaw acquiring a business through, *inter alia*, extortion, under the definition in sections 1961(1)(A) and (B)].¹⁰²

After takeover, the Senator went on, the organized criminal would secure further illicit profits by such means as arson frauds, bankruptcy frauds, and restraints on trade enforced through "techniques of vio-

100. The Senate Judiciary Committee added an exception, not contained in S. 1861, for the investment purchase of shares of a publicly held corporation, if the number of shares held by the racketeer, members of his family, and his accomplices in the pattern of racketeering amounts to less than 1% of the outstanding shares of the corporation. 18 U.S.C. § 1962(a) (1982).

101. The conspiracy provision, absent from S. 1861 as originally drafted, was added in committee. See Senate Comm. on the Judiciary Report on Organized Crime Control Act of 1969, S. Rep. No. 617, 91st Cong., 1st Sess. 22-23 (1969).

102. 115 Cong. Rec. 5874 (1969). This analysis of the means by which organized crime accomplishes its infiltrations is cribbed from that of the Katzenbach Commission. See *supra* note 41 and accompanying text.

lence and intimidation."¹⁰³ Conducting the affairs of an enterprise through such a pattern of racketeering activity is prohibited by section 1962(c).

Certain expansions of the coverage of RICO beyond the "Criminal Activities Profits Act" earlier proposed by Senator Hruska should be obvious. First, although the prohibition against investment of unreported income as such has been dropped, the prohibition of direct infiltration of legitimate business has been considerably expanded. Penetration of a business through extortion and loansharking, as well as through investment of criminal profits, was prohibited, thus striking at all means of infiltration earlier identified by the Katzenbach Commission and Senator McClellan.¹⁰⁴

Second, in accord with Justice Department criticisms of the bill,¹⁰⁵ section 1962(c) was added, thus providing the means to prosecute not only the act of infiltration, but also the conduct of the affairs of the enterprise through racketeering that could be expected to follow such penetration. While still serving the goal of attacking organized crime's involvement in legitimate business, section 1962(c) takes a different approach to the problem, prohibiting not the act of infiltration itself, but the criminal activities committed by the infiltrated racketeers.

Third, unlike Senator Hruska's bills, which were limited to investment of dirty money in "*business enterprises*,"¹⁰⁶ the RICO bill broadly defined "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."¹⁰⁷ This expansion clearly broadened the range of activities to be protected against infiltration beyond businesses to include labor unions and government bodies as well, both of which had been identified by Senator McClellan as victims of organized crime penetration "[c]losely paralleling its takeover of legitimate businesses."¹⁰⁸

Finally, S. 1861 substantially increased the criminal penalties applicable to violators.¹⁰⁹

103. 115 Cong. Rec. 5874 (1969).

104. See *supra* notes 41 & 102 and accompanying text.

105. See Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 387 (1969).

106. S. 1623, 91st Cong., 1st Sess. § 2(c) (1969).

107. 18 U.S.C. § 1961(4) (1982); cf. S. 1861, 91st Cong., 1st Sess. § 2(a) (1969) (identical language to have been codified as § 1961(5)).

108. 115 Cong. Rec. 5874-75 (1969).

109. Senator Hruska's original Criminal Activities Profits Act had provided for fines of \$10,000 and sentences of 10 years, S. 2049, 90th Cong. 1st Sess. § 3(a), and his Sherman Act amendment prohibiting investment of unreported income had a maximum sentence of only one year and a \$50,000 fine. S. 2048, 90th Cong., 1st Sess. (1967). (In the consolidated version introduced in the 91st Congress, the penalties for both offenses were set at not more than 10 years and not more than \$10,000. S. 1623, 91st Cong., 1st Sess. §§ 2(a), 2(c) (1969).) None of the Hruska bills provided for forfeiture. In contrast,

In the process of broadening its assault on infiltration, the drafters of the Corrupt Organizations Act also retained and expanded those aspects of the earlier bills that swept beyond that particular problem. RICO continued to make no attempt to define organized crime, either as the monolithic Italian-American conspiracy most often discussed by the Katzenbach Commission and Senators McClellan and Hruska or in the more general sense of structured criminal syndicates or organizations of any kind. Instead, the new bill, like the old, implicitly defined organized crime by what it did rather than by what it was, by listing a variety of crimes to which the prohibitions of the act applied.¹¹⁰ Like earlier federal statutes enacted out of concern about organized crime,¹¹¹ RICO thus makes no attempt to define its target and limit its applicability to organized crime.

Broadening the bill's prohibitions beyond organized crime, however defined, expanded its coverage beyond the "infiltration" problem the bill was supposed to address. The broadening effect of this decision, moreover, was multiplied by other innovations in the newly expanded bill. Since the Hruska proposals dealt only with the *investment of profits from* criminal activities, defining species of crimes instead of species of criminals as the source of prohibited investments constituted a limited and reasonable expansion of coverage: keeping criminals out of legitimate businesses is desirable whether the infiltrators are officially "made" members of the Mafia, or more localized gamblers or drug dealers. But the new section 1962(c) prohibited as well the *conduct of a business through* the specified criminal means. As this prohibition applied to anyone who "participate[s], directly or indirectly, in the conduct of [an] enterprise's affairs," and not merely to infiltrating gangsters, the dramatic criminal penalties now made available covered ordinary businessmen gone astray as well as career criminals.¹¹²

Even this expansion would have been modest had the list of activities selected as "typical of organized crime" remained limited to such blue-collar offenses as drug dealing, gambling, and crimes of violence. But the Hruska bill already had included bankruptcy fraud and bribery

Senator McClellan's corrupt organizations bill provided for a maximum sentence of 20 years imprisonment and a \$10,000 fine, as well as providing for forfeiture by the violator of "all interest in the enterprise." S. 1861, 91st Cong., 1st Sess. § 2(a) (1969) (to have been codified as § 1963(a)). As enacted, RICO permitted 20-year jail terms and fines up to \$25,000 and contained similar, but more elaborately defined, forfeiture provisions. See 18 U.S.C. § 1963(a) (1982) (amended 1984).

110. This, it will be remembered, was the approach to defining organized crime that the Katzenbach Commission had seemed to consider unsophisticated. See *supra* note 33 and accompanying text.

111. See Bradley, *Racketeering*, *supra* note 21, at 244-46.

112. In contrast, S. 1623 had not reached ordinary white collar criminal conduct at all and had penalized insiders who assisted in the investment of criminal profits in their businesses by outside mobsters only as misdemeanants, while providing for up to 10-year sentences for the infiltrators themselves. S. 1623, § 2.

of federal officials,¹¹³ and Senator McClellan's original Corrupt Organizations Act had added additional white-collar offenses such as embezzlement from union, welfare and pension funds, and interstate transportation of property stolen or taken by fraud.¹¹⁴ Most critically, the Senate Committee added to the final version of RICO violations of federal laws involving mail and wire fraud, and securities fraud.¹¹⁵ Without question, these amendments included offenses that infiltrating racketeers would be likely to commit,¹¹⁶ but the effect of the changes was that any corporate executive who conducted the affairs of his business "through a pattern of" fraud (i.e., by at least two fraudulent acts related in some unexplained fashion within ten years¹¹⁷) would violate RICO. In short, the combination of expansions of coverage had the effect—apparently unintended—of drastically increasing the potential penalties facing many "white collar" criminals.

An even more dramatic expansion of the potential coverage of RICO appears when the language of the statute is given an only slightly more creative reading. The logic of the reading is smooth and simple: (1) it is a crime for anyone associated with any "enterprise" to conduct the affairs of that enterprise through a "pattern of racketeering activity"; (2) an "enterprise" includes "any . . . group of individuals associated in fact," a description that manifestly describes an organized crime syndicate; (3) a "pattern of racketeering activity" includes the commission of (almost any) two crimes; (4) therefore, the statute criminalizes not merely, say, the operation of a Mafia-infiltrated carting company through a pattern of extortion, but also the operation of a Mafia "family" itself, for what is a criminal syndicate but a "group of individuals associated in fact" who conduct their affairs "through a pattern of racketeering"? By this logic, RICO could be read as imposing drastic sanctions not only on the infiltration of legitimate business by organized criminals and on the operation of legitimate business in a criminal manner by anyone at all, but also on the operation of organized crime itself. And indeed, since the statute's working definition of organized crime is found only in the expansive definitions of "enterprise" and "pattern of racketeering," the statute so read would apply not only to La Cosa Nostra, but to any group of individuals banded together into an "associat[ion] in fact" to commit any of the wide range of crimes defined

113. See *id.*, at § 1(1). Bankruptcy fraud, though unaccountably dropped from S. 1861, reappeared in the enacted version of RICO. See 18 U.S.C. § 1961(1)(D) (1982).

114. See S. 1861, 91st Cong., 1st Sess. § 2(a) (1969) (provision to have been codified as § 1961(1)(B)).

115. See 18 U.S.C. § 1961(1)(B), (D) (1982) (amended 1984). The Senate Committee also made other additions that fall within the possible ambit of ordinary corporate crime, including Taft-Hartley violations, 18 U.S.C. § 1961(1)(C) (1982), and violations of state bribery laws, 18 U.S.C. § 1961(1)(A) (1982).

116. See 115 Cong. Rec. 6993 (1969) (remarks of Sen. Hruska).

117. See 18 U.S.C. § 1961(5) (1982).

by section 1961(1) as "typical of organized crime."¹¹⁸

E. *The Logic of Expansion*

What accounts for the continual expansion of the language of RICO to the point that the statute as enacted is protean in form and pervasive in coverage? The basic structure of the statute and the pronouncements of its supporters all support the view that the statute was initially designed to strike a blow at organized crime by criminalizing the infiltration of legitimate business by members of a nationwide criminal syndicate, and that its principal supporters in Congress never understood the statute to encompass other aspects of the organized crime problem. Nevertheless, the statute that emerged clearly goes beyond the prohibition of the act of infiltration itself and equally clearly includes more than the actions of a monolithic "Cosa Nostra." Moreover, the statute can be read without serious distortion of its language to escalate dramatically the sanctions available against business fraud and against organized criminal activity in the loosest possible sense, neither of which have any necessary relation to the infiltration problem that was all that overtly concerned the Congress. What happened?

The expansion of the coverage of the statute was driven by fundamental definitional and criminological difficulties with the project on which Congress had embarked. The original insight behind RICO—Senator Hruska's notion that it was desirable to mount a "direct attack" against the infiltration of legitimate business by organized crime—was at least plagued by definitional problems and at worst totally misguided. The effort to solve the inherent problems of the approach and salvage a useful law enforcement tool was the engine that drove the expansionist draftsmanship of RICO.

1. *Defining Organized Crime.*—The first definitional hurdle was faced, and solved in an expansionist direction, at the very outset. If the goal is to prohibit the penetration of legitimate business by organized crime, we must know what we mean by organized crime. Defining organized crime, however, turns out to be a slippery business, from a sociological as well as from a legal point of view.¹¹⁹ The first reaction of the ordinary citizen is to conjure up visions of "the Mafia" or "La Cosa Nostra"—a formalized, hierarchical secret society, a corporation of crime—whose central members are all but invariably Italian, or more particularly Sicilian. As we have seen, this popular image is not confined to the person in the street; the same understanding of organized crime

118. As we will see, this logic has been adopted by prosecutors and by the courts in interpreting RICO. See *infra* notes 165–198 and accompanying text. My concern here is not to determine whether that interpretation is "correct," but simply to identify the wide divergence between the expansive wording of the statute and the expressions of intention of its congressional sponsors.

119. See, e.g., Ianni & Reuss-Ianni, *Organized Crime: Overview*, in 3 *Encyclopedia of Crime and Justice* 1094, 1095–96 (S. Kadish ed. 1983); see also *supra* note 11.

pervaded the thinking of the President's Crime Commission and the congressional sponsors of the precursors of RICO.

But this understanding of organized crime would not do as a juridical concept in the definition of a crime. Putting aside possible constitutional problems under the bill of attainder clause, the idea that criminal prohibitions should apply generally is deeply imbedded in our traditions. Congress obviously would recoil at a law criminalizing certain actions when performed by members of a specific, named organization that could be performed without penalty by other citizens—even if that organization could be satisfactorily defined and even putting aside the further constitutional and political dubiousness of including ethnic classifications in the definition.¹²⁰

In any event, a definition focused on a single entity, even if one could be devised, would not be desirable. The Mafia may not be a mythical entity, but it is hardly coextensive with syndicate crime in the United States. If professional criminal elements, organized into structured, businesslike units characterized by division of labor and hierarchical organization, are moving into legitimate businesses around the country where they can be expected to continue to utilize unlawful tactics in pursuit of profit, the appropriate law enforcement response does not turn on whether a particular syndicate is affiliated with the largest nationwide organization of its kind. Granted that the devisers of RICO took some inspiration from the antitrust laws, the goal of Congress was obviously not to further competition in the criminal sector of the economy by breaking up Crime, Inc., into smaller, more efficient units.

But what of a definition of "organized crime" that tries to capture the general features of criminal syndicates that make them "organized"?¹²¹ This is a more promising approach, though it too presents problems of definition and proof. Exactly what elements of structure,

120. Even the criminal provisions of the Smith Act are not directed to members of the Communist Party, but rather attempt to describe in general terms the *sort* of organization in which membership is prohibited. See 18 U.S.C. §§ 2385, 2386 (1982).

121. A proposed statute taking this approach is § 1005 of the proposed revised federal penal code drafted by the National Commission on Reform of Federal Criminal Laws (the Brown Commission). That statute, titled "Organized Crime Leadership," would have made it a crime to undertake certain significant leadership roles in a "criminal syndicate." National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code, § 1005(2) (1970). A "criminal syndicate" was defined as

an association of ten or more persons for engaging on a continuing basis in crimes of the following character: illicit trafficking in narcotics or other dangerous substances, liquor, weapon[s], or stolen goods; gambling; prostitution; extortion; engaging in a criminal usury business; counterfeiting; bankruptcy or insurance frauds by arson or otherwise; and smuggling. . . . Association, within the meaning of this section, exists among persons who collaborate in carrying on the criminal operation although:

- (a) associates may not know each other's identity;
- (b) membership in the association may change from time to time;

organization, or activity differentiate a "syndicate" from a mere "gang"? How loose an association of criminals should count? How large or small must it be? Many criminals have accomplices in particular crimes, and, like the business or social associates of individuals in legitimate pursuits, those accomplices are likely to be drawn from a limited and recurring circle of acquaintances. Do these loose affinity groups constitute "organized crime"? When we say "organized crime," we clearly mean the criminal equivalents of General Motors and the University of Chicago Faculty of Law, but do we also mean the underworld counterparts of the Vienna Circle and the Critical Legal Studies Movement? And if not, how do we differentiate more from less highly organized groups in a zone of activity not given to formalized relationships?

The definitional problems here, though real, may not be insoluble.¹²² But once again, one may seriously question whether there is any point to solving them, at least if the goal is to criminalize infiltration into legitimate business. Does it really make sense to hold that a hit man or a narcotics dealer who uses his ill-gotten gains to acquire a garbage collection business, or uses strong-arm tactics to take over such a business, is more of a menace if he is associated with a relatively formal criminal organization than if he were simply a somewhat disorganized free lance? Perhaps an argument is available that a member of a functioning criminal organization is more likely to continue in his dishonest ways once ensconced in a legitimate trade, while a relatively casual criminal might use infiltration as a painless route to a straight occupation. Still, Congress can be forgiven for concluding that the distinction was not worth making in a prohibitory statute.

Rather than attempting to define even a broad concept of organized crime in terms of its structural characteristics, Congress' solution, which was reached in the very first of Senator Hruska's proposed bills¹²³ and never departed from, was to define the problem functionally. Organized crime is as organized crime does. In other words, anyone who performed the criminal acts considered typical of organized

(c) associates may stand in a wholesaler-retailer or other arm's length relationship in an illicit distribution operation.

Id. For further discussion of this proposal, see Lynch, *supra* note 14 at note 216 and accompanying text. Interestingly, Professor Blakey was also a consultant in the drafting of this proposal as well. See Schwartz & Blakey, *Introductory Memorandum and Excerpts from Consultant's Report on Conspiracy and Organized Crime: Sections 1004 and 1005 (1969)*, in 1 *Working Papers of the National Commission on the Reform of the Federal Criminal Laws* 381 (1970).

122. See Lynch, *supra* note 14, at notes 210-16 and accompanying text. Indeed, the courts are struggling with just such issues now as they try to determine what kinds of criminal associations constitute RICO "enterprises" in their own right. See, e.g., *United States v. Turkette*, 452 U.S. 576, 583 (1981); *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). See Lynch, *supra* note 14, at notes 201-09 and accompanying text.

123. See *supra* notes 59-63 and accompanying text.

crime would be treated the same as the Mafia capo. Of course, the list of crimes typical of organized crime rapidly became a long and diverse list, for is it not a defining characteristic of organized crime that it would do just about anything for a profit?¹²⁴

From such puzzling about the concept of organized crime was born the "pattern of racketeering." Any criminal can be a racketeer, regardless of his involvement in a criminal syndicate, if he commits a "pattern of racketeering acts." The logic of defining crimes in general terms, and the difficulty of defining organized crime structurally, led inexorably to the conclusion that anyone who attempts to acquire a foothold in a legitimate business through violence or usury, or by investing the proceeds of criminal activities, should be subject to the same penalties.¹²⁵

2. *Defining Legitimate Business.*—Similar problems pushed back the frontiers of the area to be protected against "infiltration." Legal concepts like corporations or partnerships were inadequate to the definitional task. Criminals could, and the studies available to Congress showed that they sometimes did, penetrate not only legal entities officially capable of divided ownership, but also unincorporated businesses nominally owned by a sole proprietor, acquiring covert interests in the profits of such businesses through their muscle or capital. Indeed, "business" itself was too narrow a term. What about labor unions, to take only the most obvious example?¹²⁶ Or charitable or social organizations? Or trade associations (the prototypical vehicle for the operation of a "racket")?¹²⁷ Or even governmental agencies or offices?¹²⁸ The definitional construct had to encompass all of these. Here, Congress' answer was the "enterprise"—a nicely vague and encompassing term that could cover just about anything, and was defined so that it did.¹²⁹

Thus, the technical difficulties of defining key concepts in the conduct Congress sought to attack forced the realization that a fairly broad

124. Senator McClellan in fact acknowledged that the list of predicate offenses was long precisely because organized criminals are "sufficiently resourceful and enterprising" that it is "impossible to draw an effective statute that reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." 116 Cong. Rec. 18,940 (1970).

125. The conclusion is inescapable that Congress made a deliberate definitional choice in response to these difficulties. Thus, cases rejecting efforts to limit RICO by confining its reach to "organized crime" cases understood in the most narrow sense, see *infra* note 158, are clearly correctly decided.

126. See, e.g., 115 Cong. Rec. 5874 (1969) (remarks of Sen. McClellan).

127. See H. Nelli, *The Business of Crime: Italians and Syndicate Crime in the United States 241-43* (1976).

128. See, e.g., 115 Cong. Rec. 5874-75 (1969) (remarks of Sen. McClellan).

129. See 18 U.S.C. § 1961(4) (1982). This definitional expansion was only made when RICO's immediate progenitor, the Corrupt Organizations Act, was introduced to supersede Senator Hruska's original Criminal Activities Profits bill. See *supra* notes 77-98 and accompanying text.

range of conduct not necessarily included in the catch-phrase description of the evil to be prevented by the statute should be brought within its prohibition. But the core conceptual problem of the approach Congress had chosen would not appear until Congress set about defining what it meant by "infiltration."

3. *Defining Infiltration.*—Here, too, there was a technical problem, though one that was rather easily solved, again in an expansionist direction. Senator Hruska's original proposals prohibited only the financial penetration of a legitimate business by criminal elements through the investment of the proceeds of criminal conduct.¹³⁰ As ultimately enacted, RICO also prohibited acquisition of legitimate businesses through racketeering means such as extortion or loansharking.¹³¹

This expansion, though simple and logical, marks a subtle change in focus. If the financial penetration model had already, in Senator Hruska's formulation, made its peace with a broadened concept of "racketeer" that did not specifically require that the infiltrator be an agent of "organized crime," at least it retained the idea of the infiltrator as a character previously identifiable as a criminal. That is, in order to have acquired tainted funds to invest in an ordinary business, the infiltrator must have already engaged in a pattern of defined criminal conduct. The image was thus maintained of two separate spheres, the legitimate and the criminal, that meet only when an alien being from the underworld breaches the wall between them by "infiltrating" or "penetrating" the world of legitimate activity.

One needs no prior involvement in criminal activity, however, to violate section 1962(b): anyone who acquires an interest in a business through a pattern of violence or usury is ipso facto a racketeer. Thus, one who was not previously part of the criminal sphere becomes a racketeer by the same act by which he infiltrates the straight business world. There is, of course, nothing peculiar about punishing such conduct, but the change highlights the oddity of "infiltration" as a defining concept in a criminal statute: what is offensive about the violation of section 1962(b) is the conduct of extorting a business interest from a victim, not some metaphorical corruption of the business enterprise that comes about by its invasion by a "racketeer."

The change thus reflects a broader problem inherent in the basic idea of a law prohibiting the "infiltration" of legitimate enterprises by criminals. Putting aside for a moment the acquisition of a business interest through direct criminal action, the act of acquisition is morally neutral, or even beneficial—"black money" is fungible with the ordinary green stuff with respect to its economic function as a source of capital for socially productive businesses. The harm to society is not in the act of infiltration—the investment of criminal proceeds—but in the

130. See *supra* notes 51–65 and accompanying text.

131. See 18 U.S.C. § 1962(b) (1982).

acts of racketeering that precede and follow it.¹³² Society is injured by the narcotics and gambling businesses that are the source of criminals' profits, not by the use of those profits to buy a laundry; any harmful result of the latter comes not directly from the investment itself, but from the predicted operation of the laundry by criminal means.¹³³

Of course, this does not pose a critical problem in criminal law theory. Acts not intrinsically harmful in themselves, when committed with a criminal intent, may be punished as attempts. More to the point, specific acts that threaten future harm may be criminalized without the showing of any intent beyond the intent to commit the "preparatory" act itself, as, for example, with statutes prohibiting possession of weapons.¹³⁴

Prohibition of the morally neutral act of investing under circumstances suggesting that the investment may lead to future social harms is thus not conceptually difficult. Such legislation may have its costs: for example, the possibility that legitimate investments might lead criminals to retire from active commission of crimes is foregone.¹³⁵ But if Congress concludes, as apparently it did,¹³⁶ that criminals entering legitimate businesses corrupt the straight world rather than straightening themselves out, no reason of principle prevents it from prohibiting the act that brings the criminal closer to the accomplishment of his goal, even at the expense of preventing those who would perform the same act for innocent purposes. Section 1962(a) of RICO,

132. It may be possible to argue that infiltration should be prohibited because the prospect of legitimate investment increases the attractiveness of engaging in the original criminal acts. It is doubtful, however, that such indirect deterrence is realistic; the opportunity to invest in legitimate business can hardly be a major factor in the calculations of most criminals, and the fact that such investment would be unlawful can hardly be expected to discourage someone who by hypothesis is willing to violate the law to obtain capital.

133. See Bradley, RICO, *supra* note 4, at 884. One court, following this reasoning, has called the idea behind RICO "basic[ally] irrational." *United States v. Loftin*, 518 F. Supp. 839, 853 (S.D.N.Y. 1981), *aff'd*, 819 F.2d 1130 (2d Cir. 1987). Even Professor Blakey disputes this view not by defending the idea of a "direct attack on infiltration," but by denying that that idea was the sole motivating force behind RICO. Blakey, RICO Civil Fraud, *supra* note 5, at 254 n.49.

134. See, e.g., N.Y. Penal Law § 265.01 (McKinney 1980 & Supp. 1987) (prohibiting possession of various weapons without requirement of intent to commit crimes). For a general discussion of the circumstances in which possessory offenses may be punished on a "preparatory" theory, see G. Fletcher, *Rethinking Criminal Law 197-205* (1978).

135. This possibility is perhaps too easily overlooked. Especially when looked at across generations, rather than over a single criminal career, it is possible that the anti-social subculture that is a unifying factor in ethnically homogeneous organized crime groups may be attenuated when legitimate business opportunities are available to a new generation, even if the opportunities were provided in the first instance by revenues from unlawful activity. Extending the boundary of criminality further forward to include the first step away from criminal acts can hardly further any such socialization process.

136. See 115 Cong. Rec. 9567 (1969) (remarks of Sen. McClellan).

in effect, could be construed as a kind of inchoate crime.¹³⁷

The expedience of such a course is another question entirely. The whole point of punishing possession of burglar tools is that it is easier to prove than attempted burglary. Such advantages might well be desirable in prosecuting organized crime figures, who are often difficult to convict. But the RICO infiltration offense is not easier to prove than the charges already available. In order to prove a violation of section 1962(a), the prosecutor still has to prove the underlying racketeering acts that constituted the source of the proceeds or the means of acquiring the enterprise. Since these are by definition already crimes, and constitute the principal socially harmful conduct committed by the defendant, RICO has not made it any easier (procedural and remedial considerations aside¹³⁸) to prove the case; it has eliminated no element necessary to convict on the underlying charges. On the contrary, it has added an additional element: the use of the proceeds from racketeering to invest in a legitimate enterprise. That element is hardly a trivial one. Even if the underlying illegitimate activities could be proved, it may well be extremely difficult, and it usually will be burdensome, to prove that the funds used to acquire the interest were indeed drawn from the profits of the defendant's racketeering activities, rather than from other sources.¹³⁹

137. Interpreting the statute this way does not, contrary to Professor Bradley's suggestion, undermine the rationale or legitimacy of the conspiracy provision of RICO, 18 U.S.C. § 1962(d) (1982). See Bradley, RICO, *supra* note 4, at 884-85. There is nothing incoherent about the concept of a conspiracy to commit a "preparatory" offense like burglary or possession of burglar tools or possession of narcotics with intent to distribute, and no special mens rea requirements beyond those applicable to other conspiracies are imposed in such cases. At some point in the chain, perhaps, it could be argued that the substantive preparatory crime is itself so remote from harm that imposing inchoate liability for attempt or conspiracy to commit that particular crime is questionable. But this can hardly be true of an infiltration offense, where the "preparatory" act of investment follows as well as precedes criminal activity.

138. For example, the new prohibition may make it possible to prosecute racketeering acts on which the statute of limitations would otherwise have run, or the additional RICO crime may significantly increase the penalties that would have been available if the racketeering acts had been prosecuted independently. Such procedural and remedial benefits for the prosecution are not necessarily desirable, however. If a racketeer's investments proceed from crimes that were committed long enough ago to have earned the benefits of repose provided by the statute of limitations, it is not obvious that the act of using the money from long-past crimes justifies overriding the usual policies of the statute of limitations. Nor is it obvious that the penalties for investing the proceeds of crimes should not bear some proportionate relation to the seriousness of the underlying crimes. Cases in which RICO would provide significantly higher penalties for investing the proceeds of crimes than would be imposed for the crimes themselves would raise questions about whether the dangers of infiltration justified the severity of the sentence. For a discussion of some of the procedural and remedial consequences of other RICO offenses, see Lynch, *supra* note 14, at notes 89-116 and accompanying text.

139. This problem was foreseen by critics while RICO was still under consideration. See Committee on Fed. Legislation, Ass'n of the Bar of the City of New York, *The Proposed Organized Crime Control Act of 1969* (S.30) 8 (1970) (arguing that the diffi-

Cases brought under section 1962(b) do not present the same problem. Where the government can prove that an interest in a legitimate enterprise is the fruit of an extortion or the collection of an illegal debt, casting the offense as a violation of section 1962(b) imposes little or no additional burden on the prosecution. Indeed, in most cases the shape of the prosecution's case will not be affected at all. The prosecution will need to show that the victim parted with some property in order to prove most predicate crimes of this category.¹⁴⁰ Even where an equally severe offense not requiring such proof is available,¹⁴¹ the prosecutor for tactical reasons will generally prefer to prove the loss to the victim, if such a loss actually occurred. It thus imposes no additional burden on the prosecutor, where the proceeds of the crime consist of an interest in an enterprise rather than mere cash, to punish separately the infiltration aspect of the crime.

On the other hand, one may seriously question how helpful this additional weapon is to prosecutors. Acquiring a business through the commission of a crime is, tautologically, a crime already. And those crimes that will most commonly be the means of infiltration are already provided with ample penalties.¹⁴² If section 1962(a) seems too cumbersome a tool to be useful to law enforcement, section 1962(b) appears merely redundant.

4. *Defining Pattern of Racketeering.*—Prohibiting acts of infiltration per se thus proves to add few useful legal weapons against it. Section 1962(c) represents a possible response to the futility of subsections (a) and (b). If the principal harm to be feared from infiltration is the consequent likelihood that the business will be run in a criminal fashion, and especially if it is difficult to see exactly how to prohibit infiltration in a way that makes it easier for law enforcement to stop it, why not go to the heart of the matter and make it a separate offense, more serious than the underlying crimes themselves, to operate an enterprise in the way racketeers can be expected to: through a pattern of criminal

culty of tracing funds to prove an offense under § 1962(a) is "likely to prove insuperable").

140. See, e.g., 18 U.S.C. § 1951 (1982) (extortion); id. § 894 (extortionate collections of credit).

141. See, e.g., id. § 1951 (attempts and conspiracies to commit extortion); id. § 892 (extortionate extensions of credit).

142. See, e.g., id. § 1951 (extortion affecting interstate commerce punishable by twenty years' imprisonment); id. §§ 892, 894 (extortionate extensions or collections of credit punishable by twenty-years' imprisonment). This, of course, is not to say that imposing additional criminal penalties or civil sanctions, such as forfeitures, will not be of some use to prosecutors, although in view of the extremely severe sanctions available for the most common predicate felonies in § 1962(b) cases, the additional sanctions must be mere overkill in the overwhelming majority of cases. But the creation of a new crime is not in itself helpful if it does not prohibit socially harmful conduct not previously punishable or eliminate barriers to successful prosecution of conduct already illegal.

acts?¹⁴³

This step requires no revolution in criminal law theory: sentence-enhancing statutes are common, as are statutes that, in form or substance, create higher degrees of offenses where additional social harms are present. But what precisely is the aggravating circumstance in section 1962(c)? In the case of infiltration, the additional aggravating factor might be thought to be the presence of the racketeer. An ordinary business fraud is bad enough, but a fraud committed by an organized criminal who acquired the business in the first place only so as to commit such frauds is arguably something worse. But there are definitional and conceptual difficulties with this approach. The structure of RICO reflects a decision that it is too difficult and constitutionally problematic to define racketeers other than by their acts. Moreover, section 1962(b) assumes that prior racketeering acts are not necessarily required: if under section 1962(b) one can become a racketeer by acting like one in the acquisition of a business, why cannot one become a racketeer by acting like one in the operation of a business?

Finally, it is by no means clear that, in the context of a "legitimate" enterprise, "being a racketeer" is really an aggravating factor. If the principal danger of racketeers in business is that they will create a social harm by conducting the business in a distinctly criminal way, it is difficult to understand why anyone who conducts a business in such a socially harmful way should not be equally accountable.¹⁴⁴ And so the operation of a legitimate enterprise by criminal means becomes a logical target of RICO, whether or not the perpetrators are infiltrating racketeers.

But if a prior record of racketeering is not the distinguishing aggravating factor in section 1962(c), only the "corruption" of an enterprise is left to distinguish the violation of that statute, with its severe penalties, from the mere commission of predicate offenses. In the abstract, putting the resources of a corporation or a union behind a criminal act, or distorting a legitimate economic institution, may plausibly be thought to aggravate the intrinsic harm or wrongfulness of a particular criminal act. In practical operation, however, it is difficult to isolate this factor. Many RICO predicate crimes can only be committed in the context of an economic enterprise: the claim that a securities fraud or

143. If, as suggested above, §§ 1962(a) and (b) can be seen as inchoate offenses, § 1962(c) is the consummated offense for which they serve as preparation.

144. Special treatment for business criminals who are identified as racketeers by their prior conduct might be justified on the theory that the infiltrating organized criminal has an advantage over other businesspeople who seek to compete by unlawful means, because his reputation for prior criminal conduct or Mafia connections may intimidate his victims out of complaining or cooperating with the authorities. But if victims are afraid to complain about crimes, it is difficult to see how the situation is helped by imposing further penalties for offenses that are by hypothesis not being brought to the attention of the authorities. Any effort to capitalize on a reputation for violence, moreover, is already punishable as extortion.

Taft-Hartley violation is worse if it implicates the resources of an economic enterprise is meaningless. Nor is it easy to define the "corruption" of a legitimate organization. News media accounts frequently describe a RICO count as charging that "the defendants in effect converted the [named legitimate enterprise] into a criminal enterprise," but the sense of *pervasive* corruption this implies is only rarely accurate and is certainly not required by a statute that permits a "pattern of racketeering" to be found in as few as two predicate criminal acts regardless of the size of the enterprise. The addition of section 1962(c) to the statute, then, expands the coverage of the statute to the point that the infiltration idea, and with it any specific harm that can be identified with crime in the context of a legitimate enterprise, totally evaporates.

The logic of expansion has now become fairly clear: the intrinsic illogic of attempting to punish infiltration itself, combined with the difficulties of defining "organized crime," inevitably resulted in a statute that punishes anyone who acts in the way that organized criminals are thought to act when they have infiltrated the legitimate world—by corrupting legitimate institutions to criminal ends. And since corruption of an enterprise from within is no easier to define than infiltration from without, the statute is left punishing anyone who commits more than one crime within the context of a legitimate enterprise, with only the shakiest justification for treating such crime as distinct from or more serious than crime that occurs outside such an enterprise.

Combined with the expansive definition of "enterprise" already discussed, however, the statute can be read to break down even this distinction, by providing enhanced punishment for anyone who acts like an organized criminal—by committing crimes. For, as already noted, an "enterprise" does not need to be a legitimate institution at all. At least if the statutory definition is taken literally, the RICO statute is violated if a "group of individuals associated in fact"—say, the James gang—runs its enterprise not by criminal means that distort its legitimate ends, but by the very crimes that are the object of the association in the first place. As we are about to see, the courts have interpreted RICO very literally indeed.

F. *RICO in the Courts: The Expansion Continues*

The goal of curbing organized crime's penetration into legitimate sectors of society thus resulted, through the combination of a congressional choice to attack the problem by direct prohibition and the difficulties of drafting a statute that would effectively make such an attack, in a very broadly drafted bill that was capable of being applied to a remarkable range of conduct. But the breadth of potential coverage would not necessarily be determinative. The new law would have to be applied by prosecutors and judges. How they responded to the bill's language would determine its ultimate scope. While they initially re-

sponded cautiously, within a few years it would become clear that RICO would have all the reach that its language suggested.

1. *Early Cases*.—Although RICO became law on October 15, 1970, the first reported judicial opinion dealing with the statute did not appear until three years later.¹⁴⁵ The earliest judicial encounters with RICO did not involve elaborate discussions of the statute's meaning. Apparently, RICO's very novelty encouraged prosecutors not to push at the statute's outer limits and led defense attorneys to attack the statute in broad terms rather than to focus on the interpretation of its specific language. Thus, many early RICO opinions are concerned with broad-scale attacks on the constitutionality of the statute in cases that do not approach the frontiers of the statutory language.¹⁴⁶

One interesting aspect of these cases is that in rejecting the claim that the prohibitions of RICO are too nebulous to pass constitutional review, judges tended to hint at the kind of literal reading of the statute that would lead to the broadest possible applications. Faced with the claim that RICO was unconstitutional because it made it a crime merely to be "reputed to be an organized crime member,"¹⁴⁷ or because it failed to "set forth the degree and intensity of the relationship required between the racketeering activity and the usual operation of the enterprise,"¹⁴⁸ judges emphasized that the behavior prohibited by the statute was clear enough because the predicate offenses were clearly defined criminal acts, and, therefore, the conduct to be avoided was obvious to all.¹⁴⁹ Similarly, the failure of the statute to specify the relationship required between the racketeering activity and the enterprise was not a defect because Congress intended the statute to apply whenever there was any relationship whatever between the racketeering activity and the operation of the legitimate enterprise.¹⁵⁰ These judicial

145. *United States v. Amato*, 367 F. Supp. 547 (S.D.N.Y. 1973). As always, it is necessary to be cautious in drawing conclusions about the use of a statute solely from reported opinions. Although *Amato* represents the first reported judicial encounter with RICO, at least one previous indictment had already progressed to a successful conclusion: nine months before *Amato*, the Fifth Circuit noted that a witness in a perjury case then before it had previously been convicted of a RICO violation in a case involving police protection of a prostitution and gambling operation. *United States v. Cross*, 474 F.2d 1045, 1046 (5th Cir. 1973).

146. See *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir. 1975) (ex post facto law), cert. denied, 423 U.S. 1050 (1976); *United States v. Stofsky*, 409 F. Supp. 609, 612-14 (S.D.N.Y. 1973) (vagueness), aff'd, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976); *United States v. Amato*, 367 F. Supp. 547, 548-49 (S.D.N.Y. 1973) (claim that statute was "ambiguous"); *United States v. Parness*, No. 73 Cr. 157 (S.D.N.Y. May 17, 1973) (cited in both *Amato*, 367 F. Supp. at 548, and *Stofsky*, 409 F. Supp. at 614) (vagueness), aff'd, 503 F.2d 430, 440-42 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

147. *Amato*, 367 F. Supp. at 548.

148. *Stofsky*, 409 F. Supp. at 612.

149. See *id.* at 612-13; *Amato*, 367 F. Supp. at 548-49.

150. *Stofsky*, 409 F. Supp. at 613. The court's conclusion as to Congress' intention was based not on anything in the legislative history, but on what the language of the

reactions reflect the same tension that underlay the expansive draftsman's undertaking by the Congress: to avoid the vagueness and imprecision of the concepts of "organized crime" and "infiltration," the courts resorted to a literal reading of the broader but less indefinite language chosen by Congress. If anyone who committed a "pattern of racketeering acts" while participating in any fashion in the operation of any enterprise violated the statute, the statute might be extremely broad, but there would be no definitional ambiguity about the meaning of its terms.¹⁵¹

Just as these early cases show judges reacting cautiously to RICO by refusing to indulge in speculative limiting interpretation or aggressive constitutional review, they equally show prosecutors proceeding cautiously by using RICO only in cases that bore at least some plausible connection to the legislative rationale for the law. The earliest RICO cases¹⁵² involve classic "racketeering" schemes that directly preyed upon legitimate economic activity,¹⁵³ or entry into a legitimate business by criminal means.¹⁵⁴ Notably, however, in none of these cases did the courts explicitly identify the defendants as members of "organized

statute "plainly says" and on the belief that there is "[n]o good reason" why Congress would want to cover "some, but not all" of the forms that the "perversion of legitimate business may take." *Id.*

151. Judge Pierce in *Stofsky* explicitly preferred to ground the elusive notion of "relationship" between the enterprise and the predicate acts in "objective factors of employment status and the commission of the predicate acts," and explicitly noted the tradeoff: "This may be broad, but it is not vague." *Stofsky*, 409 F. Supp. at 613; see also *United States v. Parness*, 503 F.2d 430, 442 (2d Cir. 1974) (test is whether the statute conveys an adequate warning as applied in a specific situation), cert. denied, 419 U.S. 1105 (1975).

152. Only four RICO indictments were considered in reported opinions of courts of appeals through 1975.

153. *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976), charged a conspiracy between a trucking company and a teamsters local to force meat packers to use the services of the trucking companies through intimidation. In *United States v. Stofsky*, 527 F.2d 237 (2d Cir. 1975), cert. denied, 429 U.S. 819 (1976), officers of the union representing fur workers in New York's garment industry were charged with accepting bribes from manufacturers to permit violations of the collective bargaining agreements governing their industry. *United States v. Green*, 523 F.2d 229 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976), in which the RICO counts were ultimately dismissed in the district court, involved "a large-scale conspiracy" among officers and employees of a New Jersey trucking company to steal frozen seafood from New York City piers. *Id.* at 231.

154. While *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), did not involve infiltration of a business by defendants explicitly identified as associated with "organized crime," it did involve the acquisition of an apparently legitimate enterprise by illegal means. Parness schemed to acquire a gambling casino on a Caribbean island by converting money he collected on the casino's account and then lending the money back to its owner. Whether or not Parness was a member of "organized crime," the case clearly fits the prohibition of § 1962(b) against acquiring an interest in an enterprise through a pattern of predicate offenses. Indeed, as will be seen below, *Parness* is one of what continues to be only a handful of cases brought under § 1962(a) or (b), the provisions of RICO most directly tied to the original intent of Sena-

crime."¹⁵⁵ The statute as finally adopted had made it unnecessary to attempt any such classification.

But even in those early days, more aggressive strategies were budding. As prosecutors began to indict ordinary business crimes¹⁵⁶ and government corruption cases¹⁵⁷ as "racketeering conspiracies," defense attorneys began to argue that RICO should be construed in ways that reflected more closely its original purposes and gave less scope to its broad wording.

The courts had little difficulty with most of these arguments. They repeatedly and emphatically rejected arguments that RICO applied only to defendants who were part of "organized crime."¹⁵⁸ This decision was clearly correct; as we have seen, the legislative history requires the conclusion that Congress made a conscious decision not to define RICO liability in terms of any such conception and instead to define the statute's reach in terms of particular behavior.¹⁵⁹ More troublesome was the argument that the definition of a RICO "enterprise" should be limited in various ways.

2. *Government Agencies.*—One common form of this argument was the claim that a governmental unit could not be a RICO "enterprise."¹⁶⁰ The argument here had considerable force. As we have seen, the original idea behind RICO was that organized crime posed a threat to legitimate society, among other things, through the infiltration of legitimate business enterprises.¹⁶¹ Although the concept of "enterprise" in the statute as ultimately drafted is a broad one in the

tors Hruska and McClellan to strike directly at organized crime infiltration of legitimate enterprises.

155. See *supra* notes 153 & 154.

156. See, e.g., *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978).

157. See, e.g., *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), *aff'd*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980).

158. See, e.g., *United States v. Rubin*, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated and remanded*, 439 U.S. 810 (1978), *rev'd in part on other grounds*, 591 F.2d 278 (5th Cir.), *cert. denied*, 444 U.S. 864 (1979); *United States v. Campanale*, 518 F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976). Somewhat surprisingly, the issue continues to be raised and rejected. See, e.g., *United States v. Romano*, 736 F.2d 1432, 1441 (11th Cir. 1984), *vacated in part on other grounds*, 755 F.2d 1401 (11th Cir. 1985).

159. See *supra* notes 119–125 and accompanying text.

160. See, e.g., *United States v. Frumento*, 563 F.2d 1083, 1089 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); *United States v. Brown*, 555 F.2d 407, 415 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978).

161. See *supra* notes 22–98 and accompanying text.

Two less common arguments deserve some mention. In *United States v. Parness*, 503 F.2d 430, 438–40 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975), the court rejected the view that RICO applied only to domestic enterprises. In *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the Second Circuit appeared to limit the concept of "enterprise" to activities having an economic *raison d'être*, but the court has since considerably limited the meaning of that opinion. *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983).

sense that it covers a broad range of forms of organization, the language is at least open to the interpretation that an "enterprise," granted that it may take any *form*, must function as a business undertaking. After all, an enterprise under the statute is something in which one may acquire an "interest."¹⁶² Moreover, while the legislative history reflects a conscious effort to move away from "organized crime" as a defining concept, no similar intent to move beyond the concept of "penetration of legitimate business" is explicit in the remarks made by RICO's congressional supporters.

Nevertheless, most courts that considered the "government enterprise" issue had little difficulty resolving it in favor of the prosecution, and correctly so. First, the statutory language does not encourage the creation of exceptions to the definition of enterprise. Although the definition is comprehensive in terms of the forms that an enterprise might take, rather than of the objects that it might have, the breadth of the list, the choice of the extremely general term "enterprise," and the absence of any restriction whatever on the substance or purpose of the enterprise, all reinforce the conclusion that the statute covers the broadest possible range of activity. Second, even if the principal focus of congressional discussion in the debates leading to the adoption of RICO was on the infiltration of businesses by organized crime, it is by no means clear that the infiltration of other sorts of "enterprises" was outside the scope of the discussion. Labor unions, for example, were prominently mentioned as a type of entity frequently targeted by organized criminal groups.¹⁶³

Finally, it is possible to analogize with some success from the type of infiltration that directly concerned the congressional supporters of RICO to the corruption of government functions. A government de-

162. See 18 U.S.C. §§ 1962(b), 1963(a) (1982 & Supp. III 1985).

163. There is some temptation to argue that infiltration of government agencies, like infiltration of labor unions, was specifically foreseen and intended by Congress as a potential target of RICO prosecutions. Organized crime's corruption of government was a common theme of its critics, from the Kefauver Committee to the Katzenbach Commission to the proponents of the Organized Crime Control Act of 1970. This fact should not be relied on uncritically, however, as an indication of intention to include government enterprises in RICO. First, accounts of organized crime's corruption of government generally arose in Congress in general descriptions of the depredations of organized crime, and not in specific discussions of what RICO would do about the problem. See, e.g., 115 Cong. Rec. 5874-75 (1969) (remarks of Sen. McClellan). Second, while the definition of "enterprise" in 18 U.S.C. § 1961(4) (1982) includes language that seems specifically to describe labor unions ("group of individuals associated in fact") but not business enterprises, no similar description associated specifically with governments (e.g., "agency," "bureau," or "department") appears. Finally, while Congress was concerned about the "perversion" of legitimate functions of both government and economic enterprises, the structure of the perversion was different: for businesses and unions, the dominant image was the "infiltration" or "penetration" of the business, while for government agencies, "corruption" from the outside in the form of bribery was the principal danger. It is thus not clear that Congress specifically foresaw or intended RICO prosecutions in which the "enterprise" was a government agency.

partment is not the sort of thing in which one may acquire an interest, or in which one can invest the proceeds of racketeering, and therefore it can never be the "enterprise" in a prosecution under sections 1962(a) or (b); in that sense, it may never be "infiltrated" in the manner proscribed by the statute.¹⁶⁴ On the other hand, once the statute was expanded to go beyond the act of infiltration to prohibit as well the operation of an enterprise by racketeering means, a police department or tax assessor's office is in precisely the same condition as a contractor or a labor union. If a business executive or union leader is in violation of the statute when he operates his enterprise through a pattern of racketeering acts, even though he has no previous ties to organized crime or other criminal record, the concept of infiltration is meaningless as a restraint on the statute's sweep, and the sheriff who runs his department through a pattern of racketeering is perverting the function of a legitimate institution in precisely the same way as the corrupt executive or infiltrating racketeer. Congress may not have foreseen this use of the statute, but it can hardly be argued that it intended to preclude it, or that prosecutions for corrupting government departments are radically different from those for corrupting other legitimate institutions.

3. *Criminal Enterprises*.—A far more difficult question was whether the concept of an enterprise could be limited to "legitimate" entities. Inclusion of government bodies as "enterprises" preserves the feature of RICO that makes violations of that statute distinct from other sorts of criminal behavior: perversion of legitimate activities to criminal purposes. But if it is a crime to operate a criminal enterprise by criminal means, that distinctive rationale for the statute falls away, and it becomes more difficult to articulate what, if anything, holds the statute together as a coherent set of prohibitions.

Perhaps for this reason, the application of RICO to criminal enterprises became a far more controversial issue than its application to governmental ones.¹⁶⁵ Moreover, as we shall see below,¹⁶⁶ the use of

164. See *supra* notes 130-142.

165. Only one circuit ultimately adopted the view that a group of individuals associated for entirely illegitimate purposes could not be a RICO "enterprise." *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981). Eight other circuits, eventually joined by the Supreme Court, adopted the more expansive interpretation. See, e.g., *United States v. Sutton*, 642 F.2d 1001, 1006-09 (6th Cir. 1980) (*en banc*), *cert. denied*, 453 U.S. 912 (1981); *United States v. Errico*, 635 F.2d 152, 155 (2d Cir. 1980), *cert. denied*, 453 U.S. 911 (1981); *United States v. Provenzano*, 620 F.2d 985, 992-93 (3d Cir.), *cert. denied*, 449 U.S. 899 (1980); *United States v. Whitehead*, 618 F.2d 523, 525 n.1 (4th Cir. 1980); *United States v. Aleman*, 609 F.2d 298, 304-05 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Rone*, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *United States v. Swiderski*, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); *United States v. Elliott*, 571 F.2d 880, 896-98 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); *cf. United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980) ("enterprise" limited "to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an exist-

RICO against illicit enterprises would become the most important, and the most radical, application of the criminal provisions of RICO.

At one level, the use of RICO to attack criminal syndicates directly presents a fairly ordinary problem of statutory interpretation. As we have seen, the legislative history of RICO clearly reveals the understanding of those who discussed it in Congress that the specific purpose and effect of RICO was to penalize organized crime infiltration of legitimate business.¹⁶⁷ But the language chosen by Congress to effectuate this purpose was easily susceptible to a broader interpretation.¹⁶⁸ Moreover, this broader interpretation was fully consistent with the broad purposes of RICO and of the Organized Crime Control Act of which it is a part—the legislative history of the statute is replete with examples of proponents of the bill discussing in broad general terms the menace of organized crime, Congress' resolve to do something about it, and the need for innovative legal weapons to accomplish the goal.¹⁶⁹ Whether a statute should be interpreted to cover a case within the literal meaning of its language but apparently not specifically intended by its enactors to be covered is a common problem in statutory interpretation, and the response that "it is [not] normally a proper judicial function to try to cabin the plain language of a statute, even a criminal statute, by limiting its coverage to the primary activity Congress had

ence that can be defined apart from the commission of the predicate acts"), cert. denied, 450 U.S. 912 (1981). But this lopsided margin understates the degree of division in the courts. One circuit reached the majority view by a divided en banc vote after a panel of the court had reversed an "illegitimate enterprise" conviction. See *United States v. Sutton*, 605 F.2d 260, 264-70 (6th Cir. 1979), vacated, 642 F.2d 1001 (6th Cir. 1980) (en banc), cert. denied, 453 U.S. 912 (1981). Other decisions upholding such convictions were rendered over strong dissents. See *Rone*, 598 F.2d at 573 (Ely, J., dissenting); *United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), cert. denied, 429 U.S. 1039 (1977).

166. See *Lynch*, supra note 14.

167. See supra notes 51-98 and accompanying text. The Supreme Court recognized this intent in its first reference to RICO, in dictum in *Iannelli v. United States*, 420 U.S. 770, 787 n.19 (1975).

168. See supra note 118 and accompanying text.

169. See, e.g., S. Rep. No. 617, 91st Cong., 1st Sess. 78-79 (1969); 115 Cong. Rec. 5872-85 (1969) (remarks of Sen. McClellan); 113 Cong. Rec. 17,997-18,001 (1967) (remarks of Sen. Hruska). It would be disingenuous to seize upon these broad statements, which were generally made in support of the entire package of proposals in the Organized Crime Control Act, and which in any event are best understood as pious attacks on a universally despised institution, as a gauge of the specifically intended application of RICO. For an example of a court making such a use of the legislative history, see *Russello v. United States*, 464 U.S. 16, 26-28 (1983). Broad statements of the congressional intent to put the Mafia out of business cannot be simplistically translated into a specific intent that RICO should be interpreted in any way that makes life harder for organized crime. A more modest use of these comments, however, does seem appropriate. Even if a particular application of the statute was not specifically foreseen, where that application is within the literal scope of the statutory prohibition, it is at least relevant that the application would further rather than obstruct Congress' broad purpose in enacting the statute.

in mind when it acted"¹⁷⁰ is a familiar one. Especially in light of the statute's highly unusual instruction to interpret RICO's language liberally to effectuate its purposes,¹⁷¹ it is not surprising that when the courts were faced with precisely the sort of innovative attacks on Congress' announced target that the legislators seemed to be demanding, they rapidly signed on in support.

The principal consideration favoring restraint in accepting the Government's proffered interpretation, however, is the radical change in the sort of criminal prosecutions that could be brought once the application of RICO to wholly illegitimate enterprises was accepted. This interpretation of the statute is not merely, as the courts might have thought, a simple extension of the legislative purpose to an unforeseen application within the language of the statute and not in conflict with the broad purposes of the legislation. Rather, it permitted the transformation of RICO into a completely different sort of statute than Congress had envisaged. The effects of this change are discussed in greater detail in Part III of this Article;¹⁷² only the more obvious ones are traced here.

The crimes created by RICO that most directly effectuate the original purpose of the statute reflect a rather traditional view of the nature of a criminal act. Sections 1962(a) and (b) each prohibit a single action or effect that occurs at a particular time and place: the investment of a sum of money or the acquisition of an interest in a business, respectively. This is not to say that proof of such violations will be simple, that the trials to prove them will not be long, or that the evidence may not show a lengthy, complex, and horrifying course of conduct. In a prosecution under section 1962(a), for example, the prosecutor may be able to prove numerous, potentially disparate criminal acts that provided the capital invested by the racketeer in a particular instance. In a section 1962(b) case, a course of conduct including several different crimes may have been the means by which the interest in the legitimate enterprise was acquired or maintained.

Nevertheless, there is in each case a single act or effect that culminates the course of conduct, crystallizes the criminal liability of the defendant, and provides a specific focus for the trial: the acquisi-

170. *United States v. Le Faivre*, 507 F.2d 1288, 1295 (4th Cir. 1974) (emphasis omitted), cert. denied, 420 U.S. 1004 (1975).

171. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947. The more usual maxim, of course, is the so-called rule of lenity, under which penal statutes should be strictly construed. See, e.g., *Dowling v. United States*, 473 U.S. 207, 213-14 (1985); *Busic v. United States*, 446 U.S. 398, 406 (1980); Sutherland, *Statutory Construction* § 59.03 (4th ed. 1984). Some modern penal codes, following the example of the Model Penal Code § 1.02(3) (1985), attempt to avoid the excesses of the rule of lenity, by providing that their prohibitions should be construed "according to the fair import of their terms." See, e.g., N.Y. Penal Law § 5.00 (McKinney 1975). None that I am aware of encourages expansive interpretation.

172. See Lynch, *supra* note 14, at notes 89-197 and accompanying text.

tion of the enterprise. All of the acts of racketeering charged against the defendant must be related to that goal. This required relationship substantially limits the scope of the crimes that can be proved in a single trial. If the defendant is believed to have committed a dozen crimes over ten years, only those that are related to the infiltration of the enterprise, or that are otherwise joinable under the ordinary rules of procedure,¹⁷³ may be part of the same indictment.

The same feature of this sort of prosecution limits the number of defendants likely to be tried together. Since the prohibited act is the acquisition of the enterprise, only those actors who intended to further that goal can be charged as accomplices or co-conspirators in that crime. For example, all those who were associated with the racketeer's past criminal acts that provided him with the cash he used to violate section 1962(a) presumably are not chargeable as part of a conspiracy to violate RICO. Both their substantive exposure and their procedural liability to be tried along with others who may have been involved in completely separate crimes are not affected by the existence of RICO.¹⁷⁴

When it is used against those who operate a legitimate organization by criminal means, section 1962(c) effects only a minor expansion of these traditional notions. Since the "pattern" of racketeering may involve fairly loosely related crimes, it may be the case that disparate crimes involving disparate individuals of varying degrees of culpability may be tried together, or that widely separated criminal schemes may be linked together in ways that would not be possible under ordinary conspiracy theory.¹⁷⁵ But the existence of the legitimate entity still serves as an objectively ascertainable connection among the various defendants and offenses, and as a limit to the diffuseness of the trial.¹⁷⁶ Moreover, courts have refused to find that completely separate patterns of corruption of the same legitimate enterprise constitute a single viola-

173. See Fed. R. Crim. P. 8.

174. This does not necessarily mean such defendants cannot be included in an indictment that contains a RICO count. For example, a § 1962(a) count may be joined to a narcotics conspiracy count. See, e.g., *United States v. Loftin*, 518 F. Supp. 839 (S.D.N.Y. 1981), in which the principal defendant and a lawyer who allegedly assisted him to invest the proceeds of his crimes were charged with a RICO count. This charge was tried along with the substantive and conspiracy narcotics crimes in which various other defendants were involved. But they would have been tried together anyway. Addition of the RICO count did not associate them with any more shocking crimes or co-defendants than they were otherwise charged with and did not increase their substantive liability.

175. The extent to which RICO actually represents an expansion of the theory of conspiracy is considered at some length in Part III. See Lynch, *supra* note 14, at notes 117-54 and accompanying text.

176. See *United States v. Weissman*, 624 F.2d 1118, 1122 (2d Cir.) (pervasively corrupt corporate enterprise; court noted that "the enterprise itself supplies a significant unifying link between the various predicate acts"), cert. denied, 449 U.S. 871 (1980).

tion of section 1962(c).¹⁷⁷

In contrast, the use of section 1962(c) against an illegitimate enterprise provides no similar focus for a prosecution. Since the enterprise in essence is what the enterprise does, any defendant who participated in two or more predicate acts can be found to have associated with the enterprise and can be joined in a single indictment with any other defendants who committed any other predicate acts as part of the enterprise. The various crimes need not be related to any single event or transaction, so long as they were committed in the operation of an ongoing criminal organization in which all had agreed to join.¹⁷⁸ Thus, all crimes committed by the members of the organization can be charged as predicate acts: the course of conduct is not, as in a prosecution under subsection (a) or (b), the context or predicate for the ultimate criminal act—it is the crime itself. A defendant who participated in only a few of the least serious acts of the enterprise may thus be rendered guilty of an additional, and far more serious, crime and may be tried together with defendants who have committed considerably more serious predicate offenses.

Finally, because it is necessary, in a RICO prosecution, to demonstrate the existence of the enterprise as an association of some permanence, it becomes a provable element of the offense to demonstrate that, for example, “the Mafia” or “the Bonnano Family of La Cosa Nostra” actually exists as a more or less formal institution. Evidence concerning the existence, structure, and functions of such organizations, including perhaps other crimes that are not even predicate acts charged in the particular RICO indictment, might become relevant, even if such evidence does not implicate particular defendants on trial, and even if it is highly prejudicial.¹⁷⁹

177. Two cases exemplifying this tendency in fact represent rather classic applications of the “rimless wheel” notion of *Kotteakos v. United States*, 328 U.S. 750 (1946). In *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982), two private citizens were charged with separate agreements to bribe a municipal judge. *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981), presents the converse. The county administrators of two separate Arkansas counties were charged with receiving kickbacks from the same salesman. In each case, the courts rejected the idea that a single RICO enterprise existed such that the two unrelated parties could be tried together. It seems clear that in each case the separate spokes could be charged with violating § 1962(c) by participating in the affairs of the same enterprise (the salesman’s business or the municipal court), but through *different* patterns of racketeering. And it is equally clear that they did not conspire with each other to do so, because neither had any reason to know of or to depend on the existence of other similar arrangements.

178. For a discussion of *United States v. Elliott*, 571 F.2d 880 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979), see Lynch, *supra* note 14, at notes 131–47.

179. In an ordinary trial, in contrast, a prosecutor could hardly be heard to argue that she should be allowed to introduce evidence that a defendant charged with bank robbery was a member of a gang that included members who had committed other crimes than those charged in the instant case.

The case in which the Supreme Court endorsed the "illegitimate enterprise" prosecution illustrates these points. The indictment in *United States v. Turkette*¹⁸⁰ was principally concerned with a number of arson-for-profit schemes involving the defendant Novia Turkette, Jr.¹⁸¹ As the Supreme Court wrote, "[t]he common thread to all counts was [Turkette's] alleged leadership of this criminal organization through which he orchestrated and participated in the commission of the various crimes,"¹⁸² but the nature of the schemes and the cast of supporting characters varied considerably. Four separate arson schemes were charged, both as predicate acts of racketeering and as separate offenses. In two of these, Turkette seems to have acted as a contractor, hiring one Landers (who testified for the prosecution) to burn houses that the owners wanted destroyed, in return for a fee that he split with Landers.¹⁸³ In the other two incidents, Turkette himself was the beneficiary of the arson fraud, arranging to burn two automobiles, one that he apparently owned himself (but caused to be insured by a co-conspirator), and the other belonging to an associate who owed money to Turkette and repaid him with the proceeds of the insurance fraud.¹⁸⁴ A different cast of supporting players figured in each crime.¹⁸⁵ In addition to the arson schemes, the indictment alleged that Turkette, along with Landers and two other conspirators, robbed eighteen pharmacies in and around Boston and then distributed the drugs that were the principal booty.¹⁸⁶ Neither of the other two members of this operation was involved in any of the arson schemes.

To the prosecution, and apparently to the Supreme Court, these activities of Turkette and his friends constituted a "criminal organization"—

"a group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local

180. 452 U.S. 576 (1981).

181. The Supreme Court opinion offers few facts. The indictment is reproduced in the appendix to the briefs in the Supreme Court, Joint Appendix at 4-23, *Turkette* (No. 80-808), and the opinion of the Court of Appeals discusses the evidence supporting the charges in some detail, 632 F.2d 896, 908-09 (1st Cir. 1980).

182. 452 U.S. at 579.

183. 632 F.2d at 909. One of the owners was a man named John Vargas, who apparently then acted as a middleman to enlist Turkette and Landers to do a similar job for another homeowner.

184. *Id.*

185. Landers and Vargas figured in the burning of Vargas' house; they were also involved in burning the house of Vargas' friend Santos, who had not been involved with the first fire. Landers, Turkette and one Teague burned the first car, which was insured by one Phil Fraher. (Neither Fraher nor Teague were implicated in the other schemes.) The only person besides Turkette charged in the last episode was a Thomas Brown, Turkette's debtor and the owner of the car. *Id.*

186. *Id.* at 908.

police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings¹⁸⁷

But it is difficult to see the "Turkette gang" as an example of "organized crime," even in the most extended sense. In the well-known case of *United States v. Elliott*,¹⁸⁸ the court suggested that RICO was an answer to the challenge presented "when groups of people, through division of labor, specialization, diversification, complexity of organization, and the accumulation of capital, turn crime into an ongoing business."¹⁸⁹ The actual evidence in *Turkette*, however, suggests something a good deal less organized.¹⁹⁰ Granted that Turkette himself had made crime into a full-time livelihood, his "organization" seems to have consisted of a couple of people with whom he committed robberies from time to time, and a few others he recruited to help when he was asked to arrange a few fires.¹⁹¹ It is not immediately clear why Turkette and his cronies should be subject to any greater punishment, or tried under different procedural ground rules, from any other criminals guilty of multiple crimes.

The Court's opinion itself is somewhat murky about what features of Turkette's "enterprise" made it an appropriate target of a RICO prosecution. Responding to the Court of Appeals' contention that the extension of RICO to illegitimate enterprises collapsed the enterprise requirement into the pattern of racketeering,¹⁹² the Court insisted that while the evidence used to prove the two elements may overlap, both elements must be proved: "In order to secure a conviction under RICO, the Government must prove *both* the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'"¹⁹³ The Court then goes on to state that the enterprise is an "entity," which must be shown "by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."¹⁹⁴

But *Turkette* itself shows how weak such evidence can be. Neither the Supreme Court nor the Court of Appeals referred to any evidence showing that Turkette's "gang" had "an ongoing organization, formal

187. 452 U.S. at 579 (quoting the indictment).

188. 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). Because of its colorful writing style, the extreme nature of its facts, and the clarity with which it endorses the use of RICO against loosely knit associations of criminals, *Elliott* has been widely anthologized in casebooks. See, e.g., S. Kadish, S. Schulhofer & M. Paulsen, *Criminal Law and Its Processes: Cases and Materials* 705-14 (4th ed. 1983).

189. 571 F.2d at 884.

190. The same is true of *Elliott*. See Lynch, *supra* note 14, at notes 131-47 and accompanying text.

191. *United States v. Turkette*, 632 F.2d 896, 908-09 (1st Cir. 1980), rev'd, 452 U.S. 576 (1981).

192. 632 F.2d at 899.

193. 452 U.S. 576, 583 (1981) (emphasis added).

194. *Id.*

or informal," except to the extent that Turkette himself, as the instigator of his various schemes, recruited various others to perform roles in them. As for continuity of personnel, Landers is the only common denominator between the arson and drug/burglary operations. This continuity has something artificial about it: since Landers was the critical government witness in the case, he was likely not so much a key actor in all of Turkette's activities, as the common link to the crimes the government knew about—because it only knew about the ones Landers could describe. A fuller account of Turkette's life of crime might show even less continuity of personnel, or greater separation between associates in various lines of work, than appears through the window opened up by Landers' cooperation.

The advantages to the prosecution in indicting this sort of case under RICO, however, are considerable. Crimes that otherwise could not have been joined in the same indictment could be amalgamated,¹⁹⁵ crimes over which the federal government would ordinarily not have jurisdiction could be proved,¹⁹⁶ and defendants who were involved in only a small part of the operation could be tied into the same indictment.¹⁹⁷ In addition, greatly enhanced penalties would be available, without the need for procedurally cumbersome mechanisms such as those of the Dangerous Special Offender statute.¹⁹⁸ If Turkette was guilty of violating RICO, then almost anyone who could be characterized as a professional criminal could be convicted on evidence of several of his activities.

In sum, the interpretation of section 1962(c) adopted in *Turkette* turns RICO from a probably redundant prohibition of acts of infiltration into precisely the sort of prohibition against membership in a criminal organization that seemed as problematic earlier.¹⁹⁹ After *Turkette*, RICO makes it a crime not only to infiltrate or corrupt legitimate enterprises, but also to be a gangster, whether in the Mafia or in a much more loosely affiliated criminal combine. Surprisingly, the Supreme Court's opinion shows little awareness of these consequences, resting primarily on a "plain" reading of the statutory definition of "enterprise."

195. The Court of Appeals had held in *Turkette* that if the RICO count were invalid, the joinder of the narcotics and arson counts would have been impermissible. 632 F.2d at 906-10; see also *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980) (misjoinder absent RICO).

196. In *Turkette* itself, the pharmacy burglaries could perhaps have been proved as part of a federal narcotics prosecution, but that would not have been the case if the conspirators had burgled hardware stores instead.

197. Cf. *Kotteakos v. United States*, 328 U.S. 750 (1946) (multiple defendants not guilty of common conspiracy where each defendant has conspired with a separate party to accomplish criminal goals that are not interdependent).

198. 18 U.S.C. § 3575 (1982).

199. See *supra* notes 119-24 and accompanying text.

G. *The Consolidation of RICO: Russello and the 1984 Amendments*

The Supreme Court's decision in *Russello v. United States*²⁰⁰ may represent the culmination of the judicial acceptance of prosecutors' efforts to transform RICO from a weapon against organized crime infiltration of legitimate business into a statute proscribing criminal organizations generally. *Russello*, like *Turkette*, involved an arson-for-hire ring. The arsonists were convicted of RICO violations, among other crimes, and, in addition to fines and prison sentences, various forfeitures were ordered. The issue before the Supreme Court was whether the profits earned by one of the arsonists were subject to forfeiture as part of the RICO judgment.

Though the issue has since been clearly resolved by statute,²⁰¹ under RICO as it stood in 1983 the forfeiture was highly dubious.²⁰² The forfeiture section provided that any person convicted of violating RICO shall forfeit to the United States "any interest he has acquired or maintained in violation of" RICO.²⁰³ *Russello* argued, in support of a narrow construction, that money or profits acquired through criminal conduct could not constitute an "interest" within the meaning of this provision because an "[i]nterest," by definition, includes of necessity an interest *in* something."²⁰⁴ In other words, *Russello* claimed that an interest, as opposed to profits or proceeds, meant an interest in the enterprise itself.

This interpretation, plausible if not necessarily compelling on its face, becomes highly persuasive when the statutory language is considered against the original purpose of RICO and the intended relation of its innovative civil and forfeiture remedies to those purposes. From its earliest precursors,²⁰⁵ the idea of RICO was to attack organized crime penetration of legitimate enterprises, not only by criminalizing the act of infiltration, but also (indeed especially) by providing remedies in addition to ordinary criminal sanctions in order to remove racketeers

200. 464 U.S. 16 (1983).

201. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 302, 98 Stat. 1837, 2040-44 (codified as amended at 18 U.S.C. § 1963 (Supp. III 1985)).

202. Three courts of appeals had considered the forfeiture issue before the Supreme Court decided *Russello*. The Seventh and Ninth Circuits had held that the forfeiture provisions of RICO did not cover profits or proceeds of racketeering activity. *United States v. McManigal*, 708 F.2d 276, 283-87 (7th Cir.), vacated and remanded, 464 U.S. 979 (1983); *United States v. Marubeni Am. Corp.*, 611 F.2d 763 (9th Cir. 1980). In the *Russello* case itself, a panel of the Fifth Circuit agreed with that result, but the court sitting en banc vacated the decision and, with seven judges dissenting, held that proceeds were covered by § 1963. *United States v. Martino*, 681 F.2d 952 (5th Cir. 1982).

203. 18 U.S.C. § 1963(a)(1) (1982) (amended 1984).

204. Brief for Petitioner at 9, *Russello v. United States*, 464 U.S. 16 (1983) (No. 82-472), quoted in *Russello*, 464 U.S. at 22 (emphasis added).

205. S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th Cong., 1st Sess. (1967).

from the businesses they had entered.²⁰⁶ The proponents of RICO, in fact, made much of this feature of the Act. Senator McClellan, for example, in responding to critics of RICO who complained that the statute would do little more than add additional penalties for acts that already were illegal,²⁰⁷ answered that RICO was intended to do more than just deter undesirable actions by the use of criminal punishment:

[T]he committee ignores the fact that [RICO] adds to the existing criminal penalties of fine and imprisonment the further criminal penalty of forfeiture. Criminal forfeiture under [RICO] serves not only to punish, deter, incapacitate and so on—it serves directly to remove the corrupting influence from the channels of commerce.²⁰⁸

Similarly, in introducing S. 1861, the immediate predecessor of the enacted version of RICO and the first version to contain the forfeiture provision, Senator McClellan linked the familiar “cancer” analogy specifically to organized crime’s invasion of the body of the legitimate economy, and stressed the surgical effects of forfeiture in removing the racketeer from the infiltrated enterprise: “If an organization is acquired or run by the proscribed racketeering method, then the persons involved are removed from the organization.”²⁰⁹ Examples of such references to the forfeiture provisions can be multiplied.²¹⁰

206. S. 2048, which prohibited the investment of unreported income in business enterprises, took the form of an amendment to the Sherman Anti-Trust Act, 15 U.S.C. §§ 1–7 (1982). Civil remedies including divestiture of illegally acquired or maintained interests would therefore be available under the ordinary principles of antitrust law. See 113 Cong. Rec. 17,999–18,000 (1967) (remarks of Sen. Hruska). S. 2049, which prohibited investment of the proceeds of specified criminal acts, expressly provided for civil actions to “prevent and restrain” violations. S. 2049, § 4(a). These remedial provisions were carried forward in the revised and consolidated bill introduced by Senator Hruska in the following Congress. S. 1623, 91st Cong., 1st Sess. § 3 (1969).

207. See, e.g., Committee on Fed. Legislation, Ass’n of the Bar of the City of New York, *The Proposed Organized Crime Control Act of 1969* (S.30) 39 (1970).

208. 116 Cong. Rec. 18,955 (1970). Somewhat ironically, Senator McClellan’s insistence that the forfeiture provision was intended principally to serve the remedial function of removing criminal forces from the legitimate economy was seized upon by the Supreme Court in *Russello*, in a somewhat disingenuous elided quotation, as evidence that forfeiture was “intended to serve all the aims of the RICO statute, namely, to ‘punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.’” 464 U.S. at 28 (quoting 116 Cong. Rec. 8, 955 (1970) (remarks of Sen. McClellan)).

209. 115 Cong. Rec. 9567 (1969). For further discussion of the “cancer” image, see *supra* notes 56, 81 and accompanying text.

210. See, e.g., 116 Cong. Rec. 35,193 (1970) (remarks of Rep. Poff) (the old approach of convicting individual violators is ineffective in removing racketeers from positions of power; forfeiture will work better by excluding them from businesses); 116 Cong. Rec. 603 (1970) (remarks of Sen. Yarborough) (“Along with severe penalties, a unique criminal forfeiture provision will make it possible to divest the racketeer of any interest he may have obtained in the organization or business.”); *id.* at 602 (remarks of Sen. Hruska) (RICO is “designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from

The close connection between the forfeiture remedy of RICO and the goal of extruding the racketeer from infiltrated legitimate organizations is further emphasized by the parallel forfeiture provisions of the narcotics "kingpin" or "continuing criminal enterprise" statute,²¹¹ enacted essentially contemporaneously with RICO.²¹² That statute contained forfeiture language substantially identical to that of section 1963, except for the explicit addition of "profits" as a forfeitable item.²¹³ The contrast is easily explained. The point of the forfeiture provisions of the narcotics statute is to take the profit out of drug dealing by making the financial penalty commensurate with the profits available from the crime. Since narcotics dealers will rarely operate the sort of "enterprise" in which it is possible to have a legal "interest" or "claim," the way to accomplish this is to forfeit the proceeds of the crime. In RICO, on the other hand, the point of the forfeiture is primarily to remove the "cancerous" corrupting influence from the legitimate enterprise it has invaded. Forfeiture of the profits the racketeer has earned from his crimes does not itself directly address this problem; what must be taken from the racketeer is that which gives him control of the enterprise: the interest he has acquired with those profits.²¹⁴

control of legitimate businesses which have been acquired or operated by unlawful racketeering methods."); *id.* at 591 (remarks of Sen. McClellan) (RICO "is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. [RICO] attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.").

211. 21 U.S.C. § 848(a)(2) (1982), amended by Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 305, 98 Stat. 2050. The statute makes it a crime, with maximum sentence of life imprisonment, to commit a narcotics felony as part of a series of such violations, which are committed by the defendant in concert with five or more persons over whom he exercises a managerial or supervisory authority, and from which he derives substantial income or resources. 21 U.S.C. § 848(b) (1982).

212. Controlled Substances Act, Pub. L. No. 91-513, § 408, 84 Stat. 1242, 1265-66 (1970).

213. As originally enacted, RICO provided that anyone convicted of violating it 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) (1982) (amended 1984). The continuing criminal enterprise statute, by comparison, provided that anyone violating it shall forfeit to the United States—

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

21 U.S.C. § 848(a)(2) (1982) (amended 1984).

214. The interpretation of § 1962(c) as proscribing the operation of illegitimate enterprises through a pattern of racketeering, coupled with the interpretation of

Despite these strong indications that the term "interest" had been understood by Congress to have a limited meaning, the Supreme Court unanimously rejected Russello's arguments. Although the Court made a number of rather inconclusive arguments from the structure and language of the statute,²¹⁵ the critical policy argument that dictated the Court's conclusion is simple and powerful:

We note that the RICO statute's definition of the term "enterprise" in § 1961(4) encompasses both legal entities and illegitimate associations-in-fact. See *United States v. Turkette*, 452 U.S., at 580-593. Forfeiture of an interest in an illegitimate association-in-fact ordinarily would be of little use because an association of that kind rarely has identifiable assets; instead, proceeds or profits usually are distributed immediately. Thus, construing § 1963(a)(1) to reach only interests in an enterprise would blunt the effectiveness of the provision in combating illegitimate enterprises, and would mean that "[w]hole areas of organized criminal activity would be placed beyond" the reach of the statute. *United States v. Turkette*, 452 U.S., at 589.²¹⁶

In other words, if the forfeiture remedy is to have any value in illegitimate enterprise cases, an interpretation keyed to the statute's original purpose (which did not reach such enterprises) is unacceptable. Having reached beyond the original purpose of RICO in *Turkette*, the Supreme Court was virtually compelled to adapt the forfeiture provisions to its expanded substantive reach. By the time *Russello* was decided, the use of RICO for a direct attack, not on infiltration of legitimate enterprises but on the criminal activities of the syndicates themselves, had become well enough established to govern the interpretation of other portions of the statute.

Whether or not *Russello* conformed to the understanding of the members of Congress who voted for the Organized Crime Control Act of 1970,²¹⁷ it was well in keeping with the spirit of Congress in the

§ 1963(a) as permitting forfeiture of the proceeds of such an enterprise, drains most of the limited utility out of § 1962(a). There is little point in prohibiting the investment of the proceeds of a racketeering enterprise in a legitimate business if the acquisition of those proceeds themselves is a crime at the same level and the profits from that crime can be forfeited whether or not they have been invested in a legitimate business.

215. See *Russello v. United States*, 464 U.S. 16, 21-24 (1983).

216. *Id.* at 24.

217. It is not my purpose here to argue that *Russello* was wrongly decided. Although the legislative history is strongly contrary to the Supreme Court's holding, the language of the statute is susceptible to the Court's reading, and the argument that the forfeiture provisions should be read in accordance with the reading given to the substantive provisions in *Turkette* is a powerful one. In any event, the congressional approval of the *Russello* result in the 1984 amendments to RICO, see *infra* notes 218-228 and accompanying text, makes the question academic. My point is only to show the extent to which the understanding of RICO had evolved between its passage and the Supreme Court's decision in *Russello* thirteen years later.

1980s. In the Comprehensive Crime Control Act of 1984,²¹⁸ Congress revisited RICO for the first time since its enactment in 1970, expressly adopting the *Russello* holding and considerably elaborating the forfeiture provisions.²¹⁹

In two major respects, the 1984 forfeiture provisions represent an implicit endorsement of the use of RICO against illegitimate associations. The first, of course, is the codification of *Russello*. As we have just seen, the forfeiture of the profits of racketeering activity is valuable precisely because it provides serious financial sanctions for RICO prosecutions in the *Elliott-Turkette* mold. At least implicitly, the congressional endorsement of *Russello* suggests congressional satisfaction with this branch of the RICO case law.

The second change bears a more complicated relation to the original purposes of RICO. The 1984 amendments provide that the property interest of the United States in assets forfeitable under the statute vests not when the forfeiture is ordered, but rather "upon the commission of the act giving rise to forfeiture under this section."²²⁰ Since the assets thus became government property immediately upon commission of the RICO violation, it follows that the assets cannot be validly transferred by the violator, and the statute accordingly provides that

[a]ny such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes . . . that he is a bona fide purchaser for value . . . who was reasonably without cause to believe that the property was subject to forfeiture²²¹

This provision completely divorces the forfeiture remedy from its original function of removing infiltrating racketeers from legitimate enterprises. Under RICO as originally enacted, if the Godfather extorted

218. Pub. L. No. 98-473, 98 Stat. 1837 (1984).

219. *Id.* § 302, 98 Stat. 2040.

220. 18 U.S.C. § 1963(c) (Supp. III 1985).

221. *Id.*; see also 18 U.S.C. § 1963(m) (Supp. III 1985) (providing procedures for persons other than defendants with interests in forfeited property, to contest forfeitures). Section 1963(c) has received considerable attention because of the implications it appears to have for attorney's fees. If a lawyer is approached for representation by a defendant charged in a RICO indictment, unless the defendant can demonstrate to the attorney that he has sources of income independent of assets sought to be forfeited, the attorney cannot claim to have been "reasonably without cause to believe that the property was subject to forfeiture," and her fee might well be forfeitable to the United States upon conviction. Several courts have been troubled by this result. See, e.g., *United States v. Harvey*, 814 F.2d 905 (4th Cir. 1987) (certain applications of forfeiture statute violate sixth amendment right to counsel of choice); *United States v. Badalamenti*, 614 F. Supp. 194 (S.D.N.Y. 1985) (attorney's fees implicitly excepted from forfeiture); see also *United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986) (freezing of assets in narcotics case); cf. Note, Attorney Fee Forfeiture, 86 Colum. L. Rev. 1021 (1986) (arguing that fee forfeiture is unconstitutionally within the purview of the statute).

an interest in a garbage carting business, he could be convicted of violating section 1962(b), and his interest in the business would be forfeited, the forfeiture serving, as we have seen, to remove the corrupting influence of the organized criminal. If, however, the Godfather had sold the business to a bona fide purchaser before the indictment had been brought, he would no longer have any interest in the enterprise to be forfeited. This would not defeat or evade the purposes of RICO. So long as the sale was an actual bona fide transfer,²²² the purpose of RICO had been accomplished, the racketeer having been removed from the infiltrated business.

Under the new provision for forfeitures relating back to the date of the violation, however, since the Godfather's interest in the business would have been forfeited *ab initio*, if the transferee had reason to know of the Godfather's mode of acquiring the business, the business could be forfeited *from the transferee*.²²³ This sort of forfeiture could well serve to deter legitimate businesspeople from dealing with racketeers,²²⁴ but it is far removed from the kind of divestiture of infiltrated assets contemplated by the sponsors of the original RICO provisions. The "relation back" provisions, like the express provision for forfeiture of the proceeds of racketeering activity and of property "derived from" such proceeds,²²⁵ will likely prove most useful in broadening the scope of forfeiture available in cases brought against illicit enterprises under section 1962(c), where both doctrines will sharply limit criminals' ability to avoid forfeiture by hiding or transferring the proceeds of their criminal activities.

While it may be dangerous to draw authoritative conclusions about the legislators' attitudes toward the body of RICO law developed by the courts over a decade and a half from such haphazardly drafted legislation,²²⁶ it would appear obvious that Congress is reasonably satisfied

222. Of course, if the transfer were not genuine, the Godfather would retain a "property or contractual right of any kind affording a source of influence over" the company, which would still be forfeitable under former § 1963(a). (The same language is now to be found in 18 U.S.C. § 1963(a)(2)(D) (Supp. III 1985).)

223. Interestingly, it would appear that under the amended § 1963, the Government might plausibly seek forfeiture of *both* the refuse business from the purchaser under § 1963(c) *and* the sales price from the Godfather, as "property . . . derived from, any proceeds [he had] obtained, directly, or indirectly," from a RICO violation, under § 1963(a)(3). So far no court appears to have confronted such a "double" forfeiture, but in the related context of narcotics forfeitures pursuant to 21 U.S.C. § 881 (1982 & Supp. III 1985), at least two courts have indicated some approval of the possibility. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1161 n.9 (2d Cir. 1986); *United States v. \$4,255,625.39*, 762 F.2d 895, 905 (11th Cir. 1985), cert. denied, 106 S. Ct. 795 (1986).

224. Unfortunately, it is also likely to deter the private bar from representing accused racketeers. See *supra* note 221.

225. 18 U.S.C. § 1963(a)(3) (Supp. III 1985).

226. The Comprehensive Crime Control Act of 1984 is indeed a remarkable hodge-podge of awkwardly fitting elements. For a drafting oddity specifically affecting

with what prosecutors and courts have made of RICO. Despite commentators' criticisms of judicial interpretations of RICO²²⁷ and specific recommendations for revision of the statute from the American Bar Association,²²⁸ Congress was content to leave RICO's substantive provisions where it found them. Moreover, the tinkering that Congress did do with the forfeiture provisions makes sense only on the assumption that if Congress had at one time conceived of RICO only as a weapon against organized criminal infiltration of legitimate business, by 1984 it no longer did. If RICO has evolved into something different from what Congress intended at its creation, it is difficult to escape the conclusion that Congress has looked at what has evolved, and pronounced it good.

II. RICO'S PRESENT ECOLOGICAL NICHE

A. *RICO, Federalism, and Legality*

From this survey of RICO's history, it can readily be seen that, as currently interpreted, RICO is capable of exceptionally broad application. If virtually any criminal federation can be a RICO enterprise, and almost any two criminal acts can be a pattern of racketeering activity, then potential RICO liability exists whenever more than one person²²⁹

RICO, compare Pub. L. No. 98-473, § 302, 98 Stat. 2040 (1984) (extensively amending 18 U.S.C. § 1963(a) and adding § 1963(d)) with *id.* § 2301, 98 Stat. 2192 (further amending § 1963(a) and deleting § 1963(d)). The in-again, out-again § 1963(d) would have further expanded the forfeiture remedy, and removed it still further from its origins as a divestiture mechanism, by allowing the forfeiture of substitute assets in an equivalent amount if the assets found to be forfeitable could not be recovered.

227. See, e.g., Tarlow, *RICO: The New Darling*, *supra* note 6; Tarlow, *RICO Revisited*, *supra* note 6; Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 Va. L. Rev. 109 (1979).

228. American Bar Ass'n, Section of Criminal Justice, Report to the House of Delegates 3-4, 7, 10 (Jan. 1982). Among other recommendations, the ABA urged replacement of the "pejorative phrase" "racketeering activity," repeal of § 1962(d) (the conspiracy provision), and a requirement that a "pattern of racketeering" include at least one offense other than mail fraud, wire fraud, or receiving stolen property.

229. In the context of a legitimate enterprise, § 1962(c) can be violated by a single individual acting alone, as when a government official operates his office through a pattern of corruption. See, e.g., *United States v. Carter*, 602 F.2d 799 (7th Cir.), cert. denied, 441 U.S. 967 (1979). Additionally, since an "individual" may be a RICO enterprise, 18 U.S.C. § 1961(4) (1982), concerted action may not in principle be required even in an illegitimate enterprise case. See, e.g., *United States v. Elliott*, 571 F.2d 880, 898 n.18 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979). In practice, however, all illegitimate-enterprise § 1962(c) cases known to me have involved concerted activity. Moreover, some courts have developed doctrines, that, if universally followed, would appear to eliminate this theoretical possibility. In cases involving corporate entities, some courts have held that, at least in cases arising under § 1962(c), a single "person" may not be both a defendant in the case and the RICO "enterprise." These courts rely principally on the argument that it is illogical to hold that an entity can be a "person employed by or associated with" itself, or can "conduct" its own affairs, as would be required for conviction under that provision. See, e.g., *United States v. DiCaro*, 772 F.2d 1314, 1319-20 (7th Cir. 1985), cert. denied, 106 S. Ct. 1458 (1986); *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190 (4th Cir. 1982), cert. denied, 459 U.S.

engages in more than one crime.²³⁰ Over a wide domain of actors and conduct, RICO has swallowed the penal code. Two significant criticisms of this comprehensive scope can be made.

1. *Federalism.*—Within the context of our federal system, RICO can be criticized as a major and unjustified expansion of the federal role in law enforcement.²³¹ RICO, after all, has not only swallowed the *federal* penal code, but by its incorporation of a wide variety of state crimes as

1105 (1983). But see *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983). See generally Note, RICO: The Corporation as "Enterprise" and Defendant, 52 U. Cin. L. Rev. 503 (1983). The only decided cases in which the alleged enterprise was a single "individual" have involved sole proprietorships. In those cases, courts have allowed that individual to be both the enterprise and a defendant, but only where the proprietor has other employees or associates, expressing doubts about whether, in the absence of other employees, it would be permissible to hold that an individual associated with himself. *United States v. Benny*, 786 F.2d 1410, 1415-16 (9th Cir.), cert. denied, 107 S. Ct. 668 (1986); *McCullough v. Suter*, 757 F.2d 142, 143-44 (7th Cir. 1985) (civil case); see also *United States v. Yonan*, 622 F. Supp. 721 (N.D. Ill. 1985) (lawyer who was sole practitioner could not be both enterprise and defendant), aff'd on other grounds, 800 F.2d 164, 166 (7th Cir. 1986), cert. denied, 107 S. Ct. 930 (1987). If this restriction is applied to illegitimate enterprises as well, a single criminal could not be a RICO enterprise, no matter how many predicate acts he commits.

230. Of course, the crimes must be listed RICO predicates, but virtually all serious crimes are. In order to constitute a pattern, the predicate acts apparently must meet some minimal standard of relation. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985). But see *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983) ("unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise"), cert. denied, 469 U.S. 817 (1984); *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. 1981) ("two predicate crimes need not be related to each other but must be related to the affairs of the enterprise"), cert. denied, 457 U.S. 1136 (1982). It has also been suggested that the criminal federation might have to meet some test of continuity and stability. See, e.g., *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981). But see *United States v. Cagnina*, 697 F.2d 915, 920-21 (11th Cir.) (rejecting requirement of structure), cert. denied, 464 U.S. 856 (1983).

On the other hand, the requirement of more than one crime is somewhat undercut by cases holding that a single criminal episode may be prosecuted under RICO if more than one predicate statute is violated. See, e.g., *United States v. Starnes*, 644 F.2d 673 (7th Cir. 1981) (burning of a single building involved arson and Travel Act violation), cert. denied, 454 U.S. 826 (1981); cf. *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978) (single fraudulent scheme, multiple mailings). Justice Department guidelines now in effect renounce the use of RICO in cases "growing out of a single episode or transaction." U.S. Attorneys' Manual § 9-110.340 (Mar. 9, 1984). In civil RICO cases, moreover, courts have been more resistant to single-episode RICO complaints, see, e.g., *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986); *Frankart Distrihs., Inc. v. RMR Advertising, Inc.*, 632 F. Supp. 1198, 1200-01 (S.D.N.Y. 1986); cf. *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22 (1st Cir. 1987) (rejecting requirement of more than one "scheme," but holding that single bribe does not satisfy continuity requirement of *Sedima* and this case law might come to restrain similar uses of criminal RICO).

231. This problem was noted even in the congressional debates concerning the Organized Crime Control Act, before the full sweep of RICO's application was known. See *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (citing and commenting on legislative history).

predicate acts, it has also swallowed large chunks of the state penal codes.²³²

I do not find the expansion of federal jurisdiction *per se* especially troubling. This is not the place for a definitive discussion of the proper role of the federal government in crime control,²³³ still less of the proper role of the states as independent sovereignties in today's world. Nevertheless, one may question whether the federalism issue presents a fundamental philosophical problem, or merely a question of the efficient allocation of resources and responsibilities in a rather unwieldy system of overlapping jurisdictions. Overfederalization of law enforcement does not appear to be a pressing political concern,²³⁴ nor is it apparent that prosecution of RICO offenses by federal officials threatens either the rights of individual defendants²³⁵ or the remaining sovereignty of the states.²³⁶

232. Nominally, the basis for federal jurisdiction in RICO is that the conduct of the enterprise have an effect on interstate commerce. Given the expansive judicial interpretation of this jurisdictional requirement, this is essentially a polite fiction, equivalent to no required jurisdictional nexus at all. See, e.g., *United States v. Qaoud*, 777 F.2d 1105, 1116-17 (6th Cir. 1985) ("insubstantial" effect on commerce sufficient; "enterprise need only have a *minimal* impact upon interstate commerce" (quoting *United States v. Robinson*, 763 F.2d 778, 781 (6th Cir. 1985)) (emphasis added by *Qaoud* court)), cert. denied, 106 S. Ct. 1499 (1986).

233. For a critical discussion of the growth of federal involvement in law enforcement, see Bradley, *Racketeering*, supra note 21.

234. The best documentation for this perception is the actual behavior of politicians. Politically ambitious United States Attorneys around the country do not find it expedient to adopt a low profile in the name of local control of law enforcement. Moreover, the Reagan administration, which is more rhetorically committed to states' rights than any in the last fifty years, has made an expanded federal role in attacking street crime a major verbal component of its law enforcement platform. This apparent paradox suggests that popular hostility to federal intervention in local functions does not extend to criminal investigation and prosecution.

235. As will be seen below, see *infra* notes 238-60; Lynch, supra note 14, at notes 89-116 and accompanying text, I do not mean that RICO prosecutions are without cost to defendants' rights, only that the costs imposed are not substantially increased by the specifically *federal* nature of RICO.

236. It may be argued that the inevitable result of an increased federal presence in criminal justice, as in any other area, must be a weakening of state power and responsibility. But the investment of federal investigative and prosecutorial resources in previously local areas of law enforcement has not disabled the states from fighting crime. Indeed, the response of state law enforcement officials to RICO has not been to seek repeal or revision of the federal statute, but rather to advocate adoption of their own "little RICO" statutes in order to get in on the action. To date, more than half of the states, as well as Puerto Rico, have adopted such statutes, based more or less closely on the federal RICO law. *Ariz. Rev. Stat. Ann.* §§ 13-2312-2317 (1978 & Supp. 1986); *Cal. Penal Code* §§ 186-186.8 (West Supp. 1987) (forfeiture remedy only; no new crimes created); *Colo. Rev. Stat. Ann.* §§ 18-17-101-109 (1986); *Conn. Gen. Stat. Ann.* §§ 53-393-403 (West 1985); *Del. Code Ann. tit. 11*, §§ 1501-1511 (Supp. 1986); *Fla. Stat. Ann.* §§ 895.01-895.09 (West Supp. 1987); *Ga. Code Ann.* §§ 16-14-1-15 (1984 & Supp. 1986); *Haw. Rev. Stat.* §§ 842-1-12 (1985); *Idaho Code* §§ 18-7801-7805 (Supp. 1986); *Ind. Code Ann.* § 34-4-30.5 (West 1983 & Supp. 1987), § 35-45-6 (West 1986);

I note two reservations about my general equanimity concerning expanded federal involvement in law enforcement. First, whatever one's view of the appropriate degree or scope of the federal role in law enforcement, all can agree that the division of responsibility between the states and the federal government should be organized on some rational principle, with the areas of federal involvement specifically defined, rather than permitting discretionary federal intervention into a broad range of local crimes whenever prosecutors choose to intervene. But given the essentially universal quality of RICO's coverage, the latter situation is exactly what has developed. RICO does not extend federal jurisdiction to specific areas of particular federal concern or competence; it creates federal jurisdiction over broad reaches of criminal conduct, characterized only by loose concepts of concerted and repeated activity and minimal subject matter limitations. Prosecutorial judgment and prosecutorial interest are the true determinants of federal involvement.²³⁷

Second, states do have a strong interest in determining, by their definitions of offenses and ordering of penalties, the relative seriousness and importance of different crimes. Many states have made serious attempts to do this, through reform of their penal codes along the lines suggested by the Model Penal Code, and by recent efforts to control sentencing discretion through rational guidelines. RICO substan-

La. Rev. Stat. Ann. §§ 15:1351-1356 (West Supp. 1987) (limited to narcotics crimes); Miss. Code Ann. §§ 97-43-1-11 (Supp. 1986); Nev. Rev. Stat. §§ 207.350-207.520 (1985); N.J. Stat. Ann. §§ 2C:41-1-6.2 (West 1982); N.M. Stat. Ann. §§ 30-42-1-6 (1980); N.Y. Penal Law §§ 460.00-460.80 (McKinney Supp. 1987); N.C. Gen. Stat. §§ 75D-1-14 (Supp. 1986); N.D. Cent. Code §§ 12.1-06.1-08 (1985 & Supp. 1987); Ohio Rev. Code Ann. §§ 2923.31-2923.36 (Anderson 1987); Or. Rev. Stat. §§ 166.715-166.735 (1985); 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1983); P.R. Laws Ann. tit. 25, §§ 971-971p (1980 & Supp. 1986); R.I. Gen. Laws §§ 7-15-1-11 (1985); Tenn. Code Ann. §§ 39-1-1001-1010 (Supp. 1986); Utah Code Ann. §§ 76-10-1601-1608 (Supp. 1986); Wash. Rev. Code Ann. §§ 9A.82.080-9A.82.170 (Supp. 1987); Wisc. Stat. Ann. §§ 946.80-946.87 (West. Supp. 1986); see also Ky. Rev. Stat. Ann. § 506.120 (Michie 1985) (operation of criminal syndicate); Tex. Penal Code Ann. §§ 71.01-71.05 (Vernon Supp. 1987) (operation of criminal syndicate). Most of these statutes have been adopted since 1980.

237. The Justice Department's guidelines for the exercise of this discretion do little or nothing to provide a principled division of jurisdiction between state and federal authorities. While the primacy of local law enforcement is acknowledged, RICO Guidelines Preface, U.S. Attorneys' Manual § 9-110.200 (Mar. 9, 1984), the only restraining guideline expressly directed to federalism rejects use of RICO only "where the predicate acts consist *solely and only* of state offenses"—and even those are permitted in several situations, including the vague and expansive case in which "local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest." U.S. Attorneys' Manual § 9-110.330 (Mar. 9, 1984) (emphasis added). No special provision is made for cases in which one federal offense can serve as a predicate act of racketeering along with numerous state offenses. Later in this Article, I will examine the appropriateness of some of the particular areas in which federal prosecutors have chosen to use RICO to expand their jurisdiction. See *infra* notes 336-359 and accompanying text.

tially subverts this process by incorporating the substance of state prohibitions without recognizing any of the sentencing or degree gradations present in state offenses, and subjecting violators to a single, severe maximum sentence and (pending the completion of efforts to create federal sentencing guidelines) unrestricted judicial sentencing discretion.

2. *Legality*.—Another major criticism of RICO's breadth presents an issue not unique to federal systems, but rather general to any system of criminal justice. One of the organizing principles of the criminal law is that criminal prohibitions must comport with the principle of legality. This principle requires, among other things, that in order to be acceptable, penal legislation must describe with some precision the conduct it proscribes and the consequences that may flow from conviction for such conduct.²³⁸

Although the broad scope of RICO has been seen by some as offending this principle, the courts have not been particularly receptive to challenges to RICO along these lines.²³⁹ The argument that RICO is unconstitutionally vague has been uniformly rejected, and on reasoning that is not unappealing. After all, courts have reminded us that, unlike the imprecise loitering statutes that have been found unconstitutionally vague by various courts,²⁴⁰ RICO does not require citizens to guess at their peril what kinds of conduct they must avoid to conduct their affairs in accordance with law. Since RICO merely imposes additional liability on those who, under certain conditions, commit particular other offenses, all one needs to do to stay out of trouble is to avoid committing murder, mail fraud, narcotics violations, and other predicate acts. Assuming the statutes defining these crimes are not unconstitutionally vague in their own right, RICO provides adequate notice of the prohibited conduct. As one court put it, RICO "may be broad, but it is not vague."²⁴¹

But this answer dodges important problems. It is not clear that the values of legality for guidance of the citizen are adequately served by a scheme in which prohibitions are clearly stated, but unexpectedly severe penalties can be imposed. Without a reasonably clear statement of

238. See Packer, *The Limits of the Criminal Sanction* 79-100 (1968). This principle finds expression in the federal constitutional doctrine of vagueness, which holds that a penal statute that does not give fair warning of the nature of its prohibitions violates the constitutional command that deprivations of life, liberty, or property must be based on due process of law. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

239. See *supra* notes 146-149 and accompanying text.

240. See, e.g., *Papachristou*, 405 U.S. 156; *Powell v. Stone*, 507 F.2d 93 (9th Cir. 1974), *rev'd* on other grounds, 428 U.S. 465 (1976); *Newsome v. Malcolm*, 492 F.2d 1166 (2d Cir. 1974), *aff'd* sub nom. *Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *People v. Berck*, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33, cert. denied, 414 U.S. 1093 (1973).

241. *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).

the penalties that attach to a particular offense, the citizen planning her activities is not really given full notice of what behavior society truly expects from her. The intensity of society's demand, as expressed in the available punishment, is relevant to the actor's understanding of her responsibilities.²⁴² In some respects, at least, the Constitution protects a citizen's justified expectation that conduct is only punishable to a particular extent in the same way as her expectation that conduct is lawful: a law raising penalties after the fact is void as an *ex post facto* law just as much as one that criminalizes conduct legal when committed.²⁴³

Furthermore, the legality principle is not limited to the requirement that the citizen be given fair notice of what conduct to avoid; it also demands that officials be given reasonably clear instructions concerning how violators should be treated. As the Supreme Court recognized in *Papachristou*, vague statutes are unacceptable not only because they fail to provide fair notice to the citizen of the prohibited conduct,

242. In his provocative article suggesting that criminal law rules addressed to the conduct of citizens could be separated from those governing the decisions of officials as to the treatment of violators, Professor Dan-Cohen appears to argue that knowledge on the part of citizens of the sanctions applicable to various transgressions is not in principle an element of the rule of law, so long as the relevant decision rules are clear enough to the officials who are their real objects. Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 667-73 (1984).

I disagree. Whatever might be true in some hypothetical universe of complete "acoustic separation," in our system conduct rules are not derived or read by citizens in isolation from formal and informal decision rules. Conduct rules are not created from first principles by a lawgiver with privileged access to the moral values of the entire society; they are the product of conflict and compromise among different groups with different values. The decision rules that guide officials in their enforcement and interpretation are frequent vehicles of compromise. Thus, a citizen learning that gambling, consumption of alcohol or marijuana, prostitution, or making payments to labor union officials is (at a particular time and place) prohibited conduct, does not know all that needs to be known in order to decide how strongly (if at all) society actually demands compliance. See R.K. Greenawalt, *Conflicts of Law and Morality* 10-18 (1987). If it turns out that the official decision rules provide only token sanctions, or the unofficial ones include a directive to police and prosecutors not to enforce the prohibition, the citizen might well be entitled to conclude that the overt legal rule prohibiting the conduct serves not as a genuine conduct rule addressed to the citizen, but as a symbolic expression of social disapproval that serves its primary purpose merely by existing on the books to comfort members of a particular religion, class, or interest group.

In any event, Professor Dan-Cohen focuses principally on the situation in which the relevant decision rule is *more lenient* than the overt conduct rule. See Dan-Cohen, *supra*, at 671. The vice of RICO is the reverse: the law enforcer is empowered in many situations unexpectedly to up the ante by invoking a sanction more serious than that otherwise announced for particular conduct. This would seem to raise more serious problems for the protection of settled expectations than the cases discussed by Professor Dan-Cohen.

243. See *Weaver v. Graham*, 450 U.S. 24 (1981); *Lindsay v. Washington*, 301 U.S. 397 (1937). On the other hand, courts have held that statutes that fail to set any maximum terms of imprisonment are not unconstitutionally vague. See, e.g., *United States v. Davis*, 801 F.2d 754, 756-57 (5th Cir. 1986); *Binkley v. Hunter*, 170 F.2d 848, 849 (10th Cir. 1948), cert. denied, 336 U.S. 926 (1949).

but also because they permit discriminatory or erratic enforcement, since police, prosecutors and courts have little to go on in determining whether to sanction particular acts.²⁴⁴ Indeed, the Court has recently suggested that controlling the discretion of law enforcement officers is the more important reason for invalidating vague statutes.²⁴⁵

This concern is plainly applicable to RICO. The presumably careful and deliberate attachment of penalties to particular offense categories is effectively undermined if a prosecutor is empowered to increase those penalties dramatically by transforming ordinary offenses into RICO violations simply by the invocation of verbal formulae.

A simple example will clarify the point. A businessman who conceives a fraudulent scheme and mails a single letter in furtherance of it commits mail fraud, a felony punishable by five years' imprisonment and, until recently, by a fine of \$1000.²⁴⁶ Mailing a similar letter to a second victim constitutes a separate offense, bringing the total sentence exposure to ten years and \$2000. If, as is not unlikely, the swindler has an associate who can be described as a co-conspirator, he has committed a third felony, raising the potential punishment to fifteen years and a fine of \$12,000.²⁴⁷ Under RICO, however, our protagonist has now also conducted the affairs of his business enterprise through a pattern of racketeering activity and has conspired to do so, exposing himself to the possibility of a forty-year sentence, a \$50,000 fine, and most importantly,²⁴⁸ forfeiture of his entire business.²⁴⁹ Nothing in the statute im-

244. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972).

245. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Goguen*, 415 U.S. 566, 574 (1974); see also Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 218 (1985) (approving of *Kolender's* emphasis on this rationale).

246. 18 U.S.C. § 1341 (1982). The available fine was increased significantly by the comprehensive Crime Control Act of 1984. See *infra* note 382. The previous figures are used here because they illustrate the effect of RICO when it was enacted, and for most of the period covered by this study.

247. 18 U.S.C. § 371 (1982).

248. The significance of the forfeiture is twofold. First, the magnitude of financial exaction it works may be well in excess of the fines otherwise available, and is limited only by the value of the defendant's ownership interest in the enterprise and, perhaps, by the cruel and unusual punishment clause of the eighth amendment. See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987). Second, the forfeiture is mandatory. That is, unlike the fines and prison terms, which may be imposed or not as the sentencing judge finds just, the forfeiture has been held to be automatic upon the jury's finding that the defendant is guilty and has the asserted interest in the enterprise. *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 883 (1980). Thus, the potential RICO defendant cannot hope to avoid the drastic financial sanctions he may face by an appeal to the judge's sentencing discretion.

249. 18 U.S.C. §§ 1961(1), (4), (5), 1962(c), (d), 1963(a) (1982 & Supp. III 1985).

Some courts have held, in civil cases, that the mailing of two letters in furtherance of the same scheme to defraud a single victim does not constitute a "pattern" because it does not satisfy the "continuity" and "relationship" standards suggested by the Supreme Court in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, n.14 (1985). See, e.g., *Holmberg v. Morrisette*, 800 F.2d 205, 209-10 (8th Cir. 1986), cert. denied, 107 S.

poses any limits or standards to govern prosecutorial discretion in determining whether to invoke the additional sanctions.²⁵⁰ Thus, the prosecuting authority has the unrestricted power to increase dramatically the stakes in a given case, for any reason that seems appropriate to it.

The judicial response to vagueness challenges to RICO thus points up a weakness in existing vagueness theory. Although the vagueness doctrine aims to provide both fair notice to citizens bound by the law and meaningful constraints on the discretion of the officials who must execute it, the two goals are not always well served by the same strategies. As RICO shows, a statute may be clear enough in informing citizens of the conduct they must avoid, but at the same time be so encompassing as to increase rather than decrease the discretion provided to officials. Indeed, the two goals occasionally conflict, for as we have seen,²⁵¹ the effort to avoid vagueness and imprecision in the core concepts of "infiltration" and "organized crime" to a considerable extent account for the extraordinary breadth of the statute's coverage.

Vesting this sort of enhancement power in prosecutors is not exactly unprecedented. Various recidivist and dangerous special offender statutes, for example, permit prosecutors to choose whether to invoke procedures that would increase the defendant's sentence exposure.²⁵²

Ct. 1953 (1987). Whether the courts will adhere to this view in criminal cases, and how the courts will give content to the notion of a "single fraudulent effort," *Superior Oil Co. v. Fulmer*, 785 F.2d 252, 257 (8th Cir. 1986), remain to be seen. Significantly, the Second Circuit, in the only criminal case to discuss the *Sedima* footnote, has rejected the effort to require two separate schemes rather than merely two indictable acts of mail fraud, adhering to its pre-*Sedima* view that any two predicate acts, even in pursuance of a single fraudulent scheme, will suffice to support a RICO conviction. *United States v. Ianniello*, 808 F.2d 184, 189-91 (2d Cir. 1986), cert. denied, 107 S. Ct. 3230 (1987); see also *Proctor & Gamble Co. v. Big Apple Indus. Bldgs.* 655 F.Supp. 1179, 1182-83 (S.D.N.Y. 1987) (distinguishing *Ianello* in civil case).

The Justice Department's announced guidelines for exercising its discretion in bringing RICO prosecutions state that the Department will not bring cases "based upon a pattern of racketeering activity growing out of a single criminal episode or transaction." U.S. Attorneys' Manual § 9-110.340 (Mar. 9, 1984). This guideline might cover some variations of the hypothetical in the text, though I presume the Department would not consider a single scheme directed at multiple victims a "single criminal episode or transaction." In any case, problems of excessive prosecutorial discretion do not disappear because the prosecutor announces an intention to use the discretion responsibly. Moreover, even where a prosecution is brought on the theory that a defendant was involved in more than one criminal episode, the jury may still be allowed to convict on multiple predicates arising from the same transaction. See *United States v. Phillips*, 664 F.2d 971, 1038-39 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982).

250. The Justice Department has created its own internal guidelines to govern its exercise of discretion in bringing RICO cases. U.S. Attorneys' Manual §§ 9-110.200-110.413 (Mar. 9, 1984). These guidelines, however, are purely self-imposed and do not have the force of law. *Id.* at § 9-110.200; see *United States v. Caceres*, 440 U.S. 741 (1979); *United States v. Busher*, 817 F.2d 1409, 1411-12 (9th Cir. 1987).

251. See *supra* notes 119-142 and accompanying text.

252. See, e.g., 18 U.S.C. § 3575 (1982) (repealed effective Nov. 1, 1987). Indeed,

These statutes, however, affect only limited types of offenders and require that the prosecutor, if the increased penalty is to be exacted, make some particular showing to demonstrate that the defendant in the case at hand falls within the defined category. RICO contains no such limitations. Because it is triggered by a wide variety of crimes, and because the preconditions for its invocation are present in a wide range of cases, its availability is far less limited than that of typical special offender or recidivist statutes. Moreover, no substantial additional element needs to be proven beyond the commission of the predicate offenses, in most instances, for the prosecutor to make the enhanced sentence stick.²⁵³ Finally, the mandatory character of the forfeiture aspect of the RICO sanction places greater sentencing power in the hands of the prosecutor, in a way that special offender provisions without mandatory minimum sentences²⁵⁴ do not.

Even taking these distinguishing factors into account, however, the extent to which RICO constitutes an expansion of prosecutorial power should not be exaggerated. While in some situations RICO radically increases available penalties without requiring proof of any substantial fact beyond the commission of the underlying criminal acts, this will not inevitably be so. In the typical illegitimate enterprise case, for example, the predicate acts may be offenses such as murder, arson, extortion, or narcotics trafficking, which carry substantial penalties of their own.²⁵⁵ In such cases, the additional impact of the forfeiture remedy may be slight.²⁵⁶ And in such a case (unlike the typical business crime case) the requirement that the crimes be committed in furtherance of a particular enterprise presents at least some additional hurdle to the

even without special enhancement devices, overlapping statutes and fragmentable offenses give prosecutors considerable discretion to expand the maximum available sentence by multiplying the offenses charged. See *infra* notes 257-59 and accompanying text.

253. The limited additional requirement of proving an actual enterprise imposed by *Turkette* is not a barrier where the defendant is engaged in a business, since his business entity automatically constitutes an enterprise for RICO purposes. Even in "illegitimate enterprise" cases to which the requirement applies, as *Turkette* itself shows, the requirement is satisfied by a minimal showing of organization on the part of the defendants.

254. See, e.g., 18 U.S.C. § 3575(d) (1982) (repealed effective Nov. 1, 1987).

255. For example, in *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983), the reversal of RICO convictions on which 20-40 year sentences had been imposed had very little effect on the defendants, all but one of whom had been sentenced for the specific predicate crimes charged in the indictment to sentences as harsh as those imposed under RICO. Of course, this result is only possible where the predicate acts can be prosecuted, given the problems of jurisdiction, venue, and statute of limitations that may prevent their prosecution. See, e.g., *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983), a case very similar to *Ivic* save for the fact that due to such procedural problems, the RICO counts were the only ones in the indictment.

256. But see *Russello v. United States*, 464 U.S. 16 (1983) (forfeiture of \$340,043.09).

prosecutor, who must show something (albeit something rather nebulous) beyond the mere commission of the crimes themselves.

Moreover, the wide discretion of the prosecutor to broaden or narrow the sentence exposure of the defendant by the selection of charges from a host of overlapping potential charges is characteristic of our system of justice, rather than a departure from it. A single act may violate a number of criminal statutes, and the double jeopardy clause provides only minimal protection against imposition of multiple consecutive sentences.²⁵⁷ In a mail fraud case more typical than the example used earlier, the schemers may have mailed not two but two-hundred letters, and made as many interstate telephone calls.²⁵⁸ In such a case, the prosecutor has discretion to seek an indictment charging either a handful or a host of counts, thus either limiting the range of possible sentences to an uncomfortably narrow scope of judicial discretion or broadening it to unrealistic excess without any more legal restraint than guides the RICO determination.

Thus, it would be unduly naive to consider the prosecutorial discretion permitted by RICO a departure from faithfully honored principles of predictability and legality. But while RICO does not create a previously unimagined potential for abuse, a measured concern for the impact of RICO on the principle of legality is wholly appropriate. Few would argue that the enormous range of charging options made available to prosecutors constitutes one of the glories of our criminal justice system;²⁵⁹ a substantial addition to this armory is cause for concern.

Moreover, RICO presents an extreme case of discretionary charge enhancement. The potential to select from among a wide range of potential charges in describing a particular criminal incident is ordinarily a byproduct of a legitimate legislative purpose to cover a diversity of antisocial conduct with precisely defined statutes. It is precisely because the legislature has been careful to define with particularity each individual act that it regards as an appropriate subject for punishment if committed in isolation that the prosecutor has such wide discretion when numerous legislative enactments are violated at the same time. Similarly, recidivist statutes respond to an understandable desire on the part of legislatures to insist that prior criminal conduct be given substantial weight in judicial sentencing decisions. Here, the prosecutor's power is enhanced, because he retains the power to dispense with the

257. See, e.g., *Albernaz v. United States*, 450 U.S. 333 (1981); *Whalen v. United States*, 445 U.S. 684 (1980); *Blockburger v. United States*, 284 U.S. 299 (1932).

258. See 18 U.S.C. § 1343 (1982).

259. The broad charging discretion of American prosecutors has been the subject of considerable criticism. See, e.g., K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969); Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. Pa. L. Rev. 550 (1978); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 *Duke L.J.* 651.

invocation of this particular sanction, even where it literally applies, in cases where it is fair to forego its use.

RICO, on the other hand, is so much broader than other criminal statutes that the discretion it confers may be seen as different in kind. Although it purports simply to define a new crime—which a defendant might or might not commit in conjunction with other crimes and which the prosecutor could then, like other charges, invoke or not in his discretion—the crime thus defined is so far-reaching that the commission of more than one crime will usually trigger availability of RICO automatically. And while even this is not entirely unprecedented,²⁶⁰ the disparity of scale between the RICO sanctions and those of at least some of its predicate acts suggests that the prosecutor's ability unilaterally to declare a crime major or minor has been dramatically increased.

We may well be willing to live with this result. Despite academic criticism, there is little pressure for substantial reform of the broad charging discretion characteristic of our system and little indication that the discretion is being routinely or seriously abused. Any definition of a new crime increases the discretionary power of prosecutors, and the byproduct of increased prosecutorial power may be acceptable (subject to any system-wide effort to control that discretion) if the ability to punish the conduct thus proscribed is valuable to society. But an offense definition that smudges the entire effort to provide clear definitions of conduct subject to clearly defined sanctions should bear a heavy burden of justification. If the conduct reached by RICO can be subjected to appropriate sanctions by more carefully drawn statutes, then it would be desirable to replace the broad and shapeless statute with the narrow and precise laws that would serve its legitimate purposes without endangering the legality principle.

B. *The Uses of RICO*

In order to determine whether RICO performs a necessary function, we must first discern what functions it does perform. Examination of the uses to which RICO has been put should accomplish two things. First, it should tell us whether RICO is serving some law enforcement purpose that otherwise could not effectively be served. If it were true, as Professor Bradley has maintained, that "RICO has virtually never been used in a case which was not reachable by other statutes, federal or state, which were on the books prior to its passage,"²⁶¹ then presumably the statute should be repealed altogether. Second, if categories of cases can be identified in which RICO has served a valuable purpose, by permitting desirable prosecutions that would not otherwise be possible, an examination of such categories might reveal weaknesses or gaps

260. It can be argued that the general federal conspiracy statute also provides prosecutors with a fairly automatic additional charge in a wide range of criminal situations.

261. Bradley, *Racketeering*, *supra* note 21, at 257.

in the present structure of federal criminal law. If possible, it would clearly be desirable to fill such gaps with specific legislation, rather than leaving RICO as a general tool to bring any prosecution that the Justice Department thinks is desirable but that does not fit under any other heading.

An examination of the uses of RICO will also answer several other questions: Has RICO been effective in dealing with the organized crime infiltration of legitimate business and labor organizations that Congress was particularly concerned with in passing the statute? Have prosecutors used the law principally as a weapon against organized crime, or has it been used more widely against broader categories of offenses? How extensively have prosecutors used RICO against white collar crime? Only after such questions as these have been answered will it be possible to decide whether the principal uses of the statute have proved valuable and legitimate responses to criminal conduct not adequately covered by other criminal statutes, and if so, whether more limited additions to the penal code can fill the gaps.

To answer these questions, I surveyed all reported criminal RICO cases decided in the courts of appeals through 1985. The survey yielded an enormous number of cases. From the first reported appellate decision involving the statute in 1974²⁶² to the end of 1985, federal appellate courts had handed down reported opinions²⁶³ in cases arising out of nearly 250 indictments containing RICO counts.²⁶⁴ For 236 of these indictments, enough detail concerning the underlying facts of the criminal transactions and the structure of the indictments was provided in the opinions (or in district court opinions or in related cases) that the opinions could be studied with a view to determining use patterns of the criminal provisions of RICO.²⁶⁵

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

263. For purposes of this Article, the term "reported" opinions includes decisions not reported in the West Federal Reporter but the texts of which are available on Lexis.

264. The number of opinions is actually rather higher, since many RICO cases, given their complexity and seriousness, have appeared in the appellate courts on more than one occasion, under more than one form. See, e.g., *United States v. Sutton*, 700 F.2d 1078 (6th Cir. 1983); *United States v. Elkins*, 683 F.2d 143 (6th Cir. 1982); *United States v. Hill*, 646 F.2d 247 (6th Cir. 1981) (en banc); *United States v. Sutton*, 642 F.2d 1001 (6th Cir. 1980), vacating 605 F.2d 260 (6th Cir. 1979), cert. denied, 453 U.S. 912 (1981).

265. These cases constitute the greater portion of all RICO cases brought during this period. The Justice Department reported to Congress that as of the end of 1984, approximately 500 RICO cases had been brought. *Oversight on Civil RICO Suits Brought Under 18 U.S.C. 1964(c): Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess., Serial No. J-99-37*, at 94 (1985). Considering that nearly a quarter of those cases may have been brought in 1984, *id.* at 95, and that few 1984 indictments would have had time to reach the appellate courts in the period covered by this survey, the cases discussed in this Article represent well over half of the RICO cases brought in the relevant period.

Of course, the reported cases cannot answer many legitimate and important questions about the use of RICO.²⁶⁶ For example, it is likely that the dramatically enhanced sanctions available through the use of RICO give prosecutors an extra card to play in plea negotiations. Defense attorneys representing subjects in white collar investigations may not uncommonly hear prosecutors mention that a RICO indictment is being considered, and this information may affect their calculations concerning the wisdom of cooperating with investigators rather than maintaining professions of innocence.²⁶⁷ In some cases, indictments including RICO counts may be handed up and later settled by accept-

266. It might be objected that studying judicial opinions provides a distorted view of the actual patterns of use of the statute, because such a study excludes that large proportion of the criminal justice system that goes on beneath the level of full-scale litigation. Cases disposed of by guilty plea, cases resulting in acquittals, cases in which convictions are not appealed, and, increasingly in the federal courts of appeals, even litigated appellate cases regarded as too routine to justify reported opinions are all excluded by such a focus. In most instances, this would be a fatal obstacle to investigating prosecutorial practice by examining its ultimate end product; a survey of homicide prosecutions that dealt only in reported appellate opinions would plainly be missing most of the iceberg.

The problem is less severe, I think, in dealing with RICO, and particularly in considering the issues I am trying to examine. As compared to more traditional crimes, a far higher proportion of RICO indictments are likely to result in appellate litigation. Because the statute is controversial, complex, and still relatively new, legal issues concerning its interpretation have abounded. Thus, cases arising under RICO have probably been, up to now at least, more likely to generate legal issues resulting in published appellate opinions. Moreover, because of the magnitude of the penalties involved, as well as the unfamiliarity of the statute, early RICO cases could be expected to be cases of considerable seriousness. The stakes to the defendants and the likelihood that the defendants would have greater than usual legal and financial resources available made it more likely that such cases would be fully litigated; at least in the early years, one would expect that guilty pleas to RICO charges would be the exception rather than, as with most other criminal charges, the norm.

Further research dealing directly with the indictments brought under RICO, including cases that did not generate reported opinions, may of course require modification of the conclusions of this study, and such research is certainly desirable.

267. The reported cases do contain some intimations of the power of RICO, and particularly of RICO forfeiture remedies, to induce concessions from defendants. In *United States v. Scharf*, 551 F.2d 1124 (8th Cir.), cert. denied, 434 U.S. 824 (1977), after remand, 568 F.2d 106 (8th Cir. 1978), for example, a defendant complained that the Government had induced his guilty plea by promising not to seek forfeiture of his business, but had then proceeded to take the business anyway by levying against it for back taxes. Allowing for the possibility that the defendant had simply thought better of his bargain, Scharf's complaint has a ring of sincere outrage that suggests that he probably would not have pleaded guilty had he not been threatened with RICO sanctions.

A more unusual example of the in terrorem power of RICO remedies is *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985), in which a private investigator was convicted of extortion when he deceived a presumably shady businessman, who had received a subpoena, into paying him money on the representation that he could "fix" a (nonexistent) RICO investigation that could lead to forfeiture of his business. Presumably the power of RICO to induce cooperation with legitimate investigators is equally compelling.

ance of pleas to lesser charges in return for the dismissal of the RICO charges. A study only of litigated cases cannot reveal the extent of this practice.²⁶⁸

While it would surely be interesting to know more about the effect of RICO on plea bargaining, that is not the purpose of this study. What I am seeking to discover is whether RICO is currently being used to deal with categories of criminal behavior that are difficult to prosecute under previous legislation. To the extent that the availability of discretionarily enhanced sentences is actually being used by prosecutors to induce guilty pleas, this is simply a concrete manifestation of the dangers of such an unfocused statute already discussed in the last section. Such dangers, we have already concluded, place a burden on those who support RICO to identify the benefits it offers.²⁶⁹

What sorts of cases, then, are being brought under RICO?

1. *Infiltration of Legitimate Business.*—RICO has been a nearly total failure as a weapon against the kind of activity that led Congress to enact it.

The sections of RICO that directly prohibit infiltration of legitimate enterprises by criminal elements²⁷⁰ have been all but dead letters as prosecuting tools. Of the 236 RICO indictments included in the study, only 17 (fewer than eight percent) appear to have included counts charging violations of these sections, or conspiracies to violate them.²⁷¹ This figure, if anything, overstates the utility of those sections

268. The Justice Department's guidelines provide that "[i]nclusion of a RICO count in an indictment solely or even primarily to create a bargaining tool for later plea negotiations on lesser counts would not be appropriate and would violate the [Department's general guidelines on prosecutorial discretion and plea bargaining]." U.S. Attorneys' Manual § 9-110.321 (Mar. 9, 1984). It would of course be naive to conclude from this that RICO does not constitute a significant prosecution weapon in plea bargaining. Even leaving aside the possibilities that some prosecutors would be unaware of or willing to disregard the guideline, the guideline prohibits only the crudest and most explicit abuse. I doubt that prosecutors often consciously include a count in an indictment "solely or even primarily" as a bargaining chip; on the other hand, there must be any number of cases where a prosecutor brings charges fully expecting to bargain the top count away in exchange for a plea. The line between these practices is no doubt difficult for an outside observer, let alone a defendant or defense attorney, to perceive. In any case, the most insidious use of serious charges in plea bargaining occurs before an indictment is even drafted, when the prosecutor can inform counsel for the subjects of the investigation in all good faith that a RICO indictment is being considered.

269. Empirical evidence that such tactics were not being used, on the other hand, would only marginally affect our determination of the wisdom of retaining a weapon that lent itself to such use.

270. Sections 1962(a) and (b) prohibit investment of the proceeds of a pattern of racketeering activities to acquire an interest in an enterprise, and acquiring an enterprise through a pattern of racketeering, respectively. 18 U.S.C. § 1962 (1982).

271. *United States v. Lizza Indus.*, 775 F.2d 492 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986); *United States v. Romano*, 736 F.2d 1432 (11th Cir. 1984), vacated in part, 755 F.2d 1401 (11th Cir. 1985); *United States v. Zielie*, 734 F.2d 1447 (11th Cir. 1984); *United States v. Rubio*, 727 F.2d 786 (9th Cir. 1984); *United States v. Ranney*,

as weapons against infiltration of legitimate businesses by criminals. In more than half of them,²⁷² the (a) or (b) counts were joined by charges sounding in section 1962(c), thus suggesting that prosecutions would have been possible in the absence of the "infiltration" sections.²⁷³ Moreover, the RICO charges in these cases have not been particularly successful; in six of the cases, the (a) or (b) count was dismissed or the conviction on that count was reversed on appeal.²⁷⁴

More significantly, the cases brought under subsections (a) and (b) hardly seem, as a group, to fit the pattern of infiltration that so concerned the sponsors of RICO. At least four of the seventeen cases involved the reinvestment into the same or related businesses of the proceeds of business frauds conducted by essentially legitimate business operations.²⁷⁵ In the others, the "infiltrators" who acquired business interests through racketeering acts were not Mafiosi but public officials: the Governor of the State of Maryland, convicted of taking an interest in a racetrack as a bribe to induce favorable consideration of official action requested by the track,²⁷⁶ a small-town mayor who put his bribe money into his business accounts,²⁷⁷ and the elected "license collector" of the City of St. Louis who used his payoffs to buy a local

719 F.2d 1183 (1st Cir. 1983); *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. Austin*, No. 82-1080 (6th Cir. Mar. 2, 1983) (LEXIS, Genfed library, Usapp file); *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983); *United States v. Jacobson*, 691 F.2d 110 (2d Cir. 1982); *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982); *United States v. Grapp*, 653 F.2d 189 (5th Cir. Unit A 1981); *United States v. McNary*, 620 F.2d 621 (7th Cir. 1980); *United States v. Goins*, 593 F.2d 88 (8th Cir.), cert. denied, 444 U.S. 827 (1979); *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980); *United States v. Brown*, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979); *United States v. Gambino*, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978); *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975).

272. *Lizza*, 775 F.2d at 494; *Romano*, 736 F.2d at 1432; *Zielie*, 734 F.2d at 1447; *Cauble*, 706 F.2d at 1322; *Austin*, No. 82-1080 (LEXIS, Genfed library, Usapp file); *Rubio*, 703 F.2d at 1124; *Computer Sciences Corp.*, 689 F.2d at 1181; *Mandel*, 591 F.2d at 1347; *Grapp*, 653 F.2d at 189.

273. Moreover, at least one of the (b) cases, *Brown*, 583 F.2d at 663, would more properly have been brought as a (c) case, since there was apparently no acquisition of an interest in a legitimate business. The indictment appears to have proceeded on the theory that one who commits a pattern of racketeering acts in the course of operating a business he already owns thus "maintains" that interest in violation of § 1962(b). Two other cases, *Zang*, 703 F.2d 1186, and *Parness*, 503 F.2d 430, also could easily have been brought as (c) cases.

274. *Ranney*, 719 F.2d at 1186; *Jacobson*, 691 F.2d 110; *Romano*, 736 F.2d 1434-35; *Brown*, 583 F.2d at 669-70; *Rubio*, 727 F.2d 790-91; *Computer Sciences Corp.*, 689 F.2d at 1189-91.

275. *Lizza*, 775 F.2d at 494-95; *Zang*, 703 F.2d at 1189-90; *Computer Sciences Corp.*, 689 F.2d at 1183-84; *Grapp*, 653 F.2d at 191-92.

276. *Mandel*, 591 F.2d at 1152-57.

277. *McNary*, 620 F.2d at 622-23, 628.

tavern.²⁷⁸ In none of these cases can it be said that organized criminals were penetrating the legitimate economy. In the end, only a handful of cases arising under sections 1962(a) and (b) appear to have involved defendants who had "infiltrated" legitimate enterprises in the manner considered a national problem by the Katzenbach Commission and Senators Hruska and McClellan.

Moreover, those few cases represent a pretty sorry catch if the problem is as serious as they believed it to be. In one case, the defendant was a local loan-shark who took over a bagel bakery upon default of a usurious loan.²⁷⁹ In another, the defendants were members of the Hell's Angels Motorcycle Club, who, as part of a massive indictment including a count under section 1962(c) of operating the organization through a pattern of narcotics violations and crimes of violence, were accused of having purchased an auto body shop with the proceeds from drug trading.²⁸⁰ Just about the only successful prosecution under section 1962(a) or (b) of a significant criminal scheme fitting the pattern described by RICO's sponsors was *United States v. Gambino*,²⁸¹ in which the defendants were convicted of exercising control of the private sanitation collection business in the Bronx on behalf of a Mafia family.²⁸²

Thus, the provisions of RICO most explicitly directed against infil-

278. *Goins*, 593 F.2d at 89-90.

279. *United States v. Jacobson*, 691 F.2d 110, 111-12 (2d Cir. 1982).

280. *United States v. Rubio*, 727 F.2d 786 (9th Cir. 1984). The indictment received considerable publicity because of its more dramatic charge that the Hells' Angels constituted a RICO enterprise operated by numerous of its members through a pattern of racketeering activity in violation of § 1962(c). All defendants were acquitted of that charge, and the convictions of one defendant for infiltrating the body shop and several others on lesser drug charges were reversed for Fourth Amendment violations.

281. 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978).

282. Two other cases warrant mention because of the difficulties they suggest in deciding when "infiltration" is present. In *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), the defendant Rex Cauble was charged with heading the "Cowboy Mafia," a criminal enterprise that specialized in the smuggling of marijuana. Among the counts in the indictment were charges that Cauble had operated a partnership called Cauble Enterprises, ostensibly in the real estate and ranching business, through a pattern of racketeering acts (the marijuana business) in violation of § 1962(c), and also that he had invested the proceeds of that drug operation in the same partnership in violation of § 1962(a). This would appear to represent not so much infiltration of a legitimate enterprise by criminal elements as the use of an ostensibly legitimate business as a front for illegal activity. For a similar case, see also *United States v. Zielie*, 734 F.2d 1447 (11th Cir. 1984).

In *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975), the defendant was charged with acquiring a Caribbean casino through a fraud in which he withheld money owed to the financially troubled casino management, and then "loaned" the money to the management through confederates who foreclosed on the loan. Though Parness was certainly a crook, and he acquired the casino by fraud, it is not clear that this transaction represented infiltration of a legitimate business by a racketeer so much as a simple fraud that largely depended for its success on the fact that the enterprise that was the victim of the "infiltration" was engaged in a business that was at the fringes of the legitimate economy in any event.

tration of legitimate entities by organized crime have proven all but totally useless in dealing with the particular harm at which they were aimed.²⁸³ This does not in itself mean that RICO as a whole has been ineffective in dealing with organized crime's penetration of business, however. As the discussion of the problems of drafting RICO has already shown,²⁸⁴ infiltration can be attacked by seeking to prevent its occurrence, as subsections (a) and (b) do, or its expected effects. Thus, we must still ask, has the prohibition in subsection (c) against operating an enterprise through a pattern of racketeering activity been utilized to crack down on the activities of organized criminals who have invaded legitimate enterprises and turned them to illegitimate pursuits and tactics?

The same factors that create doubt about the value of criminalizing infiltration make it difficult to conclude with any assurance whether RICO has been effective in dealing with the problem. First, as noted above,²⁸⁵ the fact of infiltration is not directly relevant to the harmfulness of criminal conduct committed in the operation of an enterprise. If a businessman conducts his affairs fraudulently or a labor official administers his trust corruptly, his conduct is equally harmful whether he is an organized criminal who has infiltrated the enterprise or an ordinary officer of the enterprise gone bad. For just this reason, the cases give few hints as to the provenance of defendants convicted of RICO violations.

Second, even where it is clear that defendants are essentially professional criminals and the crimes they are accused of committing have been committed in the context of an entity with a legitimate form or appearance, it is not always clear that the situation is properly described as penetration of legitimate commerce by criminals. The harm that concerned the Katzenbach Commission and the legislative sponsors of RICO as a potential consequence of infiltration was essentially an economic harm analogous to that imposed by antitrust violators. It was feared that organized criminals, with their vast economic resources drawn from illicit activities and with their willingness to engage in violent or corrupt tactics in carrying on their businesses, would have an unfair competitive advantage that would enable them to drive legitimate competitors out of business and establish economically harmful monopolies.

But many instances of criminal operation of legitimate businesses, including many that have been prosecuted under RICO, do not fit this model. Rather than being an end pursued by criminal means, the business is merely a means to a criminal end. In one common pattern, the legitimate enterprise serves as a front or blind to provide a cover for

283. Professor Blakey himself has acknowledged that § 1962(a), at least, is very rarely used. Blakey & Goldstock, *supra* note 5, at 356-57.

284. See *supra* notes 126-142 and accompanying text.

285. See *supra* notes 132-133 and accompanying text.

illegitimate activities. Where, for example, a restaurant is used as a situs and cover for a narcotics operation,²⁸⁶ or a jewelry store as a front for fencing stolen property,²⁸⁷ the goal is not to exploit the legitimate economy by driving other restaurants or jewelry stores out of business, but simply to find a safe and convenient way of carrying on pre-existing criminal activities.

Finally, some RICO cases present a pattern of organized crime ownership, intimidation, and control of businesses that are not unambiguously identifiable as "legitimate," such as gambling enterprises or massage parlors.²⁸⁸ While the pattern of behavior in such cases is analogous to those cited by members of Congress concerned with infiltration, one imagines that such cases are not precisely what they had in mind.

But with these reservations, it can still be said that RICO has been used on quite a number of occasions to prosecute individuals whose crimes reflected the kinds of harms envisioned by its sponsors as resulting from criminal penetration of the straight business world. *Russello v. United States* is a good example.²⁸⁹ That case, prosecuted under section 1962(c), involved an arson ring that bought buildings or businesses, then burned them down to defraud insurance companies.²⁹⁰ Similarly, RICO has been used against defendants who acquired businesses for the purpose of running them into bankruptcy and defrauding their creditors.²⁹¹ Whether or not the criminals in these cases were members of any monolithic "Mafia" (and there is certainly reason to believe that some of them were indeed involved in that type of syndicate), they clearly fit a pattern of outside predators infiltrating and exploiting a legitimate commercial endeavor for criminal ends through criminal means. On the other hand, almost the same factual patterns arise in cases where individuals who in no ordinary sense can be described as organized criminals or infiltrators conceive and operate schemes of arson or bankruptcy fraud with equally devastating consequences.²⁹²

The field in which the interpenetration of organized criminal activity and legitimate enterprise has been most clearly present in RICO prosecutions has been labor racketeering and corruption; RICO has

286. See, e.g., *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 933 (1979).

287. *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982).

288. See, e.g., *United States v. Porcaro*, 648 F.2d 753 (1st Cir. 1981).

289. 464 U.S. 16 (1983).

290. Other cases involving arson ring prosecutions are *United States v. Russotti*, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); *United States v. DiFrancesco*, 604 F.2d 769 (2d Cir. 1979), rev'd on other grounds, 449 U.S. 117 (1980).

291. *United States v. Hewes*, 729 F.2d 1302 (11th Cir. 1984), cert. denied, 469 U.S. 1110 (1985); *United States v. Tashjian*, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981).

292. See, e.g., *United States v. Peacock*, 654 F.2d 339 (5th Cir. 1981), vacated in part on other grounds, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983).

been used successfully to attack criminals who have become union leaders.²⁹³ The special issues raised by use of RICO in this area are discussed later in this Article.²⁹⁴

It would appear that while the particular provisions of RICO that directly criminalize penetration of legitimate enterprises have not been notably successful, at least some RICO cases have been responsive to the concerns of its sponsors. These cases, however, constitute a small fraction of the total number of RICO prosecutions. While the imprecision of the concept of infiltration makes any precise statistical analysis impossible, the reported cases suggest that cases are not being selected for RICO prosecution based on whether criminal infiltration of legitimate enterprise is present.

2. *An Overview of the Cases.*—What sorts of cases, then, are being brought under RICO? Has RICO served legitimate law enforcement purposes that cannot be served by more narrowly drawn statutes? That RICO has not solved the problem its sponsors were principally concerned about does not mean it has no legitimate uses.

Of the 236 RICO indictments discussed in the sample reported appellate cases, 228 of them appear to have charged either substantive violations of section 1962(c) or conspiracies to commit such violations.²⁹⁵ The most striking feature of these cases is the diversity of the criminal conduct they involve: labor racketeering, terrorism, gambling, narcotics, arson, business fraud, political corruption, prostitution, murder, and copyright violations. As we have seen already,²⁹⁶ the range of conduct that can be penalized under RICO is broad indeed, and the cases that have actually been brought fully reflect that potential.

Still, some classification is possible. One potentially useful classification is by the type of enterprise alleged in the indictment. Any indictment under section 1962(c) must allege that a particular "enterprise" is being operated through a pattern of racketeering activity, and as we have seen, the definition of enterprise is quite broad. What kinds of enterprises have been alleged in RICO indictments to be criminally operated?

A precise statistical answer to that question is impossible to formulate from the reported cases. In part, the difficulty results from using judicial opinions for data; a full description of the alleged enterprise is not always relevant to the legal issues in the case and thus will not al-

293. See, e.g., *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981).

294. See *infra* notes 405-425 and accompanying text.

295. 219 charged only such violations; nine of the seventeen cases in which subsection (a) or (b) violations were charged, *supra* note 271, also contained charges under subsection (c).

296. See *supra* notes 229-232 and accompanying text.

ways appear in the court's opinion.²⁹⁷

But this apparently technical problem, as so often with RICO, reflects a deeper imprecision in the statute. The precise description of the enterprise alleged in the indictment will rarely be relevant to determinative legal questions in a RICO prosecution, because the amorphous nature of the statute gives prosecutors remarkable flexibility in drafting indictments. Suppose, for example, officers of a corporation doing business with a city agency regularly bribe officials of the agency in return for favorable consideration.²⁹⁸ An indictment could easily be constructed charging that the public officials and the businessmen all participated in operating either the business²⁹⁹ or the government agency³⁰⁰ through a pattern of racketeering, or that the businessmen and the officials constituted an enterprise in the form of a "group of individuals associated in fact" for the purpose of securing benefits to a particular business through corruption.³⁰¹ In fact, this prosecutorial flexibility extends even to trial, since courts have held that the difference between an "association in fact" and a legal entity is not critical to the prosecution's legal theory: so long as the prosecution proves that an enterprise existed, a variance between the enterprise characterized in the indictment and the one ultimately proved at trial is immaterial.³⁰²

As a result of this flexibility, in many cases the enterprise alleged in

297. In fact, however, this does not prove an insuperable obstacle. In the overwhelming majority of cases in the sample, the court of appeals opinion explicitly or implicitly describes the nature of the enterprise involved. Even where it does not, if the opinion contains any description of the facts of the case or the racketeering acts alleged—and it nearly always does—a knowledgeable observer can generally deduce the nature of the enterprise alleged.

298. Several RICO cases involve a longstanding pattern of corruption by which lawyers and tax advisers handling cases before the Cook County Board of Appeals received favorable treatment in exchange for bribes to Board officials. See, e.g., *United States v. Chaimson*, 760 F.2d 798 (7th Cir. 1985); *United States v. Alexander*, 741 F.2d 962 (7th Cir. 1984); *United States v. Gorny*, 732 F.2d 597 (7th Cir. 1984); *United States v. McManigal*, 708 F.2d 276 (7th Cir.), vacated, 464 U.S. 979, reinstated on remand, 723 F.2d 580 (7th Cir. 1983); *United States v. Lynch*, 699 F.2d 839 (7th Cir. 1982); *United States v. Burns*, 683 F.2d 1056 (7th Cir. 1982), cert. denied, 459 U.S. 1173 (1983).

299. See, e.g., *McManigal*, 708 F.2d at 283; *Lynch*, 699 F.2d at 841.

300. This is the theory that has been used in the highly publicized RICO charges involving the New York City Parking Violations Bureau. See *Indictment, United States v. Friedman*, No. 86 Cr. 259 (S.D.N.Y. filed Apr. 9, 1986).

301. See, e.g., *United States v. Qaoud*, 777 F.2d 1105, 1116 (6th Cir. 1985), cert. denied, 106 S. Ct. 1499 (1986); see also *United States v. Turkette*, 632 F.2d 896, 904 n.31 (1st Cir. 1980) (describing enterprise alleged in the indictment that led to both *United States v. Rad-O-Lite, Inc.* 612 F.2d 740 (3d Cir. 1979) and *United States v. Manchester*, 605 F.2d 1198 (3d Cir. 1979) (mem.), cert. denied, 445 U.S. 945 (1980), as "a wholly unlawful enterprise"), rev'd, 452 U.S. 576 (1981).

302. *United States v. Alonso*, 740 F.2d 862, 870 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); cf. *United States v. Stratton*, 649 F.2d 1066, 1075 (5th Cir. 1981) (prosecution does not have "to choose between alternative enterprise theories . . . as long as the indictment is otherwise sufficient").

the indictment could easily have been structured differently. Moreover, there is no simple one-to-one correspondence between the type of enterprise alleged in the indictment and the nature of the criminal conduct underlying the prosecution. Several cases in which the enterprise was defined as a "group of individuals associated in fact" are really cases of ordinary business fraud, labor racketeering, or government corruption, rather than cases of wholly illegitimate criminal syndicates. And some cases in which the enterprise alleged was a corporation turn out to be cases in which the gist of the predicate acts of racketeering was political corruption rather than business fraud.

With all these reservations, however, an attempt to divide the cases according to the nature of the alleged enterprise nevertheless yields at least one interesting conclusion. Given the emphasis in the legislative history on infiltration of legitimate enterprises, and the early split in the courts of appeals concerning whether an "enterprise" that had no purpose independent of the commission of the predicate acts of racketeering even could constitute a RICO enterprise, it is impressive to note that over forty percent—the largest single category—of the 228 indictments containing counts charging violations of section 1962(c) that have generated appellate opinions have involved the operation of wholly criminal enterprises.³⁰³ This statistic alone suggests that a major use of RICO has been in direct attacks on criminal activities of the sort exemplified by *United States v. Elliott*.³⁰⁴ In the remainder of the cases in the sample, the enterprises alleged to have been conducted through a pattern of racketeering were formal or "legitimate" entities—businesses, government agencies, and labor unions.³⁰⁵

Because the formal status of the enterprise alleged can be both difficult to identify and deceptive about the nature of the criminal conduct involved, classifying the cases according to the underlying conduct charged—in effect, according to the pattern of racketeering activity—offers a more promising approach to determining the patterns of use of the statute. When this is done, it becomes even clearer that the principal use of RICO has been for a direct attack on the criminal activities of groups or individuals thought to constitute especially serious threats.

303. As noted *supra* text accompanying note 295, 228 of the 236 cases in the sample contained (c) counts. Of those 228, 99 (43%) appear to have been drafted to charge that the enterprise, operated through a pattern of racketeering activity, was an "association in fact," in almost all cases having no purpose other than the commission of the predicate racketeering acts charged. Due to the difficulties discussed above, the precise numbers must be taken with some caution, since in a fair number of cases the classification must be based on informed estimation rather than an explicit recitation in the opinion of the charging language in the indictment.

304. 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978); see Lynch, *supra* note 14, at notes 131–54 and accompanying text.

305. Business enterprises were alleged in 63 cases (28%); government officers or agencies in 44 (19%); and labor organizations in 21 (9%). In one additional case, the enterprise comprised a corporation *and* a labor union.

Table 1 sets forth the types of criminal activities that have been prosecuted using the RICO statute. The data are particularly reliable—in all cases included in the survey, the opinions included a sufficient description of the underlying pattern of criminal behavior to make classification of the essential nature of the case a fairly straightforward task.³⁰⁶

The largest single category of cases is, once again, those in which RICO is used not against corrupters of legitimate functions, but in cases of concerted criminal activity. The important consequences of the criminal enterprise cases for our substantive and procedural criminal law make it desirable to postpone consideration of this category of cases to Part III of this Article.³⁰⁷ The other categories share a common characteristic: in each, the principal legitimate function of RICO is to solve relatively narrow jurisdictional, procedural, or remedial problems in the federal criminal code. In most instances, the legitimate value of RICO to law enforcement in these areas could be captured by much more specific legislation.

3. *Government Corruption.*—The principal legitimate institution the corruption of which federal prosecutors have attacked through the RICO statute has been government itself—more particularly, state and local government. Of the 236 RICO cases in the sample, corruption of government officials was the essence of the activity alleged in seventy-

306. Only one classification difficulty requires mention. A large number of the cases brought under RICO include as predicate acts, in addition to the underlying criminal conduct, acts of obstruction of justice through bribery, witness intimidation, or perjury. These subsidiary offenses have generally been disregarded in classification. For example, where the prosecution focused on a gambling ring and charged, in addition to predicate violations of state or federal laws regarding gambling, some acts of obstruction or bribery, the case was classified as a gambling case. This leads to some overlap with the category of police corruption cases. Where a case involves police officers taking bribes from operators of illegal gambling enterprises, should the case be treated as a gambling case or as a corruption case? My rule was to attempt to follow as closely as possible the apparent intentions of the prosecutor. In objective terms, this meant that a case was classified according to the underlying criminal activity where the RICO enterprise was alleged to be the criminal group and the predicate acts charged included violations of state or federal laws against, for example, gambling or prostitution, see, e.g., *United States v. Fernandez-Toledo*, 749 F.2d 684 (11th Cir. 1985) (marijuana); *United States v. Colacurcio*, 659 F.2d 684 (5th Cir. 1981) (gambling); *United States v. Whitehead*, 618 F.2d 523 (4th Cir. 1980) (prostitution), but as a corruption case where the law enforcement agency was the enterprise alleged or where the predicate acts laid to the nongovernment enterprise included only acts of bribery and not instances of the underlying crimes, see, e.g., *United States v. Ambrose*, 740 F.2d 505, 512 (7th Cir. 1984) (enterprise was "the Chicago Police Department (though it could just as easily be the [drug] kingpins' businesses)"), cert. denied, 472 U.S. 1017 (1985); *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982) (enterprise was motel business used for prostitution; predicate acts were bribery of local police and justice of the peace). The classification scheme used for Table 1 thus reflects the principal thrust of the prosecution, but somewhat understates the number of cases in which corruption of law enforcement was one factor in the prosecution.

307. See Lynch, *supra* note 14.

TABLE 1
 PREDICATE ACTIVITY
 CHARGED IN 236 REPORTED RICO CASES

Concerted Criminal Activity		94
Narcotics	26	
Gambling/Sports Bribery	15	
Arson	10	
Violence/Extortion	10	
Political Violence	6	
Loan-sharking	5	
Prostitution	4	
Theft/Fencing	4	
Diversified Syndicate	14	
Government Corruption		71
Police	18	
Contracts/Purchasing	16	
Courts	13	
Tax/Regulatory	13	
Legislative	6	
Governor	2	
Other	3	
Business Crime		42
Fraud	35	
Violence/Theft	4	
Copyrights	3	
Labor Corruption		29

one (thirty percent). What accounts for this extensive use of RICO against corrupt public officials? Is such use consistent with the legislative purposes for which the statute was intended?

One might speculate that RICO is used in these cases because criminal organizations have corrupted local law enforcement officials to their own ends. While this may not fit the narrowest paradigm of organized crime infiltration of legitimate business, such situations were certainly among those that seriously concerned the members of the Katzenbach Commission and the sponsors of the Organized Crime Control Act,³⁰⁸ and they do constitute examples of criminal organizations corrupting legitimate social institutions. Cases fitting this model would certainly be legitimate uses of the RICO statute under any but the most grudging interpretation.

a. *Types of Corruption Cases.*—Law enforcement corruption is the largest single category of corruption prosecuted in these cases. Of the

308. Commission Report, *supra* note 22, at 191, 199, Task Force Report, *supra* note 26, at 6, 15; 116 Cong. Rec. 601 (1970) (remarks of Sen. Hruska); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan); 115 Cong. Rec. 5874-75 (1969) (remarks of Sen. McClellan).

seventy-one cases in which governmental corruption was the gravamen of the RICO prosecution, eighteen involved local police, and a number of other cases, although not classified as corruption cases, at least incidentally involved allegations of police bribery.³⁰⁹ Moreover, most of the thirteen cases in which judges or court personnel were implicated involved enforcement of the criminal laws.³¹⁰ Altogether, thirty-five to forty percent of the RICO public corruption cases involved corruption of law enforcement.

Nevertheless, of the cases in the sample involving government corruption of some kind, only a handful can fairly be described as involving penetration of law enforcement by organized criminal groups. In these cases, local sheriffs, police, prosecutors, or judges were found to have taken bribes in order to protect the organized conduct of gambling, prostitution, or narcotics crimes within their jurisdictions.³¹¹ Two things are striking about these cases.

First, they constitute a small minority of the corruption cases. More than half of the RICO corruption cases do not involve law enforcement officials at all. Even of those that do involve police and judges, many have no particular relation to any particular criminal organization, still less to any monolithic conception of "organized crime"—frequently, the cases appear to involve corrupt law enforcement officers taking the initiative to profit from their situations, rather than criminal groups penetrating the police.³¹² Even taking into ac-

309. See *supra* note 306.

310. See, e.g., *United States v. Robinson*, 707 F.2d 872 (6th Cir. 1983) (sale by judge of confiscated bootleg liquor); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) (fixing traffic tickets), cert. denied, 455 U.S. 949 (1982); *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981) (protection of illegal activities by judge).

311. See, e.g., *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982); *United States v. Welch*, 656 F.2d 1039 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); *United States v. Allen*, 656 F.2d 964 (4th Cir. 1981); *United States v. Stratton*, 649 F.2d 1066 (5th Cir. 1981); *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980); *United States v. Baker*, 617 F.2d 1060 (4th Cir. 1980); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); see also *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (members of state cigarette tax commission bribed in connection with cigarette smuggling by organized crime), cert. denied, 434 U.S. 1072 (1978).

312. Several police corruption cases clearly involve police officers who engaged generally in soliciting or accepting bribes, or participated in corrupt activities with respect to narcotics. See, e.g., *United States v. DePeri*, 778 F.2d 963 (3d Cir. 1985); *United States v. Davis*, 707 F.2d 880 (6th Cir. 1983); *United States v. Lee Stoller Enters.*, 652 F.2d 1313 (7th Cir.) (en banc), cert. denied, 454 U.S. 1082 (1981); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979), cert. denied, 444 U.S. 1084 (1980); *United States v. Blasco*, 581 F.2d 681 (7th Cir.), cert. denied, 439 U.S. 966 (1978). In these cases, it does not appear possible to say that any criminal group that can in any sense be described as "organized" corrupted a police force; it seems more appropriate to say that corrupt individuals or groups in the police or sheriff's departments took advantage of the opportunities for corruption available in law enforcement generally. Parallel cases can be found for judges. See, e.g., *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981) (traffic court judge fixing tickets); *United States v. Bachelier*, 611 F.2d 443 (3d Cir.

count several police corruption cases in which it is unclear whether the corrupt officers were involved with any particular organized criminal groups,³¹³ it would seem reasonable to estimate that only a small minority of the official corruption cases fall within the model of organized criminal groups corrupting local law enforcement.

Second, those cases that do reflect a pattern of penetration of local law enforcement by criminal groups generally seem to involve at most locally organized criminal operations. With few exceptions,³¹⁴ the cases do not arise in the traditional urban strongholds of organized crime, and the groups involved—to the limited extent one can tell from the cases—generally had no obvious links to any nationwide criminal syndicates. Perry Russell Tunnell, who granted free sexual services to a local police officer and justice of the peace so that the Pines Motel could operate unmolested as a house of prostitution in Kilgore, Texas³¹⁵ is much more typical of the cases in the sample in which RICO has been used against law enforcement corruption than a Mafia chieftain dominating the police force of a major urban area.

Where the corruption is outside the realm of law enforcement, evidence of organized crime infiltration of government is even less common. While the atmosphere of mob involvement hangs over a few government corruption cases outside the law enforcement area,³¹⁶ most of the large number of cases in which RICO has been used against corruption of governmental functions in contracting, regulation, or taxation have not involved organized criminals—or any kind of “blue collar” criminals at all—but have instead involved businesses that sought favorable treatment from government officials, or officials who used their positions to extract financial benefits.

What, then, are we to conclude about these cases? Are traffic court judges who fix parking tickets,³¹⁷ county executives who receive merchandise in exchange for steering county purchases to overpriced

1979) (same). Other cases of the same sort involve police or judicial officials dealing in selling seized contraband on their own account. See, e.g., *United States v. Stratton*, 649 F.2d 1066, 1071 (5th Cir. Unit A 1981).

313. See, e.g., *United States v. Bright*, 630 F.2d 804 (5th Cir. 1980); *United States v. Altomare*, 625 F.2d 5 (4th Cir. 1980); *United States v. Ohlson*, 552 F.2d 1347 (9th Cir. 1977).

314. See, e.g., *United States v. Ambrose*, 740 F.2d 505 (7th Cir. 1984) (Chicago), cert. denied, 472 U.S. 1017 (1985); *United States v. Frumento*, 563 F.2d 1083 (3d Cir. 1977) (Philadelphia), cert. denied, 434 U.S. 1072 (1978).

315. See *United States v. Tunnell*, 667 F.2d 1182 (5th Cir. 1982).

316. See, e.g., *United States v. Aimone*, 715 F.2d 822 (3d Cir. 1983) (bribery of mayor and numerous other officials in Union City, N.J., to steer construction contracts to corrupt enterprise), cert. denied, 468 U.S. 1217 (1984); *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981) (conspiracy to bribe legislators to legalize gambling in State of Washington and to control gambling business).

317. *United States v. Campbell*, 702 F.2d 262 (D.C. Cir. 1983); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981); *United States v. Bachelier*, 611 F.2d 443 (3d Cir. 1979).

merchants,³¹⁸ or state tax officials who grant favorable assessments at the behest of corrupt lawyers³¹⁹ appropriate targets for RICO? Or are these cases abuses of the statute? Why do prosecutors bring these cases as RICO indictments in the first place?

b. *Explaining This Use of RICO.*—Determining whether cases brought under RICO represent “abuses” of the statute by prosecutors requires a judgment about what constitutes an abuse of prosecutorial discretion. Of course, cases of this kind are, by definition, not appropriately brought under RICO if one takes the view that only those cases that fall within the narrowest conception of its sponsors’ concerns are appropriate RICO cases. This view, however, has been rejected by the courts, and correctly so. In the area of government corruption, the principal legal argument reflecting the effort to narrow the statute to the immediate problem that prompted it has been the claim that a government office or department cannot be an “enterprise” within the meaning of the statute. This argument, as we have seen,³²⁰ has been universally rejected by the courts of appeals, which have stressed the broad language of the definition of “enterprise” in the act and the concern of its sponsors with corruption of government officers by organized crime.³²¹

An alternative definition of abuse is clearly called for. It might be argued, for example, that a statute with such potent penalties is best reserved for cases of more than ordinary seriousness. In the area of government corruption, “appropriate” uses of RICO might be considered to be those in which the breach of public trust was either dramatic in its scale,³²² or persistent and widespread in a particular department.³²³ Certain governmental functions, moreover, might be so sym-

318. *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981), cert. denied, 456 U.S. 1006 (1982); *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981); *United States v. Anderson*, 626 F.2d 1358 (8th Cir.), cert. denied, 450 U.S. 912 (1980); *United States v. Grant*, 622 F.2d 308 (8th Cir. 1980).

319. *United States v. McManigal*, 708 F.2d 276 (7th Cir.), vacated, 464 U.S. 979 (1983).

320. See *supra* notes 160–164 and accompanying text.

321. *United States v. Altomare*, 625 F.2d 5, 7 (4th Cir. 1980); *United States v. Grzywacz*, 603 F.2d 682, 685–87 (7th Cir. 1979); *United States v. Frumento*, 563 F.2d 1083, 1089–92 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); *United States v. Brown*, 555 F.2d 407, 415–16 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); see *supra* note 163 for a discussion of the legislative history.

322. For example, a plot to corrupt enough members of a state legislature to accomplish the legalization of gambling, *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982), or the sale of governor’s pardons to criminals, *United States v. Thompson*, 685 F.2d 993 (6th Cir.) (en banc), cert. denied, 459 U.S. 1072 (1982), would appear to be monumental enough crimes to justify resort to extraordinary sanctions.

323. Pervasive corruption of an entire institution, regardless of the significance of the particular government function, also seems a worthwhile target for extreme sanctions. Such corruption appears to have been present in such cases as *United States v. Angelilli*, 660 F.2d 23 (2d Cir. 1981) (New York City marshals’ corrupt administration of

bolically important that any corruption that is not *de minimus* would justify extreme sanctions. The courts and the police might well be examples of this proposition. But one might question whether the receipt of bribes by a county officer acting as a purchasing agent³²⁴ merits the potentially sweeping sanctions imposed by RICO.

While the use of a statute with potentially devastating penalties in a case where such penalties are inappropriate, in order to secure a plea bargaining advantage, would be improper prosecutorial behavior,³²⁵ it is not *per se* improper for a prosecutor to use a statute with heavy penalties against conduct that is literally within the prohibition of the statute but seems to call for a much lighter sentence. Particularly in dealing with an unreformed criminal code like that of the United States, it is frequently the case that the only available statute that covers particular conduct is one whose maximum penalty is grossly disproportionate to the conduct involved. For example, one who knowingly passes a single counterfeit bill commits a felony with a maximum fifteen-year term of imprisonment.³²⁶ One is hard put to imagine any case of this sort in which a sentence of even a fifth of that would be called for. Yet there is no federal statute applicable to such conduct that imposes any lesser maximum penalty.³²⁷ In these circumstances, it is not an abuse of either the defendant's rights or the proper federal role in law enforcement for a federal prosecutor to charge a defendant with counterfeiting simply because the maximum penalty is concededly excessive of the particular instance. The prosecutor is not threatening the defendant with grossly disproportionate punishment, since everyone involved is aware that the judge's sentencing discretion will be exercised to impose a punishment far below the statutory maximum.³²⁸

Similar reasoning may justify RICO charges in public corruption cases. That serious penalties are available for RICO violations does not automatically mean that RICO prosecutions should only be brought where the maximum sentence applicable under the statute would be an appropriate disposition of the case. Nor does the use of RICO by prosecutors suggest that prosecutors were seeking to impose extraordinary

judgment sales), and *United States v. Davis*, 707 F.2d 880 (6th Cir. 1983) (sheriff took bribes in return for systematic disregard of truck weight requirements and extorted campaign contributions from deputies).

324. See cases cited *supra* note 318.

325. See *supra* note 268.

326. 18 U.S.C. § 472 (1982).

327. In some districts, pleas have been accepted in minor counterfeiting cases to misdemeanor violations of 18 U.S.C. § 491 (1982). The legislative history of this statute does not support this use, and no litigated case has been reported upholding it.

328. Nor is the prosecutor in such a case abusing the federal role in law enforcement, since the distinct federal interest in the protection of the currency requires federal control of prosecutorial discretion in such cases. Particularly in urban jurisdictions with crowded courts and overworked police, the protection of the currency would get short shrift if the prosecution of all but the largest counterfeiters were left to the discretion of local police and prosecutors.

penalties on the defendant, or even seriously to threaten the defendant with such penalties. In the reported cases involving Arkansas county judges³²⁹ charged with taking bribes and kickbacks in connection with county purchases, for example,³³⁰ the sentences meted out ranged from six months to three years, and there is no reason to believe that any prosecutor, or any experienced defense attorney representing any of the defendants, would have anticipated sentences much higher than these. Presumably, then, the level of penalty available under RICO does not account for its use in these cases.³³¹

Nor do prosecutors in official corruption cases appear to be using RICO because of the potential procedural advantages of the statute. As we shall see below,³³² RICO may permit the joinder of defendants or charges in the same trial that would otherwise need to be brought in separate cases, a step generally to the tactical and logistical advantage of prosecutors. But the official corruption cases rarely involve this sort of tactical advantage. Far more frequently than other RICO prosecutions, corruption cases involve single defendants.³³³ Where multiple defendants are present, the existence of a single government agency or office as the RICO enterprise tends to unify the evidence in such a way that a conventional conspiracy prosecution would suffice to permit joinder of all defendants in the scheme.³³⁴ In fact, in at least one case

329. The Arkansas county judge is an executive officer similar to a county executive in other states.

330. See *supra* note 318.

331. Nor do the forfeiture provisions of RICO appear to play much of a role in the typical public corruption RICO case. Few of the reported opinions in such cases refer to the imposition of forfeitures. The nature of the prosecutions suggests that forfeiture remedies will rarely be important in such cases. The proceeds of most of the bribery schemes prosecuted under RICO have not been extravagant enough to be beyond the power of ordinary fines or imprisonment to deter, and one imagines that federal judicial orders to public officials convicted of crimes of corruption to divest themselves of their jobs, cf. *United States v. Local 560, Int'l Brotherhood of Teamsters*, 780 F.2d 267 (3d Cir. 1985) (union officials ordered to forfeit their offices in civil RICO action), cert. denied, 106 S. Ct. 2247 (1986), are rarely required to remove those convicted from positions of public trust.

332. See *Lynch*, *supra* note 14, at notes 15-18, 53-62 & 100-04 and accompanying text.

333. See, e.g., *United States v. Campbell*, 702 F.2d 262 (D.C. Cir. 1983); *United States v. Lynch*, 699 F.2d 839 (7th Cir. 1982); *United States v. Dean*, 647 F.2d 779 (8th Cir. 1981); *United States v. Clark*, 646 F.2d 1259 (8th Cir. 1981).

334. For examples of cases involving such schemes, see *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985); *United States v. Davis*, 707 F.2d 880 (6th Cir. 1983); *United States v. Bachelor*, 611 F.2d 443 (3d Cir. 1979); *United States v. Lawrence*, 605 F.2d 1321 (4th Cir. 1979). A conventional conspiracy prosecution would often suffice even where a large number of defendants are charged with many discrete criminal acts. In the Philadelphia police corruption case, for example, although the particular acts of bribery and extortion were committed separately by officers who were not necessarily aware of the particular shakedowns being made by other officers, the pervasiveness of the corruption and the organized sharing of receipts with supervisory personnel in the department would easily permit the inference that the defendants knew of and partici-

where prosecutors did try to cobble together a RICO charge out of corrupt acts that could not have been charged as part of the same conspiracy, they met with a rare rebuff.³³⁵ While there may be a few cases in which the charging of a single RICO enterprise permits the linkage in a single trial that would not otherwise be permissible of corrupt law enforcement officers with the criminal elements they serve, such cases are the rare exception rather than the rule.

The principal motivating factor in the use of RICO in public corruption cases seems to be the unavailability of an alternative simple theory of federal jurisdiction in prosecuting local officials for bribery. While payment of money or favors to federal officials is proscribed in a straightforward statute making sensitive distinctions of degree,³³⁶ bribery of a state or local officer is not, without more, a federal crime. This, of course, does not mean that a corrupt state official is immune from federal prosecution, for numerous more or less creative theories of federal prosecution are available. Most directly, the Travel Act³³⁷ prohibits interstate travel or the use of instrumentalities of interstate commerce for the promotion of bribery in violation of state laws. Moreover, numerous cases have held that a bribery scheme in which a public official is caused to act to the detriment of his official trust may constitute a "scheme to defraud" the official's employer—the public—of the "faithful and loyal services" of its employee, and that the use of the mails to further such a scheme may constitute a violation of the federal mail fraud statute.³³⁸ Finally, the receipt of bribes by a public officer may constitute the "obtaining of property from another, with his consent, . . . under color of official right"³³⁹ that (if interstate commerce is affected) constitutes extortion in violation of the Hobbs Act.³⁴⁰

pated in a single criminal agreement to accept bribes and thus would apparently support an overarching conspiracy count and joinder of the individual crimes committed in furtherance of that conspiracy. See *United States v. DePeri*, 778 F.2d 963 (3d Cir. 1985).

335. In *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981), the government tried two county judges together on a theory that confused the nature of the enterprise at issue. The Eighth Circuit reversed the convictions and required separate trials, holding that the government had not proven that the two judges were part of the same enterprise within the meaning of the statute. *Anderson* is a rare example of a case in which an appellate court reversed on the ground that the government failed to demonstrate the existence of a single enterprise under RICO.

336. 18 U.S.C. § 201 (1982).

337. 18 U.S.C. § 1952 (1982). For the history of the Travel Act, see Bradley, *Racketeering*, *supra* note 21, at 242-47.

338. See, e.g., *United States v. Mandel*, 415 F. Supp. 997, 1010-15 (D. Md. 1976), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States v. Bush*, 522 F.2d 641, 646-49 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976). See 18 U.S.C. § 1341 (1982).

339. 18 U.S.C. § 1951(b)(2) (1982).

340. See, e.g., *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc) (dictum) (citing cases); *United States v. Margiotta*, 688 F.2d 108, 130-36 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983).

Thus, federal prosecutors are by no means bereft of theories on which to bring federal charges against corrupt local public officials. These theories have their drawbacks, however. Bribery schemes do not invariably involve the use of interstate travel, the mails, or interstate telephone calls, so that the jurisdictional nexus demanded by the Travel Act and mail fraud theories is not always present. Nor are mail fraud and extortion theories especially attractive to prosecutors. It is always disadvantageous to the prosecution to have to explain to the jury why something that on its face looks like bribery must in reality be understood as fraud or extortion—such indirect theories of liability are likely to raise doubts and questions in jurors' minds that would not be present in a straightforward bribery prosecution, and thus to present opportunities for defendants to raise reasonable doubts about whether the requirements of the crime charged in the indictment have been proved. More importantly, the use of these theories against government corruption itself involves dubious extensions of the meaning of criminal statutes and, in some cases, the imposition of extremely heavy potential sanctions in possibly inappropriate cases.³⁴¹ Courts and commentators have become increasingly dubious about such "creative" use of the mail fraud and extortion statutes,³⁴² and prosecutors might well wonder whether continued pressure on the boundaries of these crimes will be accepted.³⁴³

RICO provides an answer to most of these problems. By incorpo-

341. For example, turning acts that, if committed by a federal officer, would constitute accepting an illegal gratuity (maximum sentence: two years) into extortion (maximum sentence: 20 years) ranks with any use of RICO as an inappropriate and unforeseen escalation of liability.

342. See, e.g., *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc) (reversing extortion conviction); *United States v. Margiotta*, 688 F.2d 108, 139 (2d Cir.) (Winter, J., concurring in part and dissenting in part) (criticizing expansive use of mail fraud statute), rehearing en banc denied, 811 F.2d 46 (2d Cir. 1982) (Oakes, Meskill, Newman, and Winter, JJ., dissenting from denial of rehearing en banc) (same), cert. denied, 461 U.S. 913 (1983); *United States v. Bronston*, 658 F.2d 920, 931 (2d Cir. 1981) (Van Graafeiland, J., dissenting) (same), cert. denied, 456 U.S. 915 (1982); see also Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White Collar Crime*, 21 *Am. Crim. L. Rev.* 1 (1983); Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 *Am. Crim. L. Rev.* 117 (1981) [hereinafter Coffee, *From Tort to Crime*]; Jeffries, *supra* note 245, at 234-42; Note, *Misapplication of the Hobbs Act to Bribery*, 85 *Colum. L. Rev.* 1340 (1985); Note, *The Intangible-Rights Doctrine and Political-Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 *U. Chi. L. Rev.* 562 (1980).

343. The Supreme Court has agreed to decide whether the mail fraud theory based on defrauding the public of the honest and faithful services of its agents can be applied to officers of political parties. These cases provide the Court with its first occasion to address the theory even as applied to public officials. See *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), cert. granted, 55 U.S.L.W. 3411 (U.S. Nov. 28, 1986). If the Court rejects the prevailing view of the lower courts that such corruption constitutes a "scheme to defraud," one might expect an even greater use of RICO prosecutions predicated on state bribery offenses.

rating state bribery laws, as does the Travel Act, without the jurisdictional requirement of interstate travel or use of interstate communication facilities, RICO makes it possible (at least where two or more offenses have been committed) to bring state bribery charges against corrupt local officials in federal court, given only the minimal requirement of proof of an effect on interstate commerce.³⁴⁴ Since the elements of the offense are those of a straightforward bribery statute, there is no need to resort to artificial theories of liability.

That this jurisdictional benefit constitutes the main reason for the frequent use of RICO in public corruption cases is confirmed by the fact that virtually all uses of RICO against public corruption have involved state and local officials. Of the seventy-one government corruption cases in our sample, only one involved a corrupt federal official.³⁴⁵ Unless we make the implausible assumption that there were no corrupt federal officials³⁴⁶ or that federal prosecutors seek harsher penalties against local officers than against federal ones, it would seem to follow that federal officials were not charged under RICO because the existing federal bribery statute provided a direct theory of prosecution against such officers making the use of RICO against them unnecessary.

If this is the reason for the use of RICO against corrupt public officers, it is difficult to conclude that the statute is being "abused" by

344. The interstate commerce requirement is not a substantial obstacle. The courts have unanimously held that even if the predicate acts do not affect commerce, federal jurisdiction exists if the *enterprise* does. See, e.g., *United States v. Murphy*, 768 F.2d 1518, 1531 (7th Cir. 1985), cert. denied, 106 S. Ct. 1188 (1986); *United States v. Stratton*, 649 F.2d 1066, 1075 (5th Cir. 1981); *United States v. Groff*, 643 F.2d 396, 400 (6th Cir.), cert. denied, 454 U.S. 828 (1981). And government offices have been held to affect commerce not only through their official functions, but by buying their equipment and office supplies out of state. *United States v. Conn*, 769 F.2d 420, 424 (7th Cir. 1985). Given such holdings, it is not surprising that no RICO conviction has ever been overturned for want of an effect on interstate commerce.

345. In *United States v. Lanci*, No. 79-5362 (6th Cir. July 11, 1980) (unpublished opinion, available on LEXIS, Genfed library, Usapp file), defendants were charged with bribing an FBI clerical employee to provide them with confidential information, including informant files. (They apparently were not convicted on the RICO count. See *United States v. Lanci*, 669 F.2d 391 (6th Cir.), cert. denied, 457 U.S. 1134 (1982).) Notably, the Government did not pursue RICO charges against the employee. 669 F.2d at 392. The impetus for the use of RICO appears to have been to maximize the possible sanctions against defendants, who were organized crime figures in Cleveland. See *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). Bribery or attempted bribery of federal officers has been a predicate act in occasional RICO cases that were not primarily concerned with official corruption. See, e.g., *United States v. Fernandez-Toledo*, 749 F.2d 703 (11th Cir. 1985) (narcotics case; violation of 18 U.S.C. § 201(d) (1982) charged as a predicate act).

346. That there were such officials, and that not all of them escaped detection and prosecution, is shown by the number of cases brought under 18 U.S.C. § 201 in the same period. A study by The Federal Judicial Center of the punishment meted out to federal offenders noted that in the single year 1984, at least 156 persons were sentenced for violating the statutes prohibiting bribery of federal employees. A. Partridge, P. Lombard & B. Mezerhoefer, *Punishment Imposed on Federal Offenders 1-3, 8-5* (1986).

prosecutors. But perhaps this is not the most important question in any event. Two more relevant questions might be: (1) Do we really want to federalize prosecution of local government corruption? (2) If we do, is RICO the most appropriate way to do it?

c. *Federalizing Prosecutions of Local Government Corruption Through RICO.*—The answer to the first question, it seems to me, is most certainly that we do. Any rational division of labor between the states and the federal government must have as one guiding principle that the federal government should specialize in investigating and prosecuting cases that are difficult for local authorities to make. Corruption in local government, and especially in local law enforcement, is precisely the sort of crime that local law enforcement authorities find most difficult to deal with.³⁴⁷ Self-investigation is a difficult task, particularly in the relatively small local police forces that have provided a large number of RICO prosecutions where there may be no separate integrity squad, or even no uninvolved individual officer, to bring charges against corrupt colleagues. The possibility that federal investigators are on the lookout for corruption could deter corruption by undermining the sense of security that a corrupt police force must otherwise take from the fact that it need not worry about the police. Even where the corrupt officials are not themselves involved in law enforcement, locally powerful political figures may be difficult targets for local law enforcement agencies that may report directly to political associates of the suspected official.³⁴⁸

There are, of course, countervailing arguments. Federal investigation of the integrity of local officials may create a risk of federal intrusion into local self-government, or improper concentration on the integrity of local officials who are identified with political parties in opposition to that controlling the federal executive. More generally, federalization of local corruption may simply expand too far the federal role in law enforcement. Must we "make a federal case" out of every bribe to a traffic cop or every gratuity to a building inspector?

I would conclude that the benefits of increased attention to an area of crime that is most debilitating to public confidence and highly resistant to local law enforcement outweigh these dangers. Moreover, the federalization of investigation and prosecution of local corruption is hardly a new idea. Even without RICO, aggressive use of the Travel Act, mail fraud, and extortion theories has brought a considerable mea-

347. Beigel, *The Investigation and Prosecution of Police Corruption*, 65 *J. Crim. L. & Criminology* 135 (1974); Gardiner, *Wincanton: The Politics of Corruption*, Task Force Report, *supra* note 26, Appendix B.

348. The Justice Department's guidelines for the use of RICO recognize this possibility. While the guidelines are not specific enough to reflect any priority on making RICO cases against state and local officeholders, the guidelines do make situations in which "the prosecution of significant political or governmental individuals may pose special problems for local prosecutors" an exception to the general guidelines against using RICO "where the predicate acts consist solely and only of state offenses." *U.S. Attorneys' Manual* § 9-110.330(C) (Mar. 9, 1984).

sure of local corruption under the federal investigative jurisdiction and enabled the prosecution of a wide range of cases. This aggrandizement of federal jurisdiction by ingenious prosecutors has met no substantial resistance in Congress or public opinion,³⁴⁹ and little in the courts.³⁵⁰

The failure to approach the problem directly, however, has resulted in an irrational pattern of jurisdiction. It makes little difference to the weight accorded to the arguments for and against federal jurisdiction over the bribery of a New York City building inspector whether the contractor who pays him off lives in Westchester or New Jersey. If such a case is too trivial, or such an investigation poses too great a threat to local autonomy, to warrant federal jurisdiction, the crossing of a state line to make the payment does not make it more fit for federal attention. Nor is it sensible to discourage federal prosecutions by making federal prosecutors run an additional risk of jury confusion through the use of convoluted theories of federal liability. If a federal case should be brought, the defendant's chances of acquittal should turn on the strength of the evidence that corrupt conduct occurred and not on the jury's ability to follow a complicated charge explaining which bribes are, and which ones are not, currently classified by the local court of appeals as extortion.³⁵¹

Ultimately, however, the question whether bribery of local officials should be a federal offense in all or some cases is of mostly theoretical interest. For it is crucial to recognize that under RICO, corruption involving state officers already is a federal offense, at least where a "pattern" of more than one violation can be shown. The extensive use of RICO in such cases and the enthusiastic endorsement by the courts of the legal theories necessary to permit such use, demonstrate that federal judges and prosecutors, at least, believe that federal law enforcement in this area is justified and that previously existing statutes provided inadequate jurisdictional or substantive tools for the job. RICO has been a highly useful tool for federal prosecutors in such cases. With respect to state and local corruption, the view that no cases have been brought under RICO that could not have been brought without it³⁵² does not seem to be correct.³⁵³

349. While it is difficult to assess "public opinion" about a matter as arcane as federal jurisdiction, the eagerness of federal prosecutors to announce indictments of local officials hardly suggests there is a stigma attached to this sort of invasion of states' rights.

350. See *supra* note 342.

351. Compare *United States v. O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc) (requiring evidence of inducement by public official) and *United States v. Aguon*, 813 F.2d 1413 (9th Cir. 1987) (requiring "demand" by official) with *United States v. McClelland*, 731 F.2d 1438 (9th Cir. 1984) (inducement not required), cert. denied, 472 U.S. 1010 (1985) and *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987) (same).

352. *Bradley, Racketeering*, *supra* note 21, at 257.

353. Of course, in a trivial sense, it will always be true that any act that is the subject of a RICO charge could have been prosecuted in some jurisdiction, under some statute,

But even if it makes sense to treat the bribery of local public officials, or at least some of them, as a federal crime, the question still remains, is RICO the best way to do that? Here the answer has to be no. First of all, the use of RICO for this purpose continues the very tradition of indirect, back-door expansion of federal jurisdiction that has created the irrational pattern of jurisdiction prevailing today. Whatever one's views on the expansion of federal enforcement power in this area, it would make sense to focus the debate on this problem and not to expand federal jurisdiction over corruption by indirection in the guise of an attack on organized crime. If the experiment with mail fraud, the Travel Act, the Hobbs Act, and RICO has persuaded us that the benefits of federal prosecution outweigh the costs, it is time to say so. If, on the other hand, the arguments against such enforcement carry the day, it does no good to pretend that state autonomy is being respected because no federal statute overtly prohibiting local graft is on the books.

Moreover, the structure of RICO's prohibitions and penalties is entirely inappropriate for dealing with government corruption. A state judge who fixes parking tickets and a leader of a Mafia crew who deals drugs and commits murder or infiltrates a legitimate business through loansharking are manifestly not doing the same thing, and a statute that defines their conduct in the same terms is plainly not serving the function of precisely defining and condemning unacceptable conduct. Similarly, within the category of official corruption, conduct in violation of state bribery laws can range (and RICO cases *have* ranged) from a supervisory electrician taking bribes of a few hundred dollars to give favorable recommendations to his workers³⁵⁴ to a state governor selling the state's entire law enforcement system by putting executive clemency up for bid.³⁵⁵ A separate federal bribery statute for state officers would permit the making of nuanced judgments about the kinds of officials who should be subject to such a statute and the gradations that should be built into the penalty structure. RICO, in contrast, applies a single, extremely serious maximum sentence to all varieties of bribery schemes.³⁵⁶ As noted above,³⁵⁷ this breadth of coverage places

because every RICO predicate act is by definition already a crime. In the area of local corruption, however, some cases that have been brought under RICO could not have been brought at all as federal prosecutions, and others could have been brought federally only by some awkward expansion of statutes aimed at other behavior. This may well mean that such cases would not have been brought at all.

354. *United States v. Picketts*, 655 F.2d 837 (7th Cir.), cert. denied, 454 U.S. 1056 (1981).

355. *United States v. Thompson*, 685 F.2d 993 (6th Cir.) (en banc), cert. denied, 459 U.S. 1072 (1982).

356. RICO's method of incorporating state laws creates an oddly uneven pattern of coverage. The content of federal law will vary from state to state depending on the scope of local bribery statutes. But this result does not reflect a genuine respect for state decisions about the gravity of conduct. If an act violates *any* state law "involving"

excessive reliance on prosecutorial and judicial discretion to define the degrees of punishment applicable to criminal conduct, and is thus in tension with the principle of legality.

Several points are apparent from our review of the RICO political corruption cases. These cases are by and large remote from the concerns of Congress in enacting RICO. Although a few cases involving police corruption do seem to involve organized criminal groups "penetrating" government agencies by means of financial inducements, most of the cases do not involve organized crime even in the loosest possible sense and involve criminal invasion of legitimate institutions only in the metaphorical sense that corruption by definition involves infection of legitimate institutions by criminal practices. The use of RICO in most of the government corruption cases does not further the specific goals of Congress in enacting the law.

Nevertheless, it is difficult to see these cases as representing an "abuse" of RICO. Nearly all the cases involve serious wrongdoing: the violation of the public trust by elected or appointed public officials. Nor do the cases show any pattern of using RICO to secure unfair procedural advantages, to stretch weak evidence to secure convictions against possibly innocent defendants, to obtain disproportionately severe sanctions for minor transgressions, or to terrorize defendants into guilty pleas by the threat of such sanctions. By and large, the corruption cases involve straightforward prosecutions of individuals or small groups of defendants for connected series of corrupt transactions and result in reasonable sentences.

What appears to be happening in these cases, instead, is a perfectly traditional prosecutorial practice. Prosecutors have used the literal reading of an expansively worded statute to reach conduct that, while wrongful, is not within the conduct the statute specifically aimed to reach and is difficult to prosecute under other statutes. In this instance, RICO has been used as one of a number of tools to expand the federal role in attacking local government corruption in the absence of a straightforward statute directly penalizing such corruption as a federal crime.

The corruption cases, then, neatly illustrate the two-sided nature of RICO. On one hand, the statute has been used in appropriate ways as an effective tool against serious criminal conduct, substantially without violations of individual rights. The broad language of the statute permits prosecutors to close a perceived gap in the federal penal code. On the other hand, both the principle of legality and our constitutional assumptions about the appropriate locus of lawmaking power tell us that it should not be for prosecutors to close gaps in the penal law. To

bribery, 18 U.S.C. § 1961(1)(A) (Supp. III 1985), it can be a predicate act for a 20-year federal felony. Sentencing gradations in the underlying state statutes are totally ignored.

357. See *supra* notes 244-260 and accompanying text.

the extent that it is a good thing for federal investigators and prosecutors to have a hand in attacking corruption in state and local governments (and Congress' tacit acceptance of aggressive use of RICO, the Travel and Hobbs Acts, and mail fraud suggests that Congress thinks it is), and to the extent that earlier statutes relying on limited notions of federal jurisdiction provide an arbitrary dividing line between corruption the federal government can and cannot reach, it is the task of Congress, and not the executive and judiciary, to say so. Furthermore, the prosecutions that have been brought so far suggest no particular need for an elaborate, innovative, and draconian statute like RICO to satisfy legitimate prosecutorial objectives in this area. A simple prohibition of bribery by some or all local officials, along the lines of the federal bribery statute,³⁵⁸ would make RICO wholly unnecessary in the typical corruption case in which it has been used.³⁵⁹

4. *White Collar Cases*.—One of the most controversial aspects of RICO has been its use against white collar crime. Such use has been widespread. At least thirty-eight RICO indictments in the sample (over sixteen percent) involved fairly ordinary business frauds.³⁶⁰

358. Of course, such a statute would be most certain to be found constitutional if its applicability were limited to cases where the bribe affected interstate commerce. On the current state of the law, this is obviously not a very serious limitation on prosecutorial aggressiveness. See *supra* notes 232 & 344. Even this jurisdictional nexus may not be necessary, given appropriate congressional factfinding. See *Perez v. United States*, 402 U.S. 146 (1971).

359. The procedural advantages of RICO might well be of value in connection with the minority of corruption cases in which police or other public officials are closely associated with a particular criminal organization. See *supra* notes 311-15 and accompanying text. Since such cases are analogous to criminal syndicate prosecutions not involving public corruption, consideration of the fairness and utility of RICO in connection with such cases is postponed until later in this Article. See *Lynch*, *supra* note 14.

360. The named enterprise in approximately 63 (27%) of the RICO indictments in the sample appear to have been business entities. Adjustments have to be made, however, because the overlap between cases in which a business entity constitutes the enterprise and cases of white collar crime is not total. For example, several cases in which the named enterprise appears to have been an "association in fact" of particular individuals for criminal purposes nevertheless involved white collar offenses. See, e.g., *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States v. Tashjian*, 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981). On the other hand, several cases in which businesses were the named enterprise were not typical business crime cases. Some such cases involved government corruption. See, e.g., *United States v. McManigal*, 708 F.2d 276 (7th Cir. 1983); *United States v. Campbell*, 702 F.2d 262 (D.C. Cir. 1983); *United States v. Lynch*, 699 F.2d 839 (7th Cir. 1982); *United States v. Chatham*, 677 F.2d 800 (11th Cir. 1982); *United States v. Grande*, 620 F.2d 1026 (4th Cir. 1980); *United States v. L'Hoste*, 609 F.2d 796 (5th Cir.), cert. denied, 449 U.S. 833 (1980); *United States v. Mandel*, 591 F.2d 1347 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980). In other cases, the business enterprise seems to have been merely a front for the conduct of ordinary "blue collar" criminal activities such as narcotics, *United States v. Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); *United States v. Webster*, 639 F.2d 174 (4th Cir. 1981), modified, 669 F.2d 185 (4th Cir.), cert. denied, 465 U.S. 935 (1982); *United States v. Swiderski*, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441

The white collar RICO cases are as various as the crimes encompassed by the mail fraud statute that is the principal predicate offense in these cases.³⁶¹ Accordingly, generalization is difficult. Still, it is possible to identify particular patterns of prosecution. Once again, clear cases of infiltration of the sort that concerned the Katzenbach Commission are few. But they are present. In *United States v. Tashjian*,³⁶² for example, the indictment charged that the defendants constituted "a group of individuals associated in fact for the purpose of operating a 'bust-out' bankruptcy scheme."³⁶³ The defendants, who may have been linked to the "Mafia,"³⁶⁴ were thus accused of running precisely the sort of scheme discussed by Senator McClellan as a prime example of the type of behavior to be expected of Mafiosi infiltrating legitimate businesses: purchasing such companies with the intention of running up huge debts, siphoning out all cash and other assets, and declaring bankruptcy.³⁶⁵

But if a few of the white collar cases have certain overtones of organized crime involvement,³⁶⁶ in most of them it is difficult to identify the presence of organized crime for a reason that is now familiar. The crimes involved in these cases are not committed more frequently by syndicate members than by other offenders, and there is no special reason why the defendants' prior records or affiliations would be relevant at their trials.³⁶⁷

U.S. 933 (1979), gambling, *United States v. Nerone*, 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978), or fencing stolen property, *United States v. Spilotro*, 680 F.2d 612 (9th Cir. 1982). In other cases, the gravamen of the charges underlying the RICO indictment was labor racketeering, *United States v. Romano*, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982), or criminal activities that, while committed in furtherance of the business aims of above-ground (one hesitates to say legitimate) business entities, are difficult to identify as "white collar," see, e.g., *United States v. Scharf*, 551 F.2d 1124 (8th Cir.) (extortion, weapons and explosives violations), cert. denied, 434 U.S. 824 (1977); *United States v. Green*, 523 F.2d 229 (2d Cir. 1975) (physical theft of goods by truckers), cert. denied, 423 U.S. 1074 (1976). The figure given in the text excludes all such borderline cases.

361. See Rakoff, *The Federal Mail Fraud Statute* (pt. 1), 18 Duq. L. Rev. 771 (1980); Coffee, *From Tort to Crime*, supra note 342.

362. 660 F.2d 829 (1st Cir.), cert. denied, 454 U.S. 1102 (1981).

363. *United States v. DeVincent*, 632 F.2d 155, 157 (1st Cir.) (describing indictment considered in *Tashjian*), cert. denied, 450 U.S. 984 (1980).

364. *Tashjian*, 660 F.2d at 837.

365. See, e.g., 116 Cong. Rec. 18,939 (1970) (remarks of Sen. McClellan); 115 Cong. Rec. 5874 (1969) (remarks of Sen. McClellan). Interestingly, however, in *Tashjian*, which in its allegations so precisely fits the RICO mold, the defendants were acquitted of the RICO charges, though convicted of a variety of other offenses. 660 F.2d at 831.

366. See, in addition to *Tashjian*, *United States v. Wuagneux*, 683 F.2d 1343 (11th Cir.) (embezzlement from Teamsters' pension fund), cert. denied, 464 U.S. 814 (1982); *United States v. Weisman*, 624 F.2d 1118 (2d Cir.) (Westchester Premier Theatre securities and bankruptcy fraud), cert. denied, 449 U.S. 871 (1980).

367. As we will see, however, RICO permits prosecutors to make membership in criminal organizations relevant by structuring an indictment to charge the particular

In any case, by far the greater number of RICO indictments in the white collar area have no connection whatever to organized crime. Rather, they run the gamut of ordinary business and regulatory offenses. Businesses overcharging their customers or underpaying their suppliers,³⁶⁸ con artists selling dubious commodities and securities or obtaining financing for nonexistent equipment sales,³⁶⁹ businessmen trying to salvage a bit more from a bankruptcy than the law allows³⁷⁰—the whole range of fraudulent conduct usually associated with the mail fraud statute—all have been prosecuted under RICO.

There is no clearly identifying feature in the white collar cases in which federal prosecutors have elected to use RICO. Because of the penalties and the stigma attached to a RICO charge, one has to assume that RICO is invoked in addition to the mail fraud statute in cases regarded by prosecutors as particularly serious. But the reasons *why* a case was classified as serious are not always apparent on the face of the opinions. Frauds involving large sums of money or large numbers of victims would seem to be good candidates for RICO prosecution, and a number of the cases seem to reflect this priority.³⁷¹ But some of the cases prosecuted as racketeering cases are hard to distinguish from ordinary mail fraud cases in size or scope.³⁷²

Some cases seem to be treated as serious because of the identity of the victim—particularly where the government itself was the victim of fraud. Where the dishonest businessman, by selling poor quality frozen shrimp or overcharging for moving services or computers, defrauds not merely the ordinary citizen but the Army, RICO is particularly likely to make an appearance.³⁷³ RICO has also been invoked where

fraudulent conduct as a predicate act that was merely part of a broader series of crimes committed by a criminal enterprise. See Lynch, *supra* note 14. Their failure to do so in the “white collar” cases suggests an absence of provable organized crime involvement in those cases.

368. *United States v. Grapp*, 653 F.2d 189 (5th Cir. 1981); *United States v. Calabrese*, 645 F.2d 1379 (9th Cir.), cert. denied, 451 U.S. 1018 (1981); *United States v. Martin*, 611 F.2d 801 (10th Cir. 1979), cert. denied, 444 U.S. 1082 (1980); *United States v. Klauber*, 611 F.2d 512 (4th Cir. 1979).

369. *United States v. Feldman*, 761 F.2d 380 (7th Cir. 1985); *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982); *United States v. Shareef*, 634 F.2d 679 (2d Cir. 1980); *United States v. Herring*, 602 F.2d 1220 (5th Cir. 1979), cert. denied, 444 U.S. 1046 (1980).

370. *United States v. Roberts*, 749 F.2d 404 (7th Cir. 1984), cert. denied, 470 U.S. 1058 (1985); *United States v. Guiliano*, 644 F.2d 85 (2d Cir. 1981).

371. For examples of RICO fraud cases in which the criminal proceeds or amounts forfeited exceeded \$1,000,000, see *United States v. Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985), cert. denied, 106 S. Ct. 1200 (1986); *United States v. Randell*, 761 F.2d 122 (2d Cir.), cert. denied, 106 S. Ct. 583 (1985); *United States v. Conner*, 752 F.2d 566 (11th Cir.), cert. denied, 106 S. Ct. 72 (1985); *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983).

372. See, e.g., *United States v. Rosenfield*, 780 F.2d 10 (3d Cir. 1985), cert. denied, 106 S. Ct. 3294 (1986); *United States v. Guiliano*, 644 F.2d 85 (2d Cir. 1981).

373. *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), cert. denied, 459 U.S.

bid-rigging or kickback schemes affect the cost of public contracts.³⁷⁴ Trying to beat the Medicare or educational benefits programs³⁷⁵ or to evade government price controls on oil³⁷⁶ similarly has led to use of the RICO sanction.

Although it is difficult to demonstrate it from the reported cases, it is likely that the identity of the defendant also affects the exercise of prosecutorial discretion to invoke RICO. Cases in which the defendants were regarded by prosecutors as professional white collar offenders, or in which an ostensibly legitimate enterprise was in fact pervaded by illegal purposes or practices, would presumably be regarded by prosecutors as worthy of the enhanced sanctions of RICO.³⁷⁷

Notably, almost none of these cases involves even a hint of organized criminal activity. Moreover, it is very difficult to distinguish these cases from the typical run of fraud cases that are prosecuted daily in the federal courts without the assistance of RICO. Procedural advantages from associating multiple crimes or multiple defendants do not seem particularly relevant in these cases: most of the cases either do not involve multifarious criminal conduct, or else could easily be brought under conventional conspiracy doctrine.³⁷⁸ The only apparent motivating factor for the use of RICO in these cases would appear to be prosecutorial interest in either the aggravated sentencing possible under RICO or the specific forfeiture remedy—or, along the same lines, the greater rhetorical impact achieved by convicting a white collar defendant of a more serious sounding crime.

If this is the motivating factor, however, the pattern of prosecution seems decidedly spotty. While some of the white collar RICO cases do seem to have been specially selected for severe treatment because of

1170 (1983); *United States v. Bethea*, 672 F.2d 407 (5th Cir. 1982); *United States v. Computer Sciences Corp.*, 689 F.2d 1181 (4th Cir. 1982), cert. denied, 459 U.S. 1105 (1983).

374. *United States v. Lizza Indus.*, 775 F.2d 492 (2d Cir. 1985), cert. denied, 106 S. Ct. 1459 (1986); *United States v. Davis*, 767 F.2d 1025 (2d Cir. 1985); *United States v. Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 830 (1980).

375. *United States v. Worthington*, 698 F.2d 820 (6th Cir. 1983); *United States v. Huber*, 603 F.2d 387 (2d Cir. 1979), cert. denied, 445 U.S. 927 (1980); *United States v. Weatherspoon*, 581 F.2d 595 (7th Cir. 1978).

376. *United States v. Zang*, 703 F.2d 1186 (10th Cir. 1982), cert. denied, 464 U.S. 828 (1983); *United States v. Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), cert. denied, 455 U.S. 908 (1982), after remand, 710 F.2d 1078 (5th Cir. 1983); see also *supra* note 3 (the prosecution of Marc Rich).

377. This factor, dependent on the prosecutor's knowledge of the defendant's criminal record or reputation, or on the nature and extent of the business enterprise's legitimate activity, is all but impossible to glean from the records of trials and appeals that ordinarily focus exclusively on the particular instances of criminal conduct alleged in the indictment.

378. Generally speaking, such ordinary business frauds have a unitary fraudulent objective and therefore do not require such exotic notions as the "RICO enterprise conspiracy" to be prosecuted effectively as ordinary mail fraud conspiracies.

the magnitude of the fraud or the identity of the defendant or victim,³⁷⁹ many of the fraud cases thus prosecuted seem quite ordinary; nor would it be difficult to find cases analogous even to the more serious RICO frauds that were prosecuted under the mail fraud statute without use of RICO.

Moreover, cases in which the alleged enterprise is a business afford a broader potential for abuse than exists in the government corruption cases. In all RICO cases, the possibility of a twenty-year prison sentence provides prosecutors with a potent bargaining threat and no doubt imposes considerable psychic strain on defendants. Nevertheless, their attorneys are certainly aware of the range of sentences actually imposed in particular cases and are unlikely to feel coerced into a guilty plea by prosecutorial invocation of RICO. If the case is essentially trivial, defense attorneys can have some confidence that prosecutorial escalation of the charging rhetoric will not persuade a judge to impose a heavier sentence.

In the case of white collar crimes, however, this confidence may not be present. Although a fraud that merits only a one-year prison sentence if brought under the mail fraud statute may result in the same jail term under RICO, the forfeiture provisions of RICO carry the possibility of financial sanctions that are both mandatory, because the judge has no discretion to moderate or remit a RICO forfeiture,³⁸⁰ and possibly draconian, since the extent of the forfeiture may be measured by the value of the defendant's interest in the enterprise rather than by the extent of the criminal conduct or the profits therefrom.³⁸¹ Indeed, the forfeiture provisions in this respect seem better calculated for abuse than for use—professional con artists rarely work through entities with significant capital assets. The principal shareholder of a legitimate bank who schemes to make favorable loans to favored associates stands to lose a life's investment, while the con man selling bank checks drawn on a Caribbean "briefcase bank" may have little to fear from the forfeiture sanction.

If the penalty provisions of RICO provide the major possibility for abuse of the statute in the white collar area, they also provide the primary benefit of the statute as it applies to this sort of crime. The penalty structure for the federal fraud statutes most commonly used against white collar offenses has historically been hopelessly inadequate, at least insofar as financial sanctions are concerned. The maximum fines available under the mail and wire fraud statutes, for example, were, until recently, \$1000.³⁸² In a RICO case like *United*

379. See *supra* notes 371, 373-76 and accompanying text.

380. *United States v. Kravitz*, 738 F.2d 102, 104 (3d Cir. 1984), cert. denied, 470 U.S. 1052 (1985); *United States v. L'Hoste*, 609 F.2d 796, 813 (5th Cir.), cert. denied, 449 U.S. 833 (1980).

381. 18 U.S.C. § 1963(a)(2) (Supp. III 1985).

382. 18 U.S.C. §§ 1341, 1343 (1982). The Comprehensive Crime Control Act of

States v. Zang,³⁸³ for illustrative comparison, the defendants were charged with a fraud that pervaded the enterprise and netted the defendants millions of dollars.³⁸⁴ In mail and wire fraud cases, at least given the widespread assumption that at a time of prison overcrowding, white collar offenders should only with reluctance be given long prison sentences, the rational alternative of serious financial exactions might appear to be foreclosed.

Of course, prosecutors have not been without tactical responses to this problem, even before the era of RICO. Since the gravamen of the offense of mail fraud has long been held to be the mailing rather than the fraudulent scheme,³⁸⁵ operation of a single fraud may be charged not as one crime, but as hundreds of separate felonies, based on the number of pieces of mail in some (often highly attenuated) way related to the fraud.³⁸⁶ By such multiplication of counts, defendants may become liable for significant financial sanctions.

But this extemporized solution has significant drawbacks. In an era in which civil antitrust and fraud damages illustrate that the burden of fraud can easily mount into millions of dollars, the number of counts necessary to achieve proportionality of punishment to the profit achieved by the defendants or the losses suffered by their victims quickly becomes ridiculous and unmanageable. Even where 100-count mail fraud indictments could in theory provide adequate penalties, the solution has many of the same defects we saw in connection with the indirect approach to jurisdictional problems in the corruption area. Just as use of the mails may not correspond to the sensible dividing line between federal and state jurisdiction, there is no reason to believe that frauds involving extensive use of the mails (or more accurately, where prosecutors can prove beyond a reasonable doubt that a large number

1984 significantly raises the fines available for federal crimes of all sorts, effective November 1, 1987. See Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1976, 1995 (1984) (codified as 18 U.S.C. § 3571 (Supp. III 1985)); see also *id.*, § 235(a)(1), 98 Stat. 2031, as amended by the Sentencing Reform Amendments Act of 1985, Pub. L. No. 99-217, 99 Stat. 1728 (effective date). As a result, the maximum fine for an individual who commits mail fraud (or any other felony) will be raised to \$250,000, and to \$500,000 for an organization that commits such an offense. It will be interesting to see whether RICO indictments in business fraud cases will decline for frauds committed after the effective dates of the new penalties, or whether labeling white collar criminals "racketeers" has become habit-forming for federal prosecutors.

383. 703 F.2d 1186 (10th Cir. 1982).

384. *Id.* at 1189-90.

385. See, e.g., *Kann v. United States*, 323 U.S. 88, 95 (1944); *United States v. Brooks*, 748 F.2d 1199, 1202 (7th Cir. 1984); *United States v. Mandel*, 591 F.2d 1347, 1358 (4th Cir.), *aff'd*, 602 F.2d 653 (4th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); *United States v. Crummer*, 151 F.2d 958, 962 (10th Cir. 1945); *Gouled v. United States*, 273 F. 506, 508 (2d Cir. 1921).

386. For cases discussing when a mailing or wire communication is made "for the purpose of executing such scheme or artifice or attempting so to do," 18 U.S.C. § 1341 (1982), see *United States v. Maze*, 414 U.S. 395, 400-05 (1974); *United States v. Sampson*, 371 U.S. 75, 80-81 (1962).

of discrete items of mail were sent) are invariably more serious than frauds that rely on other means of communication.³⁸⁷ Allowing the penalty for fraud to turn on the number of counts selected by the prosecutor makes the definition of maximum sentences a prosecutorial rather than a legislative prerogative.

Here too, then, a direct solution is preferable. The penalty available in a fraud case should be related to the seriousness of the harm and not to the cleverness of prosecutors in devising multiple counts or the value of the defendant's interest in the corporate or other entity utilized in the fraud. Several obvious methods for accomplishing this result can be suggested. The simplest is the approach taken by the Comprehensive Crime Control Act of 1984: increase the maximum fines available for white collar offenses.³⁸⁸ This would make it easier for prosecutors to bring indictments offering the prospect of meaningful financial penalties without undue multiplication of counts or the radical revision of the substantive law of crimes represented by RICO.³⁸⁹

A second approach, suggested by RICO itself,³⁹⁰ is to provide for forfeiture of the proceeds of such crimes.³⁹¹ Forfeitures limited to the losses caused or profits made from financial crimes, or to some reasonable multiple of those factors, are intrinsically proportionate to the gravity of the offense and are thus preferable to the sometimes arbitrary sanction of a forfeiture whose value depends on the extent of the offender's interest in the enterprise.³⁹² The latter sanction, as we have

387. The rise of private messenger services and air express companies, and the decline of the United States Postal Service, make it increasingly unlikely that major frauds involving banks or large corporations will involve repeated use of the mails; crimes occurring within a large financial center like New York will not invariably involve a large number of interstate telephone calls. On the other hand, a consumer fraud that may have far less financial impact, or may net only a few actual victims, may involve mass mailings giving rise to enormous potential liability under the "one count per letter" rule.

388. The Act in fact is even more simplistic, raising the maximum fines for all felonies to the same, significant level. See *supra* note 382.

389. Dramatic increases in the fines available per mail fraud count, coupled with the continued ability of prosecutors to multiply the number of counts, may seem to threaten a vast increase in the range of judicial discretion in imposing financial sentences. Presumably, legislative directives concerning the factors to be considered in imposing fines, see 18 U.S.C. § 3572 (Supp. III 1985) (effective Nov. 1, 1987), and the guidelines to be expected from the Federal Sentencing Commission, see 28 U.S.C. § 994(a) (Supp. III 1985), will reduce this danger. See United States Sentencing Commission, *Sentencing Guidelines and Policy Statement* (1987). If the danger of excessive discretion were still thought to be too great, Congress could attempt to enhance sentences for financial crimes more selectively by defining various grades of fraud.

390. See 18 U.S.C. § 1963(a)(3) (Supp. III 1985), and the discussion of forfeiture of proceeds *supra* notes 248-253 and accompanying text.

391. Maximum fines made proportionate to the harm inflicted rather than set in absolute dollar amounts would have a similar effect.

392. See Tarlow, *RICO: The New Darling*, *supra* note 6, at 294; Taylor, *Forfeiture*

seen,³⁹³ was based on the notion of divesting infiltrating racketeers of their interests in legitimate enterprises. Since the purpose of the forfeiture was divestiture rather than punishment, it could be argued that proportionality is not required. But as we have also seen,³⁹⁴ white collar RICO prosecutions have infrequently involved such infiltration. More typically, they have involved professional con artists whose assets in their corrupt businesses are often insubstantial in relation to the fraudulent schemes they perpetrate,³⁹⁵ or corrupt executives of large legitimate enterprises who are often removed from office as a result of prosecution in any event and whose equity holdings in the "corrupted" corporation neither afford them control over it nor bear a systematic relation to the gravity of their offense.³⁹⁶ In these circumstances, punishment is the principal function of the forfeiture remedy, and a forfeiture that is not related to the gravity of the defendant's offense is unfair and possibly unconstitutional.³⁹⁷

In financial crimes, punishment of the offender is only one of the purposes that can be served by financial exactions. Compensation of victims of fraud is another potential goal of the system. Reliance on fines and forfeitures has the drawback of diverting to the government financial resources that could be used for providing restitution to victims. Meaningful restitutionary remedies could also be a component of a program to insure that financial crime does not pay.

These approaches are already beginning to be taken. As already noted,³⁹⁸ the fines available for federal felonies, including those typically used in white collar cases, have recently been dramatically increased. While forfeiture of criminal proceeds is not—apart from RICO itself—routinely available in white collar cases, restitutionary remedies are available under current law. Under the Victim and Witness Protection Act of 1982, federal courts are authorized, as part of the sentence imposed, to assess compensation for the victims of a crime.³⁹⁹ The remedy differs from fines or forfeitures, in that the financial sanction is payable to the victims, rather than to the Government. Although this restitutionary remedy is too new to be evaluated, a

Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon, 17 Am. Crim. L. Rev. 379, 389-91 (1980).

393. See supra notes 216-227 and accompanying text.

394. See supra notes 360-370 and accompanying text.

395. See, e.g., *United States v. Shareef*, 634 F.2d 679 (2d Cir. 1980) ("boiler-room" operation).

396. See, e.g., *United States v. Weiss*, 752 F.2d 777 (2d Cir.) (executive of Warner Communications involved in creating cash "slush fund" ordered to forfeit Warner stock valued at \$412,000), cert. denied, 106 S. Ct. 308 (1985).

397. *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); Note, Criminal RICO Forfeitures and the Eighth Amendment: Rough Justice Is Not Enough, 14 *Hastings Const. L.Q.* 451 (1987).

398. See supra note 382.

399. 18 U.S.C. §§ 3579-3580 (1982 & Supp. III 1985) (renumbered as §§ 3663-3664, effective Nov. 1, 1987).

number of factors suggest that prosecutors may prefer forfeiture sanctions to restitution.

A principal appeal of the RICO remedy is its ease of administration. Generally speaking, the application of a RICO forfeiture requires no additional litigation and little additional proof by the Government. Forfeiture is automatic upon a finding by the trial jury that the defendant is guilty of a RICO offense and that the defendant received specified proceeds or possessed a particular interest in the enterprise. The former finding, of course, is the goal of the entire criminal prosecution, and the latter will often be a relatively simple matter to prove. In contrast, proving the extent of harm to victims of a particular fraud may well prove a difficult and elaborate process, comparable to the damages phase of a civil case. This is particularly so given the tendency of prosecutors in framing fraud cases to concentrate on illustrative examples of victimization rather than proving the precise losses of all of a wide class of victims. Given some uncertainty in the case law concerning whether restitutionary orders are limited to losses caused by the particular actions of which the defendant was convicted,⁴⁰⁰ responsible framing of indictments to provide for manageable trials may be in tension with providing compensation to all victims of fraudulent behavior.

Psychological as well as tactical considerations affect this preference.⁴⁰¹ Prosecutors usually do not see their role as encompassing this sort of essentially civil litigation; post-trial hearings concerning the proper extent of restitutionary orders, of the sort contemplated by the restitution statutes,⁴⁰² lack the excitement and satisfaction for most prosecutors of grand jury practice and jury trials. Such attitudes are attributable to more than to vanity or prosecutorial self-image. It is a truism of Anglo-American criminal procedure that the prosecution in a criminal case represents the interests of society as a whole, not those of particular crime victims. Given the limited resources available to criminal prosecution, embroiling prosecutors in potentially complex factual litigation over the collateral consequences of a conviction, essentially for the benefit of private individuals, hardly seems the best use of such resources.⁴⁰³ If restitution is to be a major goal of the courts in white

400. Compare *United States v. Barnette*, 800 F.2d 1558, 1571 (11th Cir. 1986) (limiting restitution), cert. denied, 107 S. Ct. 1578 (1987); *United States v. Whitney*, 785 F.2d 824 (9th Cir. 1986) (same); *United States v. Black*, 767 F.2d 1334, 1343 (9th Cir.) (same), cert. denied, 106 S. Ct. 574 (1985) and *United States v. Gering*, 716 F.2d 615, 622-25 (9th Cir. 1983) (same) with *United States v. Sleight*, 808 F.2d 1012 (3d Cir. 1987) (restitution order under probation statute not limited to amounts charged in counts of conviction) and *United States v. Hill*, 798 F.2d 402 (10th Cir. 1986) (broader restitution permitted under Victim and Witness Protection Act of 1982 than under previous probation statute).

401. For an exceptional evaluation of the role of such factors in undermining certain highly-touted reform efforts, see M. Feeley, *Court Reform on Trial* (1983).

402. See 18 U.S.C. § 3580 (1982) (renumbered as § 3664, effective Nov. 1, 1987).

403. Prosecutors may also prefer RICO forfeiture to post-verdict litigation because

collar prosecutions, permitting private litigants to participate in simplified post-conviction proceedings for restitution for any claim against the defendant related to the schemes charged in the criminal case seems a more promising and appropriate procedural mechanism.

In light of the lack of adequate fines and the relative unattractiveness of the recently enacted restitutionary provisions, it is not surprising that prosecutors have seen in the RICO forfeiture provisions an attractive device to permit adequate financial sanctions in white collar cases. Still, the convenience of prosecutors is not a controlling consideration in determining the scope of liability under RICO. It is a poor argument for a penalty that bears only an arbitrary relation to the magnitude of the criminal conduct to which it applies that it is easier to utilize such a sanction than a more finely tuned one. On the other hand, the convenience of officials who have wide discretion in the invocation of charges and remedies must be taken into account, particularly where that "convenience" is merely another name for the efficient use of scarce prosecutorial resources. Putting a weapon into hands in which it awkwardly fits solves nothing, for such a weapon will not be used. Remedies that require elaborate additional litigation beyond a guilty verdict to make precise findings of fact about financial harm are unlikely to satisfy the need for additional sanctions for white collar offenses.

For these reasons, the simplest solution may be the best. If the problem in white collar cases is that the fines provided by the principal federal fraud statutes have been too light to punish complex major frauds, then increasing the maximum fines was a highly desirable step. Raising the maximum fine under the mail fraud statute to \$250,000 per count, for example, should reduce the temptation to draft myriad-count indictments, somewhat simplifying the fact-finding task at trial, and should also lessen the pressure on judges to rely on jail terms as the only meaningful penalty available in white collar cases. Even fines of this size, however, are not sufficient to deter frauds of the enormous scale sometimes encountered in a multi-trillion dollar economy, and fines large enough to serve that purpose are vastly disproportionate to crimes on a more traditional scale. Fines set not in absolute numbers of dollars, but as a multiple of the profits or injury caused by crime, and/or forfeiture of proceeds,⁴⁰⁴ would seem to be preferable. Addi-

the combination of the guilt and forfeiture remedies in the same proceedings permits the admission of potentially prejudicial evidence of the defendant's wealth or life-style. See Markus, *Procedural Implications of Forfeiture Under RICO, the CCE, and the Comprehensive Forfeiture Act of 1984: Reforming the Trial Structure*, 59 Temple L.Q. 1097, 110-20 (1986).

404. Preferably, at least some of the proceeds of such forfeitures should be dedicated to a fund to provide restitution for claimants injured by the fraud. It is odd, for example, that such compensatory use of forfeiture proceeds is provided in the case of profits earned by violent criminals from book or movie contracts, 18 U.S.C. § 3672 (1982); 18 U.S.C.A. § 3682 (West Supp. 1987)—surely a minor source of funds—while

tional remedies, such as the compensation scheme enacted by the Victim and Witness Protection Act, might usefully serve supplementary purposes such as restitution and additional financial pressure on defendants.

Such remedies should make it unnecessary for prosecutors to resort to RICO in the typical white collar crime case. None of the standard business fraud cases in our sample involved any need for special prosecutorial devices or unusual criminal law theories: all that was needed, and all that RICO provided, was enhanced penalties. Dealing with that need directly should eliminate one legitimate use for RICO while simultaneously limiting the potential for arbitrariness caused by an overbroad statute and a forfeiture remedy potentially disproportionate to the crime charged.

5. *Labor Corruption*.—RICO has also been used with conspicuous success against labor corruption. Officials of numerous unions⁴⁰⁵ have been prosecuted for embezzlement, extortion, and receipt of payoffs in dozens of significant cases. Indeed, twenty-nine of the cases in our sample (twelve percent) involved corruption in labor unions or employee benefit plans.⁴⁰⁶

Moreover, in the labor cases, unlike the white collar and government corruption cases, RICO actually operates to a considerable extent as advertised. In a larger proportion of the labor cases than in those of any other category in the study, RICO prosecutions have involved conduct that can best be described as the infiltration of a legitimate economic organization by criminal elements.⁴⁰⁷ Organized criminal control of unions has long been a principal concern of law enforce-

RICO forfeitures of the property of perpetrators of property crimes are not set aside for the benefit of those directly injured by the crimes that produced the forfeitures.

405. The union whose officials have most often been successfully prosecuted is the Teamsters. *United States v. Cody*, 722 F.2d 1052 (2d Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States v. Sheeran*, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983); *United States v. Greenleaf*, 692 F.2d 182 (1st Cir.), cert. denied, 460 U.S. 1069 (1982); *United States v. Provenzano*, 688 F.2d 194 (3d Cir.), cert. denied, 459 U.S. 1071 (1982); *United States v. DeBrouse*, 652 F.2d 383 (4th Cir. 1981); *United States v. Thordarson*, 646 F.2d 1323 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); *United States v. Palmeri*, 630 F.2d 192 (3d Cir. 1980), cert. denied, 450 U.S. 967 (1981); *United States v. Provenzano*, 620 F.2d 985 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States v. Kaye*, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977). But the Laborers, *United States v. Coia*, 719 F.2d 1120 (11th Cir.), cert. denied, 466 U.S. 973 (1983); *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *United States v. Allison*, 619 F.2d 1254 (8th Cir. 1980), the Longshoremen, *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983); *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), and at least a half dozen other unions also appear in the sample.

406. See *supra* Table 1.

407. Explicit references to the organized crime connections of the prosecuted union leaders can be found in *Provenzano*, 688 F.2d 194; *United States v. Romano*, 684 F.2d 1057 (2d Cir.), cert. denied, 459 U.S. 1016 (1982); *United States v. Sanzo*, 673 F.2d 64 (2d Cir.), cert. denied, 458 U.S. 858 (1982); *Scotto*, 641 F.2d 47; *United States v.*

ment, business, and public interest groups, and RICO appears to have provided the government with the tools to make significant cases.

As in the white collar cases, however, one of the principal tools RICO has provided has been far simpler than the complex structure of RICO suggests: a dramatic enhancement of penalties. At the time of RICO's enactment, a labor union officer who accepted an unlawful payment from an employer—no matter what the size of the payoff or how corrupt the quid pro quo—committed a misdemeanor, carrying maximum penalties of a year in prison and a fine of only \$10,000.⁴⁰⁸

The importance of RICO as a penalty enhancer in these cases is evident from the fact that such Taft-Hartley violations were listed as predicate acts in more than half of the labor corruption cases in the sample.⁴⁰⁹ Moreover, in several of the cases, such acts constituted the only charged predicate criminal activity.⁴¹⁰ By charging the defendants under RICO, prosecutors were able to subject the defendants to higher maximum fines and financial forfeitures and dramatically higher maximum prison sentences. Moreover, the increased stigma attached to a "racketeering" conviction has genuine meaning when the underlying violation was otherwise characterized as a misdemeanor and could easily be perceived as a merely technical violation. Finally, the RICO conviction could require immediate forfeiture of union office,⁴¹¹ thus functioning exactly as Senator Hruska had hoped—to remove a corrupting influence from the union.⁴¹²

Clemente, 640 F.2d 1069 (2d Cir.), cert. denied, 454 U.S. 820 (1981); *Provenzano*, 620 F.2d 985.

408. 29 U.S.C. § 186(d) (1982) (amended 1984).

409. 16 of the 29 labor corruption cases explicitly refer to Taft-Hartley violations as part of the pattern of illegal activity charged.

410. See, e.g., *Scotto*, 641 F.2d 47; *Provenzano*, 620 F.2d 985; *United States v. Boylan*, 620 F.2d 359 (2d Cir.), cert. denied, 449 U.S. 833 (1980); *United States v. Kaye*, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977). In *United States v. Sheeran*, 699 F.2d 112 (3d Cir.), cert. denied, 461 U.S. 931 (1983), a union official's RICO conviction was affirmed solely on the basis of Taft-Hartley violations, after the Court of Appeals found predicate mail fraud violations did not charge a crime.

411. For examples of cases in which forfeiture was required, see *Sheeran*, 699 F.2d 112; *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982), cert. denied, 459 U.S. 1174 (1983); *United States v. Rubin*, 559 F.2d 975 (5th Cir. 1977), cert. denied, 444 U.S. 864 (1979).

Forfeiture of union office is less significant as a sanction than might appear, since defendants convicted of various criminal activities have been disqualified from holding union office in any event. 29 U.S.C. § 504(a) (Supp. III 1985). In theory, forfeiture could at one time have been significant in cases involving receipt of illegal payments, since before 1984 such violations did not lead to disqualification from union office. See 29 U.S.C. § 504(a) (1982) (amended 1984). In 1984, in addition to raising the penalties for many such violations, Congress extended the Landrum-Griffin Act's prohibition on holding of office by various felons to those convicted of § 186(b) violations now characterized as felonies. 29 U.S.C. § 504(a) (Supp. III 1985).

412. In addition, labor corruption cases are among the relatively infrequent examples in which the civil provisions of RICO have been used by the Government rather than by private plaintiffs. See, e.g., *United States v. Local 560, International Brother-*

Of course, this dramatic increase in penalties for what otherwise would be characterized as relatively minor offenses is precisely what is troublesome about these cases. Violations of the statute prohibiting receipt of payments by union officers from employers were made misdemeanors precisely because of the complexity of the prohibitions and the number of technical exceptions. Even willful violations of some of those prohibitions hardly seem to qualify as "racketeering" punishable by twenty years in prison.⁴¹³

Selective increase in the penalties available for those violations of the statute that involve a corrupt intent is a far more productive approach to the problem of underpunishment of serious labor corruption. Simply increasing the maximum sentence would be inadequate because of the wide variety of conduct potentially subject to punishment under the statute; if serious penalties are to be imposed, it is appropriate to require that the government show more than merely the intentional receipt of a payment that does not come within a technical exception. Congress finally made a start toward adopting this approach in the Comprehensive Crime Control Act of 1984, increasing the maximum penalties for most willful violations to five years and \$15,000 in fines, retaining misdemeanor treatment for illegal payments of less than \$1000, and requiring an "intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment" for criminal violation of the complex rules governing pension plans.⁴¹⁴

Unaccountably, having made this reasonable gradation of violations, Congress failed to exclude even those Taft-Hartley violations still characterized as misdemeanors from the reach of RICO. Their inclusion is now even more anomalous than before and illustrates the way that RICO can override rational gradations of criminal conduct. Congress' considered judgment in the 1984 revisions that certain conduct should be excluded from the increased penalties is undercut by the possibility that two such minor violations could be prosecuted under

hood of Teamsters, 780 F.2d 267 (3d Cir. 1985), cert. denied, 106 S. Ct. 2247 (1986); see also Kohn, U.S. Suit Hits Crime Control of 2 Unions, N.Y.L.J., June 20, 1986, at 1, col. 2 (civil suit alleging control by the Colombo family of local units of the Cement and Concrete Workers Union).

413. Moreover, it has been held that § 186 is violated whenever a union official receives a prohibited payment from an employer, regardless of whether there was an intent to influence the officer's performance of his duties. *United States v. Pecora*, 484 F.2d 1289 (3d Cir. 1973); *United States v. Ricciardi*, 357 F.2d 91, 99-100 (2d Cir.), cert. denied, 384 U.S. 942 (1966). But see *United States v. Bloch*, 696 F.2d 1213 (9th Cir. 1982) (knowledge that payment intended to influence duties required); *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961) (awareness or reckless disregard of existence of statute required), cert. denied, 368 U.S. 920 (1962). Thus, at least in dictum, courts have suggested that a union officer could be convicted of RICO violations even if no wrongful intent beyond mere knowledge that the payment came from an employer were shown. *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980); *United States v. Boylan*, 620 F.2d 359 (2d Cir. 1980).

414. 29 U.S.C. §§ 186(d)(1), (2) (Supp. III 1985).

section 1962(c) with possible sentences far beyond even the increased penalties now provided for "first-degree" violations.

Other than to enhance penalties for violations of 29 U.S.C. § 186, it is difficult to identify special functions served by RICO charges in labor cases. The sample contains no evident examples of jurisdictional use of RICO in labor cases; virtually all of the predicate activity charged in such cases involved federal offenses.⁴¹⁵ Nor are most of the offenses involved in need of penalty enhancement.⁴¹⁶ Although forfeiture may be an additional incentive to the use of RICO, the sample does not confirm frequent imposition of large financial forfeitures.⁴¹⁷

Finally, it has been suggested that section 1962(d) is important in labor cases because it permits conviction of union officials for a single conspiratorial offense in circumstances where, under ordinary conspiracy principles, a single conspiratorial objective could not be proved.⁴¹⁸ But this is hardly clear from the cases. Whether and how RICO actually expands the reach of ordinary conspiracy principles is discussed in greater detail in Part III.⁴¹⁹ But the claim that more than a very few of the labor cases could not have been brought as perfectly conventional conspiracy cases is unpersuasive.

A significant proportion of the labor cases in the sample involved only a single defendant.⁴²⁰ Although such cases may involve various separate criminal acts or schemes, joinder of those offenses in the same indictment as acts "of the same or similar character" or as "parts of a common scheme or plan"⁴²¹ to operate the union corruptly should be a simple matter. Moreover, virtually all of the cases that did involve concerted activity involved officers of a single union acting in pursuit of a rather limited criminal goal that could easily be charged as a single conspiracy.⁴²²

415. Besides receipt of illegal employer payments, the most common predicate acts are extortion, 18 U.S.C. § 1951 (1982), and embezzlement of union funds, 18 U.S.C. §§ 664, 1954 (1982); 29 U.S.C. § 501 (1982).

416. The federal penalties for extortion are essentially as severe as those of RICO. See 18 U.S.C. § 1951 (1982). Those for embezzlement of union funds are not as severe, 29 U.S.C. § 501(c) (1982), but at five years and \$10,000 fine per count, they would appear ample. Cf. 18 U.S.C. § 656 (1982) (five years and \$5000 maximum sentence for embezzlement from federally-insured bank).

417. The most common references to forfeiture in the labor cases in the sample is to forfeiture of union office. For the significance of such forfeitures, see *supra* note 411.

418. Blakey & Goldstock, *supra* note 5, at 360-62.

419. See Lynch, *supra* note 14 at notes 117-54 and accompanying text.

420. See DiNapoli v. Northeast Regional Parole Comm'n, 764 F.2d 143 (2d Cir.), cert. denied, 106 S. Ct. 588 (1985); United States v. Cody, 722 F.2d 1052 (2d Cir. 1983); United States v. Sanzo, 673 F.2d 64 (2d Cir. 1982); United States v. Boylan, 620 F.2d 359 (2d Cir. 1980); United States v. Rubin, 559 F.2d 975 (5th Cir. 1977), cert. denied, 446 U.S. 864 (1979); United States v. Kaye, 556 F.2d 855 (7th Cir.), cert. denied, 434 U.S. 921 (1977).

421. Fed. R. Crim. P. 8.

422. See, e.g., United States v. Romano, 684 F.2d 1057 (2d Cir.) (defendants, two

Only one of the labor cases in the sample involved a truly massive and diversified conspiracy of the sort that raises serious questions about its prosecutability under normal conspiracy doctrine. In *United States v. Kopituk*,⁴²³ twenty-two defendants were charged with an "extensive, and well-orchestrated conspiracy" to "control . . . the business activity at several major ports in the Southeastern United States."⁴²⁴ But the activities of the defendants in that case were so widespread and diverse that it raises questions more like those raised by the organized crime cases than by the standard RICO labor corruption case.⁴²⁵

Thus, while RICO has been successfully used against corrupt labor officials, including many associated with organized crime, the principal basis for its success has been its provision of highly enhanced penalties in an area where one of the principal tools of prosecution has been an inadequate statute that until recently has lumped together conduct of widely varying seriousness under a single, misdemeanor penalty. While RICO has generally been used only against serious and repeated violations of that statute and against other serious labor corruption, the continued applicability through RICO of serious sanctions to relatively

brothers, jointly involved in almost every aspect of conspiracy to extort businessmen at wholesale fish market), cert. denied, 454 U.S. 1016 (1982); *United States v. Thordarson*, 646 F.2d 1323 (9th Cir.) (members of Teamsters local conspire to force one employer to recognize union by acts of violence), cert. denied, 454 U.S. 1055 (1981); *United States v. Ford*, 632 F.2d 1354 (9th Cir. 1980) (trustees of benefit fund agree on single unlawful compensation scheme), cert. denied, 450 U.S. 934 (1981). For a rare exception, see *United States v. LeRoy*, 687 F.2d 610 (2d Cir. 1982) (activities of appellants "largely unrelated"), cert. denied, 459 U.S. 1174 (1983).

Nor do the cases cited by Blakey & Goldstock, *supra* note 5, at 361-65 demonstrate the "increased vulnerability" under RICO of labor union officials who "may not be amenable to prosecution under federal conspiracy law." *Id.* at 361. In *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976), the Ninth Circuit found that only a single conspiracy was involved, notwithstanding the government's effort to convict the defendants of two separate conspiracies, applying ordinary conspiracy doctrines and giving no hint that any special RICO concepts were involved. The conspiracy charged involved a unitary goal of monopolizing the loading and unloading business of meat packers in the Vernon, California area.

In *United States v. Scotto*, 641 F.2d 47 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981), the only defendants charged in the RICO conspiracy count were the President and Executive Vice-President of the same local of the International Longshoremen's Association. Blakey and Goldstock make no effort to explain why the alleged agreement, which they describe as one "to conduct [the International Longshoremen's Association's] affairs by unlawfully obtaining money from employers and by devising schemes to defraud Prudential Shipping Lines," Blakey & Goldstock, *supra* note 5, at 364 (footnote omitted), could not have been charged and proved under 18 U.S.C. § 371 (1982) in the absence of RICO. Although the union Vice-President, Anastasio, was personally implicated in fewer individual acts, the close association and joint involvement of the two defendants in several of the corrupt activities, and their mutual need to be assured of each other's support surely support an inference that they agreed to a common venture to use the union for personal profit.

423. 690 F.2d 1289 (11th Cir. 1982).

424. *Id.* at 1294.

425. Those problems are discussed in Lynch, *supra* note 14.

minor misconduct remains troubling. Moreover, even in cases of intentional receipt of bribes to undercut the interests of union workers, it would be far preferable to provide for reasonable sanctions for serious violations than to leave the grading decision to prosecutorial discretion. The 1984 amendments to the Taft-Hartley Act make a start in this direction.

6. *Some Conclusions.*—None of the uses of RICO encountered so far is radical or revolutionary in any sense. In each instance, the underlying predicate acts are familiar crimes, usually sufficiently closely related to each other that they could have been tried as part of the same indictment under conventional procedural rules; the “enterprise,” whether business entity, government agency, or labor union, provides the setting for the crimes, or serves to symbolize its victim or ultimate beneficiary, but does not ultimately affect the nature of the proof offered. The trial of the RICO indictment differs in no significant respect—save perhaps for the offering of evidence relating to a possible forfeiture verdict—from a trial of a hypothetical indictment charging only the predicate acts themselves.

Of course, this does not mean that the RICO indictment serves no purpose, or that the criminals involved could easily have been brought to book had RICO never been enacted. In each area so far examined, federal prosecutors would have reasonable grounds for arguing that if RICO had not been available, under the existing federal criminal code a federal prosecution would have been difficult or impossible, or would have resulted (assuming conviction) in penalties not commensurate with the gravity of the offenses charged. The prosecutions that have been undertaken raise legitimate questions of federal law enforcement policy: Should local governmental corruption be subject to federal prosecutorial jurisdiction? What is the appropriate sentencing structure for business frauds or labor corruption? RICO hardly represents a considered response to these questions and may not provide the correct answers, but the use of RICO has not presented significant problems of unfairness. The adaptation of RICO to these functions by prosecutors and courts cannot be considered an “abuse” of the statute.

Nevertheless, if RICO’s use were limited to these areas, it would be rather easily expendable. Given the failure of RICO to accomplish much towards its original goal of directly penalizing organized crime infiltration of legitimate business, the danger presented by a statute that vests so much additional power (whether or not exercised responsibly) in prosecutors and sentencing judges to escalate the potential or actual sanctions for criminal conduct puts too much strain on fundamental principles of legality to be justified by the covert solution of a handful of weaknesses in the federal penal law. The ease with which these gaps could be filled by straightforward legislation directly addressed to each problem, some of which has already begun to be

passed, would certainly counsel the repeal of RICO and its replacement with a handful of modest jurisdictional and sentencing reforms.

But these have not in fact been the only uses of RICO; indeed, for essentially the reasons outlined, they do not seem to be the most significant ones. Numerically the largest category of cases in the survey, arguably the most important in terms of the law enforcement benefits obtained, and by far the most important in terms of the challenge it presents to conventional theories of substantive criminal law and criminal procedure, consists of the cases in which RICO has been used not against the criminal infiltration or utilization of a legitimate enterprise, but as a device for a direct assault against illegitimate syndicates or criminal organizations themselves. These cases are so important that they deserve a separate section all to themselves.⁴²⁶

426. See *id.*