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The three unlawful acts described in this section prohibit (1) acquiring or maintaining an interest in or control of an enterprise through racketeering (primarily, the use of a pattern of criminal activity to acquire an interest in a legitimate business); (2) conducting the affairs of an enterprise through racketeering (the use of a pattern of criminal activity to conduct some or all of the affairs of legitimate or completely illegitimate business); and (3) the use of the proceeds of racketeering to acquire or maintain an interest in an enterprise or to conduct the affairs of an enterprise (the use of the ill-gotten gains from a pattern of criminal activity in what would otherwise be a legal attempt to acquire an interest in or run an enterprise). The three prohibited acts can be committed by any person. The term "person" is defined in AS 11.81.900(b). Note that this section merely describes the type of conduct that can result in criminal or civil liability under this legislation. It does not specify the penalties for that conduct, which appear in other sections of this bill. See, e.g., AS 11.59.040.

AS 11.59.010(1) covers the conduct of acquiring or maintaining an interest in or control over an enterprise through racketeering. This prohibition is aimed primarily at the use of illegal activity to take over a legitimate business, although it is broad enough to cover an attempt

by one illegitimate enterprise to take over another illegitimate enterprise.

The conduct prohibited by paragraph (1) covers any attempt to take over an enterprise by the type of illegal activity defined as racketeering in AS 11.59.020. For example, a defendant may violate this paragraph by assaulting the owner of a business and setting fire to property belonging to the owner with the intent of "persuading" the owner to sell the business to the defendant or to take the defendant as a partner. Alternatively, several persons may violate this paragraph if together they engage in the prohibited conduct. For example, assume that two defendants join in an effort to acquire an interest in a legitimate business through racketeering. One defendant bribes a municipal inspector to deny a needed permit to the business while the other commits a felony assault on the owner with the intent of persuading the owner to sell an interest in the business. Together, both defendants have satisfied the definition of racketeering in AS 11.59.020 if the illegal activity of each defendant is chargeable to the other under the general principles of criminal liability specified in AS 11.16, and both have therefore engaged in conduct prohibited by paragraph (1).

As is the case with each of the three prohibited acts described by AS 11.59.010, there is no requirement that the

conduct of the defendants be part of "organized crime" or that the defendant is a member of "organized crime." See Bennett v. Berg, 685 F.2d 1053, 1063-64 (8th Cir. 1982) cert. denied, 104 S.Ct. 527 (1983), and cases cited therein. It is apparent, however, that some of the conduct prohibited by this legislation will indeed fall within a commonly accepted definition of "organized crime." See, e.g., United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982). Nevertheless, it is the intent of this legislation that no "organized crime" connection need be shown in any criminal prosecution or civil proceeding authorized by this chapter.

AS 11.59.010(2) is aimed at the person who participates in or conducts the affairs of an enterprise through racketeering. There is no requirement in the definition of enterprise that the enterprise constitute a legal entity. Consequently, this paragraph would apply to an enterprise that has been established solely to further illegal purposes. United States v. Turkette, 452 U.S. 576 (1980). See also commentary accompanying AS 11.59.900(1).

Paragraph (2) requires that the affairs of the enterprise be conducted "through" racketeering. There is no requirement that the racketeering benefit the enterprise or result in profits for the enterprise. It is sufficient that the defendant engaged in the racketeering activity as part

of the enterprise or that the illegal activity is related to the activities of the enterprise. See United States v. Webster, 669 F.2d 185 (4th Cir. 1982), cert. denied, 456 U.S. 935 (1982); United States v. Welch, 656 F.2d 1039, 1960-62 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982); United States v. Scotto, 641 F.2d 47 (2d Cir. 1980). There is no requirement that the illegal activity that is used to establish racketeering be part of the day-to-day business operation of the enterprise. Engl v. Berg, 511 F.Supp. 1146, 1156 (E.D. Pa. 1981) (quoting United States v. DePalma, 461 F.Supp. 778 (S.D.N.Y. 1978)). It is enough, for example, that the enterprise was used as a front for illegal activity. See United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

One example of the type of conduct covered by paragraph (2) is summarized in a recent opinion by the United States Supreme Court:

> Briefly, the evidence showed that a group of individuals associated for the purposes of committing arson with the intent to defraud insurance companies. This association in fact enterprise, composed of an insurance adjuster, homeowner, promoters, investors, and arsonists, operated to destroy properties in Tampa and Miami, Florida between July 1973 and April 1976. The panel summarized the ring's operations as follows: 'At first the arsonists only burned buildings already owned by those associated with the ring. Following a burning, the building owner filed an inflated proof of loss statement

> and collected the insurance proceeds from which his co-conspirators were paid. Later, ring members bought buildings suitable for burning, secured insurance in excess of value and, after a burning, made claims for the loss and divided the proceeds' (footnote omitted).

Russello v. United States, 104 S.Ct. 296, 298 (1983) (quoting United States v. Martino, 681 F.2d 952, 953 (5th Cir. 1982) (en banc)). Other examples of conduct that is intended to be covered by paragraph (2) are provided in United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980), cert. denied, 453 U.S. 912 (1981); United States v. Whitehead, 618 F.2d 523 (4th Cir. 1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978), cert. denied, 441 U.S. 993 (1979).

AS 11.59.010(3) primarily prohibits the use of property derived from racketeering, or the proceeds of that property, to obtain an interest in an enterprise. See United States v. McNary, 620 F.2d 621 (7th Cir. 1980). The term "property" (defined in AS 11.59.900(2)) has been used rather than the undefined term "income" which appears in the federal statute.

At first glance the prohibition described in paragraph (3) appears similar to that contained in paragraph (1). However, unlike paragraph (1), which requires that otherwise illegal means be used to acquire an interest in an enterprise, this paragraph makes unlawful specified conduct

relating to an enterprise when the property used to finance that conduct has been derived from racketeering. Unlike federal law, there is no exception for investments that take the form of securities purchased in the open market amounting to less than one percent of the total securities available in the enterprise. Only four of the state statutes that are based on the federal provision contain a similar provision, and there seems to be little justification for exempting this particular class of investment from the coverage of this legislation.

Considered in conjunction with AS 11.59.100, the prohibition in paragraph (3) will be of significant importance in civil proceedings where a legitimate enterprise attempts to require that the defendant divest himself of any interest in the enterprise that was obtained through the use of property derived from racketeering. This prohibition may also be of assistance in cases where the state seeks forfeiture of the defendant's illegally obtained profits from racketeering since it effectively prevents the racketeer from "sheltering" those gains by investing in a legal enterprise. See AS 11.59.090. Note that there is no requirement that the investment in the enterprise be otherwise illegal. Rather, the investment becomes illegal since it was made possible by using the fruits of racketeering.

Paragraph (3) also prohibits using the "proceeds" of property derived from racketeering. This language is intended to permit tracing of assets derived from racketeering in order to prove that such assets were, in effect, used to take over a legitimate business. Thus illegal profits do not later become legal merely because they have been laundered, or augmented, by an intervening legal investment.

Another point should be noted regarding the applicability of paragraph (3) to cases where the defendant claims that it is impossible to establish that the particular investment in the enterprise was derived from racketeering. The "sufficient nexus" test adopted by the court in United States v. McNary, 620 F.2d 621 (7th Cir. 1980), is intended to apply to such cases. In McNary, the court emphasized that the federal prohibition similar to paragraph (3) is violated if the gains from racketeering "allowed or facilitated" a subsequent investment even though the money derived from racketeering was not directly invested. Id. at 628-29.

Also note that there is no requirement that the defendant himself participate in the racketeering under paragraph (3) -- it is enough that the circumstance exists that the property was derived from racketeering. There may be cases under paragraph (3) where the defendant claims that he or she had no knowledge that the property was derived

from racketeering. In such cases, it is intended that the burden of proof be placed on the state to establish that the defendant acted at least recklessly as to the circumstance that the property was derived from racketeering.

Sec. 11.59.020. DEFINITION OF "RACKETEERING"

In defining the prohibited acts that can form the basis of a criminal prosecution or civil action authorized by this chapter, each of the three paragraphs in AS 11.59.010 uses the term "racketeering." AS 11.59.020 defines that term.

In order to establish racketeering, it must be shown that the defendant engaged in "a pattern of illegal activity that involves two or more instances of illegal activity." Proof of two instances of illegal activity that are held to meet the pattern requirement are sufficient to constitute racketeering. There is no requirement that the two or more instances of illegal activity involve different crimes. See United States v. Davis, 576 F.2d 1065 (3d Cir. 1978), cert. denied, 439 U.S. 836 (1978).

Unlike federal law, this legislation specifically defines the term "pattern" in AS 11.59.020(c). The definition is based on a definition of "pattern" appearing in several state statutes. That definition in turn was derived from United States v. Stofsky, 409 F.Supp. 609, 613-14

(S.D.N.Y. 1973), aff'd, 527 F.2d 237 (2nd Cir. 1975), cert. denied, 429 U.S. 819 (1976), where the court held that the "pattern" requirement could not be satisfied by mere accidental or unrelated acts.

The fact that there was but one objective underlying separate acts of racketeering does not place the conduct outside the definition. United States v. Starnes, 644 F.2d 673, 678 (7th Cir. 1981), cert. denied, 454 U.S. 826 (1981). The issue is rather whether the illegal acts, undertaken to further a single objective or multiple objectives, constitute a pattern of illegal activity.

To establish a pattern of illegal activity, it must be shown that two or more instances of illegal activity were involved. The acts that are sufficient to constitute illegal activity for purposes of the definition are described in subsection (b).

One common characteristic of each crime listed in AS 11.-59.020(b)(1) -- (6) is that they are all classified as felonies. In this regard this legislation differs from federal law which allows prosecution based on underlying crimes that are misdemeanors. In view of the substantial penalties that will arise from a violation of this legislation, it seems appropriate to require that the underlying illegal activity be serious enough to be classified

by the legislature as a felony. The felonies that are listed have been chosen either on the basis that they pose a danger to personal physical security, are crimes that may be used in the effort to obtain control over an enterprise, or are crimes that may be committed by an enterprise that is in the business of crime.

AS 11.59.020(b)(6) refers to felony conduct that has been defined as "racketeering activity" under federal law. It should be noted that this paragraph does not have the effect of granting the state jurisdiction over conduct that exclusively involves federal interests. AS 11.59.-030(a)(1) specifically requires that at least one instance of illegal activity that is used to establish a pattern of racketeering must violate Alaska law. A person, for example, is not covered by this legislation for acquiring an interest in an Alaskan business through a pattern of illegal activity that involved the out-of-state bribery of a federal official and the interstate transportation of stolen property between Washington and Oregon. However, if one of the instances of illegal activity involved conduct falling within AS 11.59.020(b)(1) -- (5), a federal crime listed in 18 U.S.C. sec. 1961(1) will be sufficient to sustain an action under this chapter.

Note finally that there is no requirement that the defendant was previously convicted of the illegal activity that

is used to establish racketeering. See USACO Coal v. Carbonnin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982) and cases cited therein. To the extent that a recent opinion by the Second Circuit Court of Appeals is inconsistent with this approach, it is expressly rejected as not reflecting the intent of this legislation. See Sedima, S.P.R.L. v. Imrex Co., 53 U.S.L.W. 2062 (2d Cir. July 15, 1984).

Sec. 11.59.030. PROOF OF RACKETEERING

While AS 11.59.020 defines racketeering, AS 11.59.030 addresses several issues pertaining to the type of evidence that can be used to establish the requirements of that definition.

Subsection (a) places three restrictions on the type of illegal activity that can be used to satisfy AS 11.59.-020(b)(1) -- (6). AS 11.59.030(a)(1) requires that one of the instances of illegal activity used to establish racketeering must be in violation of Alaskan law. As discussed in the commentary accompanying AS 11.59.020, this limitation prevents the institution of a proceeding authorized by this Act based on conduct that exclusively involves federal interests.

AS 11.59.030(a)(2) requires that at least one instance of

illegal activity that is used to establish racketeering must occur after the effective date of this Act, thus eliminating any ex post facto concerns in criminal prosecutions. See United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).

AS 11.59.030(a)(3) requires that at least one instance of illegal activity used to establish racketeering must occur within a three-year period either before or after the defendant becomes involved with an enterprise under the circumstances prohibited by AS 11.59.010. This restriction effectively creates an automatic bar to a finding of racketeering if both instances of illegal activity occur outside the three-year period. While a similar provision does not apply in federal law, the restriction appears appropriate to add to this legislation.

AS 11.59.030(b) clarifies a point that is probably already implicit in the language of subsection (a): the same instance of illegal activity may be used to satisfy each of the requirements specified in (a)(1) -- (3). For example, if one of the instances of illegal activity used to obtain control over an enterprise on December 15, 1985, was an assault committed in Alaska on November 15, 1985, each of the three paragraphs of subsection (a) will be satisfied, assuming that this legislation took effect on January 1, 1985.

AS 11.59.030(c) places a limitation on how far back a prosecutor or civil litigant can go in using illegal activity to establish racketeering. If more than five years has elapsed between the most recent instance of illegal activity and the immediately preceding incident of illegal activity, the past instances of illegal activity cannot be considered. For example, assume that this Act takes effect January 1, 1986. On January 1, 1987, the defendant commits one instance of illegal activity. If the prior instance of illegal activity used to establish racketeering occurred on or after January 1, 1982, it and other past acts may be considered in establishing racketeering under AS 11.59.030. However, if the prior instance of illegal activity took place before January 1, 1982, it may not be considered.

Note that AS 11.59.030(e) qualifies the five-year period specified in subsection (c) by providing that the five-year period does not begin to run until the defendant has satisfied all conditions of a sentence, or conditions of an alternative to a prosecution, for the prior instance of illegal activity. Similarly, subsection (e) also qualifies the three-year period specified in paragraph (a)(3).

An example of the relationship between subsection (e) and (c) is provided by considering the case of a defendant who is 1986 is convicted of felony assault and is sentenced to

two years' imprisonment followed by a two-year probationary period. Assume further that the probationary period is successfully completed in 1990 and that the defendant commits another felony assault in 1993. If the other requirements necessary to establish a violation of this legislation can be established, it may be alleged that the 1986 and 1993 assaults were part of a pattern of illegal activity. In this case, subsection (e) provides that the prior conviction may be considered under subsection (c) since the five-year period did not begin until 1990, the year the defendant completed the probationary period on the earlier assault. A provision similar to subsection (e) appears in AS 12.55.145(a)(1). It is intended that the decision in Griffith v. State, 653 P.2d 1057 (Alaska Ct. App. 1982), interpreting the scope of AS 12.55.-145(a)(1) also apply in interpreting the application of subsection (e).

AS 11.59.030(d) specifies how illegal activity that is used to prove racketeering is established in a proceeding brought under this legislation. In any proceeding a certified judgment of conviction for the illegal activity will always be sufficient to establish that the illegal activity occurred. If a conviction has not been obtained, the illegal activity may be established by proof beyond a reasonable doubt in a criminal prosecution and by a preponderance of the evidence in all other proceedings.

ARTICLE 2. CRIMES INVOLVING ILLEGALLY CONTROLLED ENTERPRISES

Secs. 11.59.040 and 11.59.050. ILLEGAL CONTROL OF AN ENTERPRISE IN THE FIRST AND SECOND DEGREE

AS 11.59.040 and 11.59.050 define the only two crimes created by this legislation. The first degree crime is an unclassified felony punishable by presumptive sentencing and a maximum sentence of 30 years. Additionally, the defendant will be subject to a maximum $75,000 fine under AS 12.55.035(b)(1) if the defendant is a natural person. If an organization is charged under this section, a higher fine may be imposed under AS 12.55.035(c).

Key to both crimes is the requirement that the defendant commit an act prohibited by AS 11.59.010 or attempt or solicit such an act. The coverage of AS 11.59.010 has been discussed in the commentary accompanying that section. If the state can only prove a violation of AS 11.59.010, the crime will be Illegal Control of an Enterprise in the Second Degree, a class A felony.

The second degree crime can be aggravated to the more serious first degree offense depending on the seriousness of the illegal activity used to establish racketeering. If one of the instances of illegal activity was an

unclassified or class A felony in Alaska, AS 11.59.-040(a)(1) provides that the first degree crime has been established. Additionally, the crime will be first degree under AS 11.59.040(a)(2) if one of the instances of illegal activity used to establish racketeering is a crime in Alaska or in another jurisdiction having elements similar to a class A or unclassified felony. This provision will cover crimes repealed when the revised criminal code became effective in 1980, current crimes in Alaska defined outside the criminal code, and crimes committed in other jurisdictions. For example, if in 1979 the defendant committed conduct that would have constituted Murder in the First Degree under the Alaska statute repealed in 1980, the defendant can be convicted of Illegal Control of an Enterprise in the First Degree provided that the other elements of that crime can be established. Similarly, if the defendant committed conduct in Oregon that would be the equivalent of a class A or unclassified felony in Alaska, the first degree crime may also be established.

Under AS 11.59.040(a)(2), the elements of the offense need only be <u>similar</u> to a current unclassified or class A felony offense in Alaska. An identical standard is followed in calculating prior convictions for purposes of presumptive sentencing. AS 12.55.145(a)(2).

Note finally that no culpable mental state requirement is

specified in either of the two crimes. Consequently, the criminal code's general rules on culpability will be applicable and it will be necessary to establish that conduct was engaged in knowingly and that the defendant acted recklessly as to circumstance and result elements. AS 11.81.610(b).

Sec. 11.59.060. CHARGING UNDERLYING CRIME

This section clarifies an issue that may arise in charging a defendant under this legislation. If the prosecutor decides to proceed against the defendant for both a violation of AS 11.59.040 or 11.59.050, and the underlying illegal activity, he or she may do so in the same charging instrument. In the event that consecutive or concurrent sentences are not otherwise prohibited, they may be appropriate in cases where the underlying criminal activity is charged in addition to a violation of AS 11.59.040 or 11.59.050. See United States v. Boylan, 620 F.2d 359, 361 (2nd Cir. 1980) cert. denied, 449 U.S. 833 (1980).

ARTICLE 3. CIVIL REMEDIES

Sec. 11.59.070. EFFECT OF CONVICTION ON OTHER PROCEEDINGS

This section, which is based on 18 U.S.C. sec. 1964, precludes a defendant who has been convicted under AS 11.59.040 or 11.59.050 from denying the essential elements of the crime in subsequent litigation. Unlike the federal statute which only estops the defendant in subsequent litigation with the government, this section estops the defendant in all subsequent litigation with any party. Since the defendant's violation of AS 11.59.010 has already been established beyond a reasonable doubt in the earlier criminal prosecution, there is no reason to require the plaintiff in a civil proceeding brought against the same defendant to relitigate the basis of the criminal conviction. This is particularly the case since the burden of the civil litigant to establish a violation of AS 11.59.010 is by a preponderance of the evidence, while the government has already established a violation beyond a reasonable doubt.

Sec. 11.59.080. CIVIL ACTION FOR TREBLE DAMAGES

This section creates a civil action for treble damages available to any person, including the state, who is injured in business or property as a result of a violation

of AS 11.59.010. This section serves two purposes. First, it compensates those who have been injured as a result of racketeering. Second, it imposes severe financial disincentives on persons who violate AS 11.59.010 that are over and above any criminal penalty that may be imposed and any forfeiture that is ordered. The civil remedies authorized by this section provide another powerful deterrent against persons who may engage in conduct prohibited by AS 11.59.010. The plaintiff is only required to establish an injury "to business or property". "An allegation of commercial or competitive injury is not required...." Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), cert. denied, 104 S.Ct. 527 (1983).

Assuming that a violation of AS 11.59.010 can be established, there is no requirement that the plaintiff additionally show that the injury to his business or property was caused by the defendant's racketeering, as opposed to the illegal activity that was used to establish racketeering under AS 11.59.020. This nebulous and artificial distinction has been recognized in a few recent cases interpreting the federal law, but it is specifically rejected here as being contrary to the intent of this legislation. See Bankers Trust Co. v. Rhoades, 53 U.S.L.W. 2063 (2d. Cir. July 26, 1984); Moss v. Morgan Stanley Inc., 553 F.Supp. 1347 (S.D. N.Y. 1983), cert. denied, 104 S.Ct. 1280 (1984).

Unlike a criminal prosecution under this legislation where the proof required to establish a violation must be beyond a reasonable doubt, the elements of a civil action brought under this section need only be established by a preponderance of the evidence. See United States v. Capetto, 502 F.2d 1351, 1357 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); Herman & MacLean v. Huddlestom, 51 U.S.L.W. 4099 (Jan. 24, 1983). As previously discussed, there is no requirement that the defendant be shown to be a part of "organized crime."

AS 11.59.080 does not require that a criminal prosecution against the defendant be instituted or successfully completed as a prerequisite for a person to bring a private cause of action. Consequently, it is the intent of this legislation to specifically reject a recent contrary interpretation of the similar federal law. See Sedima, S.P.R.L. v. Imrey Co., 53 U.S.L.W. 2063 (2d Cir. Aug. 7, 1984). However, if a criminal prosecution is first successfully brought, AS 11.59.070 prevents the defendant from denying the essential allegations of the crime in a subsequent civil action.

In addition to allowing a civil cause of action for treble damages, this legislation authorizes a court to grant a wide variety of equitable relief in connection with an action brought under this section. The person may obtain

a restraining order to prevent future violations of AS 11.59.010, as well as restrictions on the conduct of the enterprise, including its dissolution or reorganization. See AS 11.59.100.

Sec. 11.59.090. PROPERTY SUBJECT TO FORFEITURE

One of the principal goals of the federal law upon which this legislation is based was to remove the profit from criminal activity "by separating the racketeer from the dishonest gain." Russello v. United States, 104 S.Ct. 296, 303 (1983). The mechanism used to accomplish that goal was the adoption of an effective forfeiture law. A similar approach is taken in this legislation, with this section providing that property used in violation of AS 11.59.010 is subject to forfeiture. The procedures specifying how the property is forfeited appear in section 3 of this legislation discussed infra. The term "property" is defined in AS 11.59.900(2) to mean "any thing of value, including real or personal property, claims against or interests in business or property, contractual rights, securities, income, profits, or any other business or financial interest." The key to the definition is that the item, claim, interest or right must be a thing of value.

Also covered by this forfeiture provision are the proceeds of property, including profits acquired from a violation

of AS 11.59.010. In Russello v. United States, 104 S.Ct. 296, 301 (1983), the Supreme Court stressed the importance of covering profits derived from racketeering under a forfeiture statutes.

> 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 [the federal forfeiture statute] to reach only interests in an enterprise would blunt the effectiveness of the provision in combatting 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.

Under AS 11.59.090(1), property is subject to forfeiture if it was acquired or maintained in violation of, or in the course of violating, AS 11.59.010. Thus the defendant's interest in the enterprise itself is subject to forfeiture if it was acquired in violation of AS 11.59.010. For example, if the defendant acquired a business through racketeering, that business will be forfeited to the state. Moreover, property such as firearms and automobiles is subject to forfeiture if acquired in the course of violating AS 11.59.010. Even if such property is never actually used as part of the illegal activity, it is subject to forfeiture if it was intended to be used to conduct or facilitate illegal activity, or to further the goals of the enterprise.

AS 11.59.090(2) subjects to forfeiture any property used or invested in violation of, or in the course of violating, AS 11.59.010. This paragraph in part permits the forfeiture of property obtained through racketeering to obtain an interest in an enterprise or to run an enterprise. This paragraph also covers property that may not have been originally derived from racketeering, but is nonetheless actually used in the course of violating AS 11.59.010. Property such as firearms, automobiles, cash receipts obtained while running the enterprise, or other business equipment or supplies are thus subject to forfeiture.

Finally, AS 11.59.090(3) covers property, or its proceeds, that is derived from racketeering (i.e., from a pattern of illegal activity) without the requirement that some enterprise actually be taken over. Thus if the scheme is stopped before it can infiltrate a legitimate business, the illegitimate gains from the racketeering are nonetheless subject to forfeiture, even though the defendants are not subject to the severe criminal penalties provided under AS 11.59.040 and 11.59.050. Because it is important to take away the profit motive existing in repeated criminal activity, AS 11.59.090 has been included in this bill.

Sec. 11.59.100. INJUNCTIVE RELIEF

This section provides a mechanism to insure that equitable relief can be obtained to minimize the harm caused by racketeering as well as to preserve the assets of the defendant for future recovery in the context of civil recovery, a criminal fine, or a forfeiture. The type of equitable relief authorized by this section depends on the stage of the litigation in which it is sought and who is requesting the relief. Subsection (a) applies to relief that is sought before an action under this legislation is actually filed and may only be sought by the attorney general. Subsection (b) applies to relief that may be granted once an action is filed. This relief may be sought by either the attorney general or a civil plaintiff. Subsection (c) applies to equitable relief that may be granted once an action is successfully concluded. The relief may be sought in connection with either a civil or criminal proceeding authorized by this legislation.

In reference to equitable relief that may be sought in conjunction with a civil proceeding, this section is subject to due process requirements governing equitable relief. United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975). The person seeking the injunction must show some potential injury, but need not show "irreparable injury other than the

injury to the public which [is] inherent in the conduct made unlawful...." Cappetto, 502 F.2d at 1358-59. The breadth of the equitable relief authorized by this action evidences the concern of this legislation that the plaintiff's right to recovery could be seriously impaired by the concealment, disposal, or removal from the jurisdiction of the property at issue.

In reference to equitable relief sought in conjunction with a criminal prosecution, no preseizure hearing is required if the injunction is necessary to achieve important governmental purposes. Preseizure notice might defeat the purposes of this section. Moreover, the injunction is initiated by government officials rather than private parties. United States v. Spilotro, 680 F.2d 612, 617 (9th Cir. 1982). Due process requirements are satisfied by a prompt postseizure hearing once the injunction has been entered. Spilotro 680 F.2d at 617. It is within the discretion of the superior court to continue the injunction if it is satisfied that there is probable cause to believe that the defendant is guilty of violating AS 11.59.040 or 11.59.050 and that the property at issue in the injunction is subject to forfeiture under AS 11.-59.090. United States v. Spilotro, 680 F.2d 612, 618 (9th Cir. 1982); United States v. Long, 654 F.2d 911, 915 (3rd Cir. 1981). "It is not necessary that the hearing duplicate the criminal trial." The prosecution is required

only to establish the probability that the defendant will be convicted and properties will be subject to forfeiture. Spilotro, 680 F.2d at 618. The likelihood of conviction may be established by such evidence as testimony of law enforcement officials concerning the sources of defendant's income and the legality of that income. See Long, 654 F.2d at 915.

Sec. 11.59.110. CIVIL INVESTIGATIVE DEMAND

This section, which is based on 18 U.S.C. sec. 1968 provides the state with the necessary mechanism to insure that investigations into suspected criminal or civil violations of this legislation can be completed successfully. The provisions are largely self explanatory, and considering that no appellate cases have arisen under the similar federal statue in the 14 years since enactment, the provisions of this section will apparently present no problems in administration.

Sec. 11.59.120. ATTEMPT OR SOLICITATION TO VIOLATE AS 11.59.010

This section is included solely for drafting convenience to insure that the quoted phrase does not have to be repeated in the numerous references in AS 11.59.070 -- 11.59.120 that depend on establishing a violation of

AS 11.59.010.

ARTICLE 4. GENERAL PROVISIONS

Sec. 11.59.900. DEFINITIONS

This section defines two key terms that are used throughout this chapter, "enterprise" and "property."

(1) Enterprise: To commit any of the three prohibited acts described in AS 11.59.010 an "enterprise" must be involved. This section defines that term. The definition is not limited to those examples specifically listed, but is merely illustrative. See United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979), cert. denied, 444 U.S. 1085 (1980). "There is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact". United States v. Turkette, 452 U.S. 576, 580 (1980).

The definition specifically includes legal as well as illegal entities. See United States v. Turkette, 452 U.S. 576 (1980); see also United States v. Griffin, 660 F.2d 996 (4th Cir. 1981), cert. denied 102 S.Ct. 1029 (1982). There is no requirement that the membership of the enterprise remain static throughout its existence. See United States v. Clemones, 577 F.2d 1247, 1253, modified, 582

F.2d 1373 (5th Cir. 1978), cert. denied, 445 U.S. 927 (1980). Further, the definition of enterprise is broad enough to include a single-person enterprise. See United States v. Hartley, 678 F.2d 961, 989 (11th Cir. 1982), cert. denied, 103 S.Ct. 834 (1983); United States v. Benny, 559 F.Supp. 264, 266-71 (N.D. Cal. 1983).

The federal definition of enterprise has been interpreted on numerous occasions to apply to commercial entities, benevolent organizations, and governmental entities. This legislation intends to adopt the federal approach of broadly interpreting the definition of enterprise as illustrated by such cases as United States v. Weisman, 624 F.2d 1118, 1120 (2d Cir.) cert. denied, 449 U.S. 871 (1980); United States v. Provenzano, 688 F.2d 194, 199-200 (3rd Cir.), cert. denied, 459 U.S. 1071 (1982); United States v. Thompson, 685 F.2d 993, 994-95 (6th Cir.), cert. denied, 459 U.S. 1072 (1982); United States v. Long, 651 F.2d 239, 241 (4th Cir.), cert. denied, 454 U.S. 896 (1981); United States v. Stratton, 649 F.2d 1066, 1074-75 (5th Cir. 1980) and cases cited approvingly therein; United States v. Grzywacz, 603 F.2d 682, 685-87 (7th Cir. 1979), cert. denied, 446 U.S. 935 (1980); United States v. Dozier, 672 F.2d 531, 543 and n. 8 (5th Cir.) cert. denied, 459 U.S. 943 (1982); United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 104 S.Ct. 283 (1983).

Establishing a pattern of racketeering is not automatically sufficient by itself to establish the existence of an enterprise. "While the proof used to establish those separate elements may in a particular case coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." United States v. Turkette, 452 U.S. at 583-85. See generally United States v. Mazzei, 700 F.2d 85, 87-90 (2d Cir.), cert. denied, 103 S.Ct. 2124 (1983); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir.), cert. denied, 104 S.Ct. 175 (1983).

(2) Property: This definition will be of primary importance in applying the forfeiture provisions in sec. 3 of the bill. Those forfeiture provisions apply to property and proceeds of property acquired, maintained, used, invested, or derived from violation of AS 11.59.010. Consistent with the recent decision of the Supreme Court in Russello v. United States, 104 S.Ct. 296, the definition of property specifically includes profits.

Section 3. Forfeitures

This section of the bill has two related purposes. First, it specifies the procedures applicable to the forfeiture of property authorized by this legislation in

AS 11.59.090. Secondly, it effectively consolidates many state forfeiture procedures in a single new article added to AS 9. This consolidation of state forfeiture procedures will minimize the possibilities of unintended inconsistencies in coverage and reduce the volume of laws that are required whenever forfeiture is authorized. Additionally, since many instances of racketeering may involve conduct that violates crimes defined outside this legislation, it is appropriate to include the general procedures pertaining to forfeiture in this legislation.

ARTICLE 7. FORFEITURE

Sec. 09.50.400. PROCEDURES APPLICABLE IN FORFEITURE PROCEEDINGS

This section accomplishes the consolidation of forfeiture procedures referred to above. For forfeiture procedures to be initiated, forfeiture must be authorized by state law. AS 11.59.090 specifically authorizes the forfeiture of property used in violation of AS 11.59.010, while other state statutes also authorize forfeiture in specified circumstances. See e.g., AS 11.66.270 and AS 17.30.110 as amended in secs. 5 and 9 of this bill.

If forfeiture is authorized by state law, the sections in this article will govern the procedures applicable to the

forfeiture procedure. There is, however, one important exception to the general rule that all forfeiture proceedings are governed by AS 09.50. In cases where the legislature wishes to make property subject to forfeiture procedures that are different from those included in this article, it can specifically do so. However, if different forfeiture procedures are not "otherwise specifically provided in the state law authorizing forfeiture," the property is subject to forfeiture under the procedure specified in this article.

Sec. 09.50.410. SEIZURE AND CUSTODY OF PROPERTY

Property subject to forfeiture may be seized with or without a court order under the provisions of AS 09.50.410(a). When property is seized without a court order under paragraph (a)(3), it may not be held for more than 48 hours unless an extension is obtained from the court.

Once property has been seized, the commissioner of public safety or a local law enforcement agency is responsible for assuming custody of the property under AS 09.50.-410(b). Only the court with jurisdiction over the property can require a subsequent movement of the property.

AS 09.50.410(c) provides that the property must be inventoried within 10 days after it is seized, and that the

value of any items, other than controlled substances, must be estimated. The results of this estimate will be of importance in determining the required notices that must be sent under AS 09.50.420.

Sec. 09.50.420. NOTICE OF SEIZURE AND FORFEITURE ACTION; ANSWERS

Once property has been seized under AS 09.50.420, the commissioner of public safety is required to comply with the notice provision outlined in this section.

AS 09.50.420(a) pertains to the notice required after seizure of the property but before the state institutes formal forfeiture proceedings. Notice must be sent to any person who has an interest in the property as described in this subsection. However, if a forfeiture proceeding has been instituted within 30 days after seizure of the property, the notice required by subsection (a) need not be given. This is because the notice required in AS 09.50.-420(b) will provide sufficient notice to persons with interests in the property.

AS 09.50.420(b) describes a separate and additional notice that must be sent within 30 days after the state actually institutes the forfeiture proceeding. Since a defendant in a criminal case has already received notice of the

proceeding under AS 09.50.430(a), no additional notice need be sent to the defendant.

AS 09.50.420(c) provides a mechanism whereby parties with an interest in the property sought to be forfeited can file an answer in order to argue against forfeiture or for a remission of the property. Since controlled substances and imitation controlled substances are summarily forfeited to the State under AS 17.30.126, AS 09.50.420(d) provides that the notice requirements specified in this section do not apply to the forfeiture of controlled substances.

Sec. 09.50.430. PROCEEDINGS RESULTING IN FORFEITURE; BURDEN OF PROOF

This section lists the underlying proceedings in which forfeiture may be initiated, and specifies the burden of proof requirement in all forfeiture proceedings.

Under AS 09.50.430(a), a forfeiture proceeding may be initiated in one of three proceedings. In the event that the state has instituted a criminal prosecution or civil action relating to the conduct making the property subject to forfeiture, the filing of a motion to forfeit in that proceeding will initiate the forfeiture action. For example, if the defendant is charged under AS 11.59.040 or

11.59.050 for conduct involving the takeover of an enterprise through racketeering, the state may also file a motion seeking forfeiture of the enterprise and all profits obtained by the defendant as a result of the illegal conduct. See AS 11.59.090. Similarly, if the state has filed a civil action for an injunction or for treble damages, it may also include a motion to forfeit property.

Alternatively, the state may institute a forfeiture proceeding simply by filing a complaint seeking forfeiture in an in rem proceeding involving the property subject to forfeiture. In this instance, there is no requirement that any additional civil or criminal action be instituted that relates to the property which is the subject of the forfeiture.

AS 11.50.430(b) provides that forfeiture proceedings are tried before a judge sitting without a jury. At the hearing, the state must establish by a preponderance of the evidence that the property is subject to forfeiture. The same burden of proof applies regardless of whether the forfeiture is sought by motion in a criminal or civil proceeding relating to the property or in an in rem proceeding.

Sec. 09.50.440. DEFENSES EXEMPTED

This section emphasizes that a forfeiture proceeding is distinct from any criminal proceeding involving the property sought to be forfeited. It is therefore irrelevant in the forfeiture proceeding that an earlier criminal prosecution involving the same property that the state seeks to forfeit resulted in an acquittal or a conviction of a lesser included offense. This is because the burden of proof applicable in the civil proceeding is less than required for a criminal conviction. See United States v. One (1) 1969 Buick Riviera, 493 F.2d 553 (5th Cir. 1974); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232 (1972); United States v. Kismetoglu, 476 F.2d 269 (9th Cir.) cert. dismissed, 410 U.S. 976 (1973).

In the civil proceeding the state must only prove by a preponderance of the evidence that the property is subject to forfeiture. AS 09.50.430(b). In a criminal prosecution, the violation of the underlying crime must be established beyond a reasonable doubt. Therefore, a jury determination in a criminal case that the defendant is not guilty of the charged offense does not mean that it has also determined that the state has failed to establish the violation of state law under the preponderance of the evidence standard applicable in civil forfeiture proceedings.

Secs. 09.50.450, 09.50.460. PETITION FOR RELEASE AND DISPOSITION OF SEIZED PROPERTY

Under certain circumstances, property may be released or disposed of under AS 09.50.450 and 09.50.460 before the court's decision on forfeiture. AS 09.50.450(b) provides that property that is not likely to be used in a court proceeding can be released if release is found to be in the best interests of the state and the claimant posts adequate security for the property. Additionally, the claimant or state can request disposition of the property before the decision on forfeiture. This may occur, for example, when the property is perishable or when its value may otherwise decrease during the proceedings. The proceeds of the sale are then treated as the property which is subject to forfeiture.

Sec. 09.50.470. FORFEITURE AND REMISSION

Subject only to the right of an innocent party to protect his interest in the property, this section makes forfeiture mandatory once it is established that the property is subject to forfeiture, regardless of the proceeding in which forfeiture is sought. The court does not retain discretion on the issue of forfeiture once it is shown that the property is subject to forfeiture.

The introductory clause of AS 09.50.470(a) refers to "the law authorizing forfeiture." To resolve any possible ambiguity on this point, the law authorizing the forfeiture

of property obtained in violation of AS 11.59.010 is AS 11.59.090. Other laws, besides AS 11.59.090, authorize the forfeiture of property, and once it is shown that the property was subject to forfeiture under those laws, that property must also be forfeited to the state under AS 09.50. For example, AS 17.30.110, as repealed and reenacted by sec. 9 of this bill, authorizes the forfeiture of property used in violation of the laws involving controlled substances. Once it is shown that the property met the requirements of forfeiture specified in AS 17.30.110, that property must be forfeited to the state in accordance with the procedures specified in this chapter.

The right of an innocent person to obtain the return of his interest in property is sometimes referred to a "remission." Remission is a form of "pardon" of the forfeited property. The Laura, 114 U.S. 411 (1885). Under AS 09.50.470(a)(1) -- (3), a totally innocent person with an interest in property subject to forfeiture may protect his or her interest in the property. In allowing an innocent person to protect his or her interest, this section recognizes that the failure to provide such an opportunity would violate the Alaska Constitution. State v. Rice, 626 P.2d 104, 111-15 (Alaska 1981). Assuming that the claimant can satisfy the requirements of paragraphs (a)(1) -- (3), the court is provided with several options in

AS 09.50.470(b) for protecting the claimant's interest depending on the extent of that interest.

Federal statutory and case law has established that only parties who are ignorant of the illegal use or intended use of property sought to be forfeited, and who are non-negligent in lending or leasing their property, can qualify as claimants entitled to "remission" or "remittance." See, e.g., 18 U.S.C. sec. 3617(b), which codifies case law from the prohibition era. The burden is placed upon the claimant to prove by a preponderance of the evidence that he or she deserves relief under the remission standards. See, e.g., Wilson Motor Co. v. United States, 96 F.2d 29, 30 (9th Cir. 1938); United State v. C.I.T. Corp., 93 F.2d 469, 470 (2d Cir. 1937); United States v. One 1933 Ford V-8 Coach, 14 F.Supp. 243 (E.D. Ill. 1936).

The claimant must establish under AS 09.50.470(a)(1) that he or she had a good faith property interest in the item at the time of the illegal use. Florida Dealers and Growers Bank v. United States, 279 F.2d 673 (5th Cir. 1960); United States v. One 1936 Model Ford Coach, 58 F.Supp. 802 (M.D. Ga. 1944). Additionally, AS 09.50.470(a)(2) and (3) require the claimant to establish that he was ignorant of the illegal use or intended use and was not negligent in lending or leasing the property. This provision is based on 18 U.S.C. sec. 3617(b)(2). See One 1941 Ford 1/2 Ton

Pickup Truck v. United States, 140 F.2d 255 (6th Cir. 1944); Federal Credit Co. v. United States, 109 F.2d 121 (5th Cir. 1940). Compare Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

Sec. 09.50.480. STATE DISPOSAL OF FORFEITED PROPERTY

Once the property is forfeited, the commissioner of administration is responsible for determining the eventual disposition of the property. Various options are listed in this section.

Sections 4-12. MISCELLANEOUS SECTIONS

The remaining sections of the bill make several miscellaneous complementary amendments to existing laws.

Section 4. This section amends the existing extortion statute to specifically provide that extortion is committed when the defendant makes one of the threats described in AS 11.41.520(a)(1) -- (7) to assist in the collection of a debt. This provision will insure coverage of conduct commonly associated with loan sharking under this legislation.

Sections 5, 6, 9, and 10. These sections make several conforming amendments to insure that gambling, controlled

substances, and imitation controlled substances are subject to the forfeiture proceedings specified in AS 09.50.

Section 7. This amendment insures that all unclassified felonies, including Illegal Control of an Enterprise in the First Degree, are subject to the fine authorized by this section.

Section 8. This amendment is necessary to authorize a term of imprisonment for a violation of AS 11.59.040.

Section 11. REPEALS. This section repeals several statutes pertaining to procedures applicable in drug forfeiture cases which are unnecessary with the enactment, in sec. 3 of the bill, of the new article in AS 09. Note that existing AS 17.30.126, which pertains to the summary forfeiture of certain controlled substances, is not repealed.

Section 12. EFFECTIVE DATE. This section specifies a January 1, 1986, effective date.

APPENDIX A

States that have adopted legislation similar to the federal Racketeering Influenced and Corrupt Organizations title:

1. Ariz. Rev. Stat. Ann. § 13-2312 (1978).
2. Cal. Penal Code § 186 (West Supp. 1983).
3. Colo. Rev. Stat. § 18-17-101 (1981).
4. 1982 Conn. Pub. Acts. 343.
5. Fla. Stat. Ann. § 895.01 (West Supp. 1982).
6. Ga. Code Ann. § 16-14-1 (Sup. 1982).
7. Hawaii Rev. Stat. § 842-1 (1976).
8. Idaho Code § 18-7801 (Supp. 1982).
9. The Illinois Narcotics Profit Forfeiture Act, H.R. 2450 (1982).
10. Ind. Code Ann., § 34-45-6-1 (Burns Sup. 1982).
11. Nevada Rev. Stat., chapter 207 (1983).
12. N.J. Stat. Ann. § 2C:41 (West 1982).
13. N.M. Stat. Ann. § 30-42-1 (Supp. 1978).
14. N.D. Cent. Code § 12.1-106.1 (C.Cupp. 1983).
15. Or. Rev. Stat. § 166-715 (1981).
16. 18 Pa. Cons. Stat. § 911 (1978).
17. R.I. Gen. Laws § 7-15-1 (Supp. 1982).
18. Utah Code Ann. § 76.10-1601 (Supp. 1981).
19. Wis. Stat. Ann. § 946.80 (Supp. 1982).

RICO REVISITED

*Barry Tarlow**

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* Member of the California Bar. Boston University, LL.B., 1964; Chairman, Criminal Law Subcommittee of the ABA Prosecution and Defense of RICO Cases Committee; Chairman, RICO Prosecution Committee of the National Association of Criminal Defense Lawyers; Chairman, RICO Committee of the California Attorneys for Criminal Justice. The author wishes to express his appreciation to Terrence V. Scott, UCLA, J.D., 1978, for his invaluable assistance in the preparation of this Article.

I. INTRODUCTION

In recent years federal prosecutors have frequently charged violations of Title IX of the Organized Crime Control Act of 1970, 18 U.S.C. § 1961-1968, popularly known as RICO. Although the statute was rarely used before 1975, RICO is now regularly discussed in appellate decisions. In 1980, this author published a comprehensive analysis of the RICO criminal provisions, which emphasized the numerous ambiguities in the statute that had not been resolved by the courts.[1] As a result of the dynamic nature of RICO litigation, many of these problems have been resolved, but the answers have created new and complex questions.

One difficulty that continues to plague RICO prosecutions is the prejudicial impact that results from labeling the conduct of a defendant, who may be a businessman, politician, or alleged gangster,

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[1] *See* Tarlow. *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165 (1980).

as racketeering.[2] The co[illegible]re not immune to this prejudice; some judges who are resu[illegible]ented have strained to adopt broad constructions of RICO by ignoring logical and theoretical consistency. The principal result of this phenomenon is that the scope of the RICO statute has been expanded far beyond what was intended by Congress.

Within the legal community, there is a sharp division of opinion concerning the courts' broad constructions of RICO and the Government's zealous exploitation of these interpretations. Although the majority of law review commentaries has urged the courts to exercise greater restraint,[3] some commentators[4] and most prosecu-

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[2] *See infra* text accompanying notes 552-57.

[3] *See, e.g.*, Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 892-93 (1980); Tarlow, *supra* note 1, at 191-99; Note, Elliott v. United States *Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109, 116-21 (1979); Comment, United States v. Sutton *and the Scope of Title IX of the Organized Crime Control Act of 1970: The Sixth Circuit's Narrow Interpretation of the Meaning of "Enterprise,"* 68 KY. L.J. 469, 485-87 (1980) [hereinafter cited as Comment, *The Scope of Title IX*]; Comment, *Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. REV. 100, 132-33 (1981) [hereinafter cited as Comment, *The Enterprise Element*]; Comment, *The Legitimate-Illegitimate Controversy over Racketeer Influenced and Corrupt Organizations (RICO) Section 1962(c): The Voyage of the "Enterprise" Through the Federal Circuits and a Proposed Solution*, 54 TEMP. L.Q. 62, 107-08 (1981) [hereinafter cited as Comment, *The Legitimate-Illegitimate Controversy*]; Comment, United States v. Sutton, *Reining in on Runaway RICO*, 42 U. PITT. L. REV. 131, 145-48 (1980) [hereinafter cited as Comment, *Runaway RICO*]; Comment, *The Racketeer Influenced and Corrupt Organizations Act: An Analysis of the Confusion in its Application and a Proposal for Reform*, 33 VAND. L. REV. 441, 466-67 (1980) [hereinafter cited as Comment, *An Analysis of the Confusion*].

[4] *See* Blakey & Gettings, *Racketeer Influenced & Corrupt Organizations (RICO): Basic Concepts—Criminal & Civil Remedies*, 53 TEMP. L.Q. 1009, 1031-33 (1980); Blakey & Goldstock, *"On the Waterfront": RICO and Labor Racketeering*, 17 AM. CRIM. L. REV. 341, 350-54 (1980); Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 185-91 (1980) [hereinafter cited as Note, *Liberal Construction Clause*]; Note, *RICO: Are the Courts Construing the Legislative History Rather Than the Statute Itself*, 55 NOTRE DAME LAW. 777, 794-95 (1980) [hereinafter cited as Note, *Construing Legislative History*]. *But cf.* Tybor, *Racketeering Law Facing Key Test*, Nat'l L.J., Dec. 29, 1980, at 19, col. 1 (Blakey quoted as expressing concern that "RICO is being brought in some marginal cases."). Not surprisingly, proponents of broad construction of RICO have urged expansive interpretations of the RICO civil provisions in 18 U.S.C. § 1964 (1976). *See* Long, *Treble Damages for Violations of the Federal Securities Laws: A Suggested Analysis and Application of the RICO Civil Cause of Action*, 85 DICK. L. REV. 201 (1981); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101 (1982) [hereinafter cited as Note, *Civil RICO*]; *see also* Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 AM. CRIM. L. REV. 655 (1982) (extensive discussion of RICO urging its use by civil liberties attorneys as a means of furthering the public interest

tors[5] uncritically applaud each decision that expands the scope of RICO. Generally, defense lawyers have condemned the loosely worded provisions of RICO and the many poorly reasoned decisions expanding the scope of the statute.[6]

The American Bar Association has adopted a comprehensive program of reforms that seeks to remedy these problems.[7] Even

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[5] *See, e.g.*, Magarity, *RICO Investigations: A Case Study*, 17 AM. CRIM. L. REV. 367, 370-78 (1980); Weiner, *Crime Must Not Pay: RICO Criminal Forfeiture in Perspective*, 1 N. ILL. L. REV. 225, 259 (1981) (Deputy Director of Justice Department Office of Economic Crime Enforcement urged broad construction of RICO forfeiture); Zuckerman & Hunterton, *RICO and Tax Fraud: Return(s) to Racketeering?*, 18 CRIM. L. BULL. 204, 227 (1982); U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, AN EXPLANATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 2, 33-34 (4th ed. 1978) (describing RICO as providing tools for "imaginative prosecutions" and urging a broad reading of the term "enterprise"); NEWSWEEK, Aug. 20, 1979, at 82, col. 2 (United States Attorney General Benjamin Civiletti declared that the Justice Department would not "shy away from using [RICO] to pursue corrupt enterprises that do not fit the layman's view of organized crime.").

The Government has enjoyed a seemingly symbiotic relationship with commentators who are either present or former prosecutors or who are associated with institutions funded by the Justice Department. For example, in a recent appellate brief, the Government noted that a case restricting RICO had been the object of frequent criticism from commentators. *See* Brief and Appendix for United States at 22 n.10, United States v. McManigal, *appeal docketed*, No. 82-1754 (7th Cir. Apr. 11, 1982). The cited commentators were as follows: (1) Edward C. Weiner, who is an official of the Justice Department; (2) G. Robert Blakey, who is head of the Institute on Organized Crime, an entity whose research has been funded and supported by the Law Enforcement Assistance Administration, United States Department of Justice, *see* 1 INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME MATERIALS ON RICO (1980) (inside back cover indicates that the study was funded by the Justice Department); and (3) a Note in the *Notre Dame Lawyer*, published by a school that is presently the home of the Institute on Organized Crime headed by Blakey.

[6] *See* Murray, *Anatomy of a R.I.C.O. Forfeiture*, CHAMPION, Mar. 1981, at 7, col. 3 (noting that continued Government abuse of RICO "will leave strewn in its wake the carcasses of many innocent persons"); Silverglate & Rankin, *Civil Uses of RICO*, CHAMPION, Apr. 1981, at 8, 10, col. 4 (describing RICO as "this ill-considered, poorly-drafted, and Draconian statute"); Tarlow, *RICO: Someone Loaded the Dice (A Response to* RICO: Evening Up the Odds), TRIAL, Feb. 1981, at 54 (in criticism of Government abuse of RICO, stating that "the Justice Department seems determined to apply the statute to almost every form of societal wrongdoing"); Marro & Shannon, *Are Prosecutors Going Wild over RICO*, Legal Times Wash., Oct. 8, 1979, at 32, col. 1 (William Hundley criticized the use of RICO against "all kinds of defendants." He noted: "You know as well as I do that Congress never would have passed it if [they] ever thought they were going to use it against governors and people like that."); Nat'l L.J., Dec. 29, 1980, at 18, col. 2 (Francis Sams, Chairman of the ABA RICO Committee, condemned RICO as the "illegitimate stepchild" of the modern prosecutor's nursery); Nat'l L.J., Nov. 26, 1979, at 12, col. 3 (George Collins termed the statute "totalitarian").

[7] The ABA proposals and the accompanying commentaries originated with the Criminal Law Subcommittee of the Prosecution and Defense of RICO Cases Committee. The Sub-

the courts, which are primarily responsible for the expansion of RICO, have acknowledged the danger of prosecutorial abuse and overreaching.[8]

Essentially, RICO punishes three types of conduct: (1) legal acquisition of an enterprise with money derived from a "pattern of racketeering activity";[9] (2) illegal acquisition of an enterprise through a pattern of racketeering;[10] and (3) operation of an enterprise through a pattern of racketeering.[11]

As defined in 18 U.S.C. § 1961(5), a pattern is established when the accused commits at least two acts of racketeering activity occurring within ten years of one another. The definition of racketeering activity in section 1961(1) includes a number of federal of-

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committee was chaired by the author, and its members included Julian Murray, Jeff Atkinson, and Assistant United States Attorney Francis Burke. Mr. Burke dissented from the Subcommittee's report. Eventually, the major proposals of the Subcommittee were approved with a few exceptions by the Prosecution and Defense of RICO Cases Committee, a mixed group of prosecutors, judges, and defense attorneys. This reform program was then adopted by the Criminal Justice Section and the House of Delegates. *See Report to the House of Delegates*, 1982 ABA SEC. CRIM. JUST. REP. 20 [hereinafter cited as *RICO Report*].

[8] United States v. Ivic, No. 81-1350, slip op. at 1438-39 (2d Cir. Jan. 25, 1983) (noting that Second Circuit warnings against prosecutorial abuse are not sufficiently heeded in the Southern District of New York); United States v. Thordarson, 646 F.2d 1323, 1329 n.10 (9th Cir. 1981) (cautioning against "undue prosecutorial zeal in invoking RICO"), *cert. denied*, 454 U.S. 1055 (1981); United States v. Turkette, 632 F.2d 896, 905-06 (1st Cir. 1980) ("[T]he courts' natural antipathy to organized crime has clouded their perception of RICO. . . . We need not distort a statute in order to properly prosecute criminals. RICO was not enacted as an offensive weapon against criminals, but as a shield to thwart their depredation against legitimate business enterprises."), *rev'd*, 452 U.S. 576 (1981); United States v. Anderson, 626 F.2d 1358, 1364 n.8 (8th Cir. 1980) ("[Among federal prosecutors], RICO has grown in popularity . . . beyond the intentions of Congress by bringing within the sphere of RICO minor offenses and by intruding on state power."), *cert. denied*, 450 U.S. 912 (1981); United States v. L'Hoste, 615 F.2d 383, 385 (5th Cir. 1980) (Tate, J., dissenting from denial of en banc hearing) (questioning the possibility of selective enforcement because of the statute's broad sweep and doubting that "it was the intention of Congress to leave to a prosecutor alone the determination to achieve forfeiture of an accused's property by prosecuting him under [RICO] for what . . . represents only two or more violations of local bribery statutes or of somewhat esoterically applied federal crimes . . ."), *cert. denied*, 449 U.S. 833 (1981); United States v. Cryan, 490 F. Supp. 1234, 1242 (D.N.J.) (RICO "may not and does not change the fundamental principle that an individual may not be convicted on the basis of another person's acts that he neither authorized nor adopted. The government's attempted use of RICO in this case would change these fundamental concepts."), *aff'd mem.*, 636 F.2d 1211 (1980).

[9] 18 U.S.C. § 1962(a) (1976).

[10] *Id.* § 1962(b).

[11] *Id.* § 1962(c).

fenses[12] and eight state crimes.[13] An enterprise is an amorphous concept that has been interpreted to include almost any combination of individuals or entities.[14]

The ambiguity of Title IX and its incorporation of state predicate crimes permit a number of abuses in the employment of the statute. This problem is not remedied by the supposed direction to prosecutors provided by Department of Justice guidelines. These guidelines, described by one observer as "somewhat opaque,"[15] are

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[12] Federal predicate offenses of RICO are enumerated in 18 U.S.C. § 1961(1)(B)-(D) (Supp. IV 1980):

> (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-2424 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities or the felonious manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under law of the United States . . . .

[13] State predicate offenses are set out in 18 U.S.C. § 1961(1)(A) (Supp. IV 1980): "(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year . . . ."

[14] The term "enterprise" has been defined by some courts in such a broad manner as to include almost any informal association of people. *Cf.* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980) (two defendants convicted under RICO after committing three robberies). This approach was sharply criticized in United States v. Bledsoe, 674 F.2d 647, 661-62 (8th Cir. 1982). "Enterprise" is defined in 18 U.S.C. § 1961(4) (1976) as follows: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . ."

[15] Blakey & Gettings, *RICO's Problem in the Courts: A Classic Case of Misreading*, Nat'l L.J., Mar. 9, 1981, at 28 n.3.

merely advisory and are not binding on the Justice Department.[16] Before the guidelines were issued, the Justice Department required approval of all RICO prosecutions,[17] but it is questionable whether this effectively restrained zealous prosecutors.[18]

Federal authorities have charged RICO offenses when prosecuting small-time criminals[19] or businessmen[20] who do not appear to

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[16] *See* Sullivan v. United States, 348 U.S. 170, 173-74 (1954); Haley v. United States, 394 F. Supp. 1022, 1024-27 (W.D. Mo. 1975). *But see* United States v. Ivic, No. 81-1350, slip op. at 1438 (2d Cir. Jan. 25, 1983) (in support of restrictive view of RICO statute, the court pointed to Government's noncompliance with guidelines and noted that the guidelines "are important evidence of the understanding of the department of government charged with the administration of the statute.").

The impact of the written guidelines is diminished by an explicit disclaimer in the preface stating that they are merely advisory and are not binding on the Justice Department:

> These guidelines provide only internal Department of Justice guidance. They are not intended, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.

UNITED STATES ATTORNEY'S MANUAL § 1.110.101 (Jan. 30, 1981).

[17] *See* Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-1968, Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 16 (1978).

[18] The Justice Department guidelines focus on four principal factors governing the Department's decision to approve a RICO prosecution: (1) the RICO charge must reflect the true nature of the crime in a way that no other federal charge can; (2) RICO prosecution cannot be based on predicate crimes that are all local in nature unless "it can be established that organized crime is involved or . . . that local authorities cannot or will not display an interest in prosecution"; (3) the applicability of forfeiture is a significant benefit for purposes of this guideline; (4) the Government must be able to prove an enterprise under the test in *United States v. Anderson*, which focuses on the existence of a group with "an ascertainable structure" and a common "economic goal." Applying this test, a member of the Justice Department has claimed that "a RICO prosecution will not be approved if the government shows only that a bunch of people committed a bunch of crimes." *Justice Department to Shift Emphasis from White Collar Area, Giuliani Says*, 30 CRIM. L. REP. (BNA) 2238, 2239 (Dec. 23, 1981). Unfortunately, this comment is not fully in accord with the actual practice throughout the country.

[19] *See, e.g.*, United States v. Guiliano, 644 F.2d 85 (2d Cir. 1981) (RICO prosecution of company employee, whose involvement in bankruptcy fraud was limited to following the orders of the prosecution witness, without knowing of the bankruptcy fraud scheme. The employee was charged with concealing cash receipts and a truck and refrigerator unit.); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980) (two county purchasing agents convicted on RICO charges based on taking $12,000 in bribes from the same road equipment salesman); United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978) (factory worker at General Motors charged with collecting usurious debts from fellow workers on General Motors premises).

[20] *See, e.g.*, United States v. Hartley, 678 F.2d 961 (11th Cir. 1982) (RICO prosecution of Florida corporation and its officers and employees for fraudulently selling substandard

be the intended targets of the legislation.[21] RICO has been employed against an astonishing variety of defendants, including members of the Hell's Angels motorcycle club,[22] an attorney charged with investing money derived from a client's drug dealing,[23] a large Japanese corporation manufacturing electrical cable,[24]

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shrimp to U.S. military); United States v. Grapp, 653 F.2d 189 (5th Cir. 1981) (white-collar RICO prosecution in which defendants sold computer equipment on behalf of Honeywell to the State of Louisiana and without the knowledge of Honeywell or Louisiana retained money that had been mistakenly paid by Louisiana); United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981) (RICO prosecution for selling domestic crude oil in excess of legal maximum); United States v. Zang, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) (selling domestic crude oil in excess of maximum); *see also* United States v. Computer Sciences Corp., 689 F.2d 1181 (4th Cir. 1982) (RICO prosecution for bribery and defrauding the Government); United States v. Drummond Coal Co., No. 79-M002765 (N.D. Ala. July 8, 1980).

[21] Congress contemplated that RICO would be directed against La Cosa Nostra and similar large scale criminal operations. For example, Senator Scott described RICO as a tool to be used against "syndicate-infiltrated business which use force to eliminate local competition and then charge extortionate prices for state commodities and services." S. REP. No. 617, 91st Cong., 1st Sess. 214 (1969) (statement of Sen. Scott). It is ironic that a statute designed to *protect* "the small or marginal businessman who is most easily subject to invasion by organized crime," *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 496 (1969) [hereinafter cited as *Hearings*], is now used to *prosecute* small or marginal businessmen.

[22] United States v. Barger, No. 79-0226, Wellenkamp, *Hells Angels Trial*, CHAMPION, June 1981, at 7, col. 3 (N.D. Cal. June 4, 1979). The indictment in *Barger* charged members of the Hell's Angels with procurement and distribution of drugs, intimidation and murder of witnesses, and bribery. Most of the conduct involved acts that resulted in prior state court convictions or dimissals. A number of defendants were acquitted in the RICO prosecution because the illegal acts were personal ventures that did not involve operation of the alleged enterprise, the Hell's Angels. *Id.* After two jury trials, each lasting four and six months with votes of nine to three for acquittal, and the Government's expenditure of 14 to 20 million dollars, the RICO charges against the remaining defendants were dismissed. *Id.* The trials occurred in an atmosphere tainted by massive pretrial publicity. For example, the initial wave of searches of the defendants' homes was accompanied by television camera crews. One reason the publicity and the prejudice resulting from the defendants' association with the Hell's Angels and the nature of the charges failed to produce RICO convictions was the questionable character of the Government witnesses. An example was Bryant, a key witness who testified in exchange for $30,000 and immunity for six murders. After one of these murders, Bryant stuffed a murder witness into a barrel and dropped it off the Richmond-San Rafael Bridge. At a press interview after the second trial the jurors commented that the Government's witnesses were "despicable," "beneath contempt," and "scum." *Id.* at 8-9.

[23] United States v. Loften, 518 F. Supp. 839 (S.D.N.Y. 1981); *see infra* text accompanying notes 117-24 (discussing *Loften*).

[24] United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980). Defendants Marubeni American Corp. and Hitachi Cable, Ltd., were two corporations engaged in the manufacture and sale of electrical cable and were bidding on contracts to supply Anchorage Tele-

the owner of Cutter Bill's, "the Neiman-Marcus of cowboy chic,"[25] two Washington state legislators, including the speaker of the state house of representatives,[26] union leaders accused of padding expense accounts,[27] and oil companies accused of violating the Emergency Petroleum Allocation Act by overcharging.[28]

The Government charges RICO violations in these remarkably diverse situations because of the significant advantages that include: (1) the prejudicial effect on judges and juries of the use of the term "racketeering";[29] (2) expansion of federal jurisdiction over local crimes traditionally prosecuted by the state;[30] (3) the ability to reprosecute defendants for transactions that previously have

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phone Utility with cable. The defendants allegedly bribed a utility official to obtain confidential bidding information and artificially lowered their bids by offering some types of cable at depressed prices. The official later persuaded the utility to purchase the more expensive cable. *Id.* at 763, 764.

[25] *See* L.A. Times, Nov. 29, 1981, at 1, col. 1 (RICO prosecution of Rex Cauble, legendary founder of Cutter Bill's, purveyors of such items as $6,000 suede Malaysian crocodile boots with a matching $15,000 blazer and a $110,000 silver Rolls Royce pickup for the cowboy who has everything).

[26] *See* United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982); *infra* text accompanying notes 377-79 (discussing *Bagnariol*).

[27] United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977).

[28] United States v. Uni Oil, Inc., 646 F.2d 946 (5th Cir. 1981) (defendants allegedly committed mail and wire fraud by participating in scheme fraudulently to certify oil from old wells as oil from new wells); United States v. Zang, 645 F.2d 999 (Temp. Emer. Ct. App. 1981) (same). The alleged activities in *Zang* and *Uni Oil* involve manipulation of federal oil price control laws that distinguish between three types of oil: (1) oil pumped from wells drilled before 1973, priced below the world price; (2) oil drilled from wells drilled after 1973, having a considerably higher permissible price; and (3) oil from wells that pumped less than 10 barrels daily, which were exempt from price controls. This regulatory system was extremely complicated and conducive to cheating. In United States v. Sutton, NEWSWEEK, May 3, 1982, at 68-69, the Government alleged that an individual manipulated the production records of oil wells and changed oil from old wells to higher-priced categories of oil. The alleged scheme produced enormous profits. The defendant's financial condition went from bankruptcy in 1970 to a $250,000,000 colossus, which included an oil refinery and terminal, a Bahamas hotel, 2 jet planes, and 50 Cadillacs. *Id.* at 68.

[29] United States v. Guiliano, 644 F.2d 85, 89 (2d Cir. 1981) (noting that one hazard of a RICO count "is that when the Government is unable to sustain a conviction under this statute, it will have to face the claim that the prejudicial effect of tarring a defendant with a label of racketeer tainted the conviction on an otherwise valid count."); United States v. Sam Goody, Inc., 518 F. Supp. 1223, 1225 (E.D.N.Y. 1981), *appeal dismissed*, 675 F.2d 17 (2d Cir. 1982); *see supra* notes 552-57 and accompanying text.

[30] *See* United States v. Altese, 542 F.2d 104, 107-11 (2d Cir. 1976) (Van Graafeiland, J., dissenting) (criticizing broad construction that "radically extends federal jurisdiction to virtually every criminal venture affecting interstate commerce"), *cert. denied*, 429 U.S. 1039 (1977).

been fully litigated;[31] (4) imposition of disproportionately severe punishment and novel sanctions;[32] (5) employment of orders barring a defendant from using available assets to post bail and obtain legal representation or prepare a defense;[33] and (6) joining defen-

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[31] *See infra* text accompanying notes 471-506.

[32] *See, e.g.*, United States v. Phillips, 664 F.2d 971 (5th Cir. 1981) (affirming RICO and 21 U.S.C. § 848 convictions for dealing in marijuana to defendants who had no significant prior records, which produced sentences of 33, 53, and 64 years); United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (en banc) (discussed *infra* note 57), *cert. denied*, 453 U.S. 912 (1981); Tarlow, *RICO Report*, CHAMPION, Sept.-Oct. 1981, at 4, col. 3 (describing RICO indictment of three attorneys charged with employing bribery to obtain property tax reduction for clients. The Government sought to forfeit the financial interests of the attorneys in their law firms, including stock in the firms' interests and in the firms' assets, profit-sharing trusts, and all contractual rights and stock redemption agreements.).

[33] *See* United States v. Bello, 470 F. Supp. 723 (S.D. Cal. 1979). *See generally* Tarlow, *supra* note 1, at 295-304. In the wake of *Bello*, recent decisions have required that the Government establish the validity of forfeiture at a full pretrial evidentiary hearing before a permanent restraining order will be granted. *See* United States v. Spilotro, 680 F.2d 612 (9th Cir. 1982); United States v. Veon, 538 F. Supp. 237, 247 n.16 (E.D. Cal. 1982) (opinion requiring full adversary hearing for 21 U.S.C. § 848 pretrial restraining order on allegedly forfeitable property and noting that "under certain circumstances a restraining order may interfere with a defendant's right to select counsel of his choice").

United States v. Spilotro, 680 F.2d 612, 614 (9th Cir. 1982), was a RICO prosecution involving reputed La Cosa Nostra figures. The defendant "Tony the Ant" Spilotro rose from a "street soldier" for the Chicago La Cosa Nostra to the head of a multimillion-dollar illegal operation based in a Las Vegas jewelry store, the Gold Rush. The operation engaged in bookmaking, burglary, loansharking, and fencing activities that spread throughout Nevada and the California counties of San Diego, Orange, and Los Angeles. Goodman, *Gangster's Rise: Vegas Empire Built on Fear*, L.A. Times, Feb. 20, 1983, at 3, col. 4. This operation was allegedly facilitated by Spilotro's control of two members of the sheriff's organized crime unit in Las Vegas and his contacts with the captain of the organized crime unit of the Las Vegas Police Department. Goodman, *Spilotro Expands His Power in Las Vegas*, L.A. Times, Feb. 23, 1983, at 18, col. 3. More importantly, Spilotro is alleged to have resorted to at least 25 gangland style killings of rival loansharks and Government witnesses characterized by the modus operandi of firing close range shots from a 22-caliber pistol to the victim's eardrum, mouth, and forehead. Goodman, *Gangster's Rise: Vegas Empire Built on Fear*, *supra*, at 3, col. 4.

Spilotro came to Las Vegas in 1971 and was thought to be a local representative for the interests of the Chicago La Cosa Nostra. Chicago control of Las Vegas organized crime was made possible in part by the disarray of the "Mickey Mouse Mafia," the Los Angeles Mafia. Goodman, *Spilotro Seizes 'Mickey Mouse Mafia,'* L.A. Times, Feb. 25, 1983, at 1, 22, col. 1. In Chicago, "Tony the Ant" had allegedly acted as a triggerman for Sam DeStefano. When Spilotro and DeStefano were jointly indicted in Chicago in 1972 for one of the murders, rumors circulated that DeStefano was about to become a Government witness, and, subsequently, someone fired two close range shotgun blasts into DeStefano's chest. Goodman, *Chicago Killing Puts Spilotro in Spotlight*, L.A. Times, Feb. 22, 1983, at 3, col. 1. When Spilotro arrived in Las Vegas in 1971, he operated in conjunction with Frank "Lefty" Rosenthal, whose reputation was that of a brilliant oddsmaker. Rosenthal testified on Spilotro's behalf at a bail hearing and helped Spilotro become a member of the exclusive Las

dants whose conduct is unrelated, orchestrating mass trials, and admitting prejudicial evidence that would be barred in any conspiracy prosecution.[34]

Although the vague language of Title IX has caused considerable confusion, the major source of confusion is the refusal of a number of courts to adopt consistent principles of statutory and constitutional construction. The same language of RICO has been broadly construed in RICO criminal cases while being narrowly construed in RICO civil cases.[35] This Article will explore the courts' adventures and misadventures in administering the RICO criminal provision. The analysis will expose the defects in unnecessarily broad statutory constructions and unduly restrictive constitutional interpretations and reveal the areas in which legislative reform is essential.

II. Overview of Title IX

The RICO statute is not solely a criminal statute; it includes

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Vegas Country Club. Goodman, *Love Triangle Lights a Fuse in Las Vegas*, L.A. Times, Feb. 27, 1983, at 3, col. 1. Spilotro broke with Rosenthal when Spilotro began an affair with Rosenthal's wife. *Id.*

The present RICO prosecution of "Tony the Ant" has been based on the testimony of Jimmy "The Weasel" Fratianno, who turned Government informant out of fear that Spilotro would kill him, and a former Spilotro lieutenant, Frank Cullotta, who feared the same possibility after being arrested for burglary. Goodman, *Spilotro Slips Up, Makes War with Cop*, L.A. Times, Feb. 28, 1983, at 1, col. 1.

[34] *See* Newsweek, Aug. 20, 1979, at 82-83; *see also* United States v. Bledsoe, 674 F.2d 647, 659-60 (8th Cir. 1982) (noting that inclusion of RICO counts enabled Government to join 22 defendants involved in various tenuously related fraud schemes); United States v. Barton, 647 F.2d 224, 237 (2d Cir. 1981) (observing that RICO would permit use of "far-flung" acts, which would not be possible under 18 U.S.C. § 371); United States v. Elliott, 571 F.2d 880 (5th Cir.) (holding that RICO is exempt from traditional limitations of conspiracy law), *cert. denied*, 439 U.S. 953 (1978); Blakey & Goldstock, *supra* note 4, at 348. Paul Coffey, Deputy Chief of the Justice Department's Organized Crime and Racketeering Section, acknowledged RICO's value as a tool to facilitate admission of other crimes although Justice Department guidelines forbid the use of RICO solely to obtain this evidentiary advantage. *Justice Department to Shift Emphasis from White Collar Area, Giuliani Says*, *supra* note 18, at 2239 (stating that "one reason RICO is a 'darling of the prosecutor's nursery' is its value as an evidentiary tool."). The Government apparently believes that Federal Rule of Evidence 404(b) can always be used in RICO cases. *See id.*

[35] The courts have been "hoisted on their own petards." Broad construction of RICO criminal provisions should produce a corresponding expansion of RICO civil liability. Fearing serious caseload problems from RICO civil actions, some trial courts have abandoned concepts of logical consistency by narrowly construing the RICO civil provisions. *See infra* text accompanying notes 46-54.

civil remedies and other procedural remedies and devices that in theory were directed at the problem of organized crime. A person violating any of the four offenses set out in section 1962 can be subject to criminal prosecutions, government civil actions,[36] and private treble damages civil actions.[37]

A. *Remedies for RICO Violations*

1. RICO Civil Actions. In 18 U.S.C. § 1964, Title IX authorizes civil actions against violators of section 1962.[38] A civil judgment under section 1964 can result in divestiture of the defendant's interest in the enterprise and award of treble damages to private parties whose business or property has been harmed. The Government has rarely invoked the civil provisions,[39] although it has signaled a developing interest in exploiting section 1964 by filing a civil action against the officers of a New Jersey Teamsters local.[40] The complaint requested that the officers be divested of their posts and enjoined from further participation in the activities of the union local. It also requested appointment of trustees to assume the duties of the union officers, to operate the pension fund, and to supervise new elections. The complaint alleged that the teamsters local is a "captive labor organization" that has been controlled by a group of individuals termed the "Provenzano Group." This group allegedly controlled the local by means of a series of extortionate acts and sporadic murders of opponents.[41]

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[36] 18 U.S.C. § 1964(a), (b) (1976).

[37] 18 U.S.C. § 1964(c) (1976).

[38] Initially, commentary on RICO civil actions focused primarily on the constitutionality of Government actions for injunctive relief under 18 U.S.C. § 1964(a). *See* Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970*—United States v. Cappetto, 25 DE PAUL L. REV. 508 (1976); Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 TEX. L. REV. 1055 (1975). Recently, the private treble damage provisions of § 1964(c) have attracted increasing attention. *See* Long, *supra* note 4; Note, *Civil RICO*, *supra* note 4; Tarlow, *Using the RICO Statute in Civil Litigation*, Nat'l L.J., May 24, 1982, at 18.

[39] At the present time, there are only three published opinions involving Government civil actions under § 1964. United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977); United States v. Winstead, 421 F. Supp. 295 (N.D. Ill. 1976).

[40] United States v. Local 560, 550 F. Supp. 511 (D.N.J. 1982).

[41] *Id.* at 512. The danger of applying the RICO civil provisions to union activities is that they can embroil the courts in labor disputes and can become a tool by which employers can disrupt a strike. *See, e.g.*, Kerr-McGee Coal Corp. v. UMW Dist. 12, No. 81-4440 (S.D. Ill.

With increasing frequency, private litigants have attempted to exploit the provisions of section 1964(c) that award treble damages to anyone who is injured in his business or property by reason of a violation of section 1962. If section 1964(c) were broadly construed, the courts would be confronted with an avalanche of RICO civil damages actions. The potential scope of section 1964(c) would be enormous because of the inclusion of wire and mail fraud as a racketeering activity,[42] in that this activity has been accurately described as "thinking deceitfully and mailing a letter."[43] Since virtually all business transactions involve the use of the mails or telephones, a combination of RICO and mail fraud could federalize all torts involving business transactions.[44]

The author predicted that the inevitable reaction of federal courts would be to construe narrowly RICO civil actions.[45] This prediction has been borne out by subsequent district court cases that have evinced unremitting hostility to RICO civil actions. Federal trial judges have developed novel theories to bar RICO civil actions. The most widely used theory for dismissing RICO civil counts is that the plaintiff failed to establish injury to "business or property by reason of" a RICO violation.[46] The courts have adopted a restrictive construction of this language and have set forth a variety of conflicting tests, including: (1) "competitive in-

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filed Oct. 8, 1981) (RICO complaint by employer requesting damages, injunctive relief against picketing, and removal of union officers).

[42] 18 U.S.C. § 1961(1) (Supp. IV 1980); *see also id.* §§ 1341, 1343 (1970) (general mail fraud statutes).

[43] Blakey, *Materials on RICO: Criminal Overview*, in 1 CORNELL INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME 25 (1980).

[44] Paltrow, *Now Concerns Are Being Sued as Racketeers*, Wall St. J., July 29, 1982, at 21, col. 3 (quoting attorney Jordan Green as stating that "because most business matters involve the mails, lawyers can use RICO to ratchet an ordinary case into a mail-fraud case"). This federalization of business litigation is a result seemingly desired by proponents of RICO civil actions. For example, Professor Blakey has urged the use of RICO civil procedures against cigarette manufacturers in the wake of an amendment of RICO to include cigarette smuggling as a predicate offense. *See Civil Rights Liability, RICO Discussed at NAAG Mid-Term Meeting*, 28 CRIM. L. REP. (BNA) 2286, 2287 (Dec. 17, 1980). Blakey urged that local governments sue manufacturers for treble damages based on the loss of revenues to cigarette bootlegging and for an injunction requiring the manufacturer to collect the local taxes at the point of origin. *Id.*

[45] Tarlow, *supra* note 6, at 57.

[46] *See, e.g.*, Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir. 1982); Harper v. New Japan Sec. Int'l, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); Maryville Academy v. Loeb Rhoades & Co., 530 F. Supp. 1061, 1069-70 (N.D. Ill. 1981).

jury";[47] (2) "racketeering enterprise injury";[48] and (3) "commercial injury."[49] The courts have also narrowly construed mail fraud to prevent ordinary state fraud claims from being transformed into federal RICO civil actions.[50] Some courts have held that a RICO civil defendant must be connected to "organized crime,"[51] a theory that has been frequently rejected in RICO criminal cases.[52] At least one commentator has criticized these restrictive holdings as a form of improper judicial legislation.[53] A number of these decisions may not be soundly reasoned and may be subject to reversal by the appellate courts if logic overcomes policy considerations.

2. *RICO Criminal Penalties.* The criminal sanctions for a violation of section 1962 are imprisonment for up to twenty years, a fine of $25,000, or both, and forfeiture of any interest in the enterprise acquired in violation of section 1962.[54] Although the severity of

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[47] *See* North Barrington Dev. Co. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980). In *North Barrington* the defendants allegedly participated in a fraudulent scheme to induce the plaintiff to perform services for a real estate development project. The defendants allegedly made fraudulent promises to real estate purchasers to finance loans and threatened purchasers with loss of their deposits if they did not consent to enter into new mortgage arrangements. The defendants argued and the court held that RICO does not provide a civil remedy for the direct victims of racketeering, but only for indirect victims who must compete with enterprises engaged in racketeering. *Id.* at 210-11.

[48] Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (imposing a requirement that the plaintiff establish a "racketeering enterprise injury"). In *Landmark Savings*, the court dismissed a RICO fraud count on the ground that the plaintiff established injury merely from fraud and not "racketeering enterprise injury." *Id.* at 209. Although the court provided no specific definition of the requisite injury, it seemed to be concerned with the problem of potential RICO plaintiffs suffering only indirect damage from racketeering.

[49] *See* Van Shaick v. Church of Scientology, Inc., 535 F. Supp. 1125, 1137 (D. Mass. 1982) (requiring proof of "commercial injury," a term that is not defined with any particularity but that may refer to injury suffered by plaintiff "in a business activity"). In *Van Shaick*, the RICO complaint failed to meet this standard but alleged that the defendant's activities caused the plaintiff to "flee about the United States," experience emotional distress, and spend money on the plaintiff's literature and auditing sessions. *Id.*

[50] *See, e.g.*, Kleiner v. First Nat'l Bank, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981); Salisbury v. Chapman, 527 F. Supp. 577, 580-81 (N.D. Ill. 1981).

[51] *See* Waterman S.S. Corp. v. Avondale Shipyards, 527 F. Supp. 256, 259 (E.D. La. 1981) (dismissing RICO-mail-fraud action based on fraud in the sale of low-pressure and high-speed flexible couplings installed in main propulsion units of lighter-aboard-ship vessels); Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981) (dismissing RICO action based on alleged land fraud by developers).

[52] *See infra* notes 55-56 and accompanying text.

[53] *See* Note, *Civil RICO*, *supra* note 4; *see also* Strafer, Marsumi & Skolnick, *supra* note 4, at 689-709; Tarlow, *supra* note 38, at 20.

[54] 18 U.S.C. § 1963 (1976). The subject of forfeiture is beyond the scope of this Article,

these sanctions may have resulted from Congress's fear of organized crime,[55] RICO is not expressly limited to organized crime, and the courts have refused to read this limitation into Title IX.[56] These severe penalties may result in harsh sentences. Although the federal appellate courts do retain the authority to review excessive sentences,[57] recent Supreme Court decisions indicate that defendants cannot challenge disproportionately long prison terms based on eighth amendment grounds.[58]

A unique feature of RICO criminal litigation is the introduction of forfeiture as a punishment for violations of the statute.[59] Section

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and it is thoroughly analyzed in a number of other articles. *See* Tarlow, *supra* note 1, at 276-305; Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AM. CRIM. L. REV. 379, 391-92 (1980); Weiner, *supra* note 5; Tarlow, *Due Process Pays the Price for RICO Forfeiture's High Cost*, Nat'l L.J., June 15, 1981, at 26.

[55] *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . . .") (statement of findings and purpose).

[56] *See, e.g.*, United States v. Aleman, 609 F.2d 298, 303-04 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Rubin, 559 F.2d 975, 991 n.15 (5th Cir. 1977), *vacated & remanded on other grounds*, 439 U.S. 810 (1978); Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 646 (N.D. Ill. 1980).

An "organized-crime connection" may have continued applicability in RICO civil actions. *See supra* note 51 and accompanying text.

[57] In the RICO context, the disproportionate punishment problem is illustrated by United States v. Sutton, 642 F.2d 1001 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981). The trial judge's imposition of terms and consecutive sentences resulted in the following total sentences for fencing and narcotics trafficking: (1) Sutton, 92 years and $100,000 fine with two 20-year concurrent terms for violations of § 1962(c) and (d); (2) Elkins, 82 years with two 20-year sentences on § 1962(c) and (d) convictions running consecutively; (3) Carter, 82 years with two 20-year sentences on § 1962(c) and (d) convictions running consecutively; (4) Rankin, 60 years with two 10-year concurrent terms for RICO violations; (5) Adams, 93 years with two 20-year terms for RICO violations and a $100,000 fine. *Id.* at 1040-41 (appendix). The en banc *Sutton* opinion characterized these sentences as "extremely severe," *id.* at 1039, and reversed the imposition of consecutive sentences for the § 1962(c) and (d) convictions. *Id.* at 1040. *See infra* text accompanying note 512. The court further stated that appellate review could be available to review trial court decisions on motions to reduce sentences under Federal Rule of Criminal Procedure 35. *Id.* at 1040. The trial judge considered the obvious disapproval of the sentences by the court and subsequently reduced Sutton's terms to 15 years. *See* Carter v. Carlson, 545 F. Supp. 1120, 1121 (S.D. W. Va. 1982) (discussing *Sutton*). The en banc decision indicates that federal appellate courts can review harsh sentences. *See id.* at 1040; *see also* United States v. Gomez, 553 F.2d 958 (5th Cir. 1977); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); United States v. McKinney, 427 F.2d 449 (6th Cir. 1970).

[58] *See* Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding 40-year sentence for marijuana charges); Rummel v. Estelle, 445 U.S. 263 (1980) (upholding life sentence for theft by false pretenses charge under recidivist statute).

[59] *See generally* materials cited *supra* note 54.

1963(a) authorizes forfeiture of (1) any interest acquired or maintained in violation of 18 U.S.C. § 1962 and (2) any interest in the enterprise.[60] The Government's policy is that RICO forfeitures "should be vigorously sought."[61] This policy is illustrated by a series of Chicago cases in which law firms are alleged to be the enterprises and the Government has attempted to forfeit any attorney's fees connected with the alleged unlawful conduct, the lawyers' ownership interests in the firms' assets, and any interests in profit-sharing, retirement, and pension plans.[62]

Presently, the Supreme Court is considering the question of whether RICO authorizes forfeiture of profits or is instead limited to forfeiture of capital interests in the enterprise. The specific issue of statutory construction is whether section 1963(a)(1) is limited to an interest "in the enterprise." Section 1963(a)(1), in contrast to section 1963(a)(2), contains no such limitation. The Government may contend that section 1963(a)(1) is not limited to interests in the enterprise and reason that an enterprise limitation would make (a)(1) surplusage because (a)(2) already applies to forfeiture of enterprise interests. In fact, this argument is specious since the two subsections apply to different types of section 1962 violations and are distinguishable. This construction is suggested by the fact that

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[60] 18 U.S.C. § 1963(a) (1976).

[61] *See* U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION, CRIMINAL FORFEITURES UNDER THE RICO AND CONTINUING CRIMINAL ENTERPRISE STATUTES 1 (1980) [hereinafter cited as CRIMINAL FORFEITURES].

[62] *See, e.g.*, United States v. McManigal, *appeal docketed*, No. 82-1754 (7th Cir. Apr. 11, 1982).

The legal fees would be forfeitable only if RICO authorized forfeiture of racketeering profits that were not invested in the enterprise—an issue on which the courts are split. *Compare* United States v. Marubeni Am. Corp., 611 F.2d 763 (9th Cir. 1980) *with* United States v. Martino, 681 F.2d 952 (5th Cir. 1982) (en banc), *rev'g* 648 F.2d 367 (1981), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). Before the *Martino* en banc ruling, the reversed panel decision was held to be controlling in United States v. Peacock, 654 F.2d 339, 351 (5th Cir. 1981), and United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981). In the *Romano* opinion, District Judge Alcee Hastings sharply criticized cases limiting RICO forfeitures but reluctantly followed the *Martino* panel opinion and modified his forfeiture to eliminate forfeiture of profits. *Id.* at 1215. A bizarre series of events followed the issuance of this opinion. On the same day the Fifth Circuit granted an en banc hearing on *Martino* on its own motion, a search warrant was issued for Judge Hastings's chambers. Judge Hastings was indicted for bribery connected with his modification of the forfeiture order. The Eleventh Circuit has recently upheld the denial of Hastings's motion to quash the indictment, a motion claiming immunity from prosecution for acts involving the exercise of judicial authority. United States v. Hastings, 681 F.2d 706 (11th Cir. 1982). Judge Hastings represented himself at trial and was acquitted by a jury.

although section 1963(a)(1) refers to all section 1962 subsections, the acts of acquiring or maintaining an enterprise interest mentioned in (a)(1) are not violations of section 1962(c), which proscribes operation of an enterprise. If section 1963(a)(1) applies only to (a) and (b) violations, it is obvious that section 1963(a)(2) would be the exclusive forfeiture provision in section 1962(c) cases and, consequently, would not be surplusage even if (a)(1) were limited to interests in the enterprise.[63]

B. Liberal Construction Clause

Title IX includes a clause that arguably authorizes broad judicial interpretation by requiring liberal construction of RICO "to effectuate its remedial purposes."[64] This provision has often been cited in support of holdings that expand RICO criminal liability.[65] In *United States v. Turkette*, the Supreme Court discussed this clause but remained cautiously noncommittal as to its applicability.[66]

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[63] The Fifth Circuit adopted the Government's surplusage argument in its en banc decision in United States v. Martino, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983). Another defect in the surplusage argument is that construing § 1963(a)(1) as authorizing forfeiture effectively makes § 1963(a)(1) surplusage. It is questionable whether § 1963(a)(2) should ever be used if § 1963(a)(1) applies to any proceeds even if those proceeds are not invested in an enterprise. The *Martino* court also did not consider the language of § 1964(a), which authorizes civil divestiture of "any interest, direct or indirect, in any enterprise." There is no policy reason for permitting criminal forfeiture of profits while limiting civil divestiture to interests in the enterprise. In *Marubeni Am. Corp.* the Ninth Circuit, correctly ruling that profits are not subject to forfeiture, reasoned that forfeiture of capital interests was sufficient to accomplish the congressional intent to separate racketeers from the enterprises and that forfeiture of profits did nothing to accomplish this goal. 611 F.2d at 766-69; *see* Tarlow, *supra* note 1, at 290-91.

[64] Organized Crime Control Act of 1970, Pub. L. 91-452, § 904(a), 84 Stat. 922, 947 (1970). The complete text states: "The provisions of this title [enacting this chapter and amending sections 1505, 2516, and 2517 of this title] shall be liberally construed to effectuate its remedial purposes."

[65] *See, e.g.*, United States v. Lee Stoller Enters., 652 F.2d 1313, 1317 (7th Cir. 1981); United States v. Sutton, 642 F.2d 1001, 1008 (6th Cir. 1980) (en banc), *cert. denied*, 453 U.S. 912 (1981); United States v. Grzywacz, 603 F.2d 682, 686 (7th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); United States v. Huber, 603 F.2d 387, 394 (2d Cir. 1979); United States v. Swiderski, 593 F.2d 1246, 1248 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 993 (1979); United States v. Forsythe, 560 F.2d 1127, 1135-36 (3d Cir. 1977); United States v. Parness, 503 F.2d 430, 439 n.12 (2d Cir. 1974), *cert. denied*, 419 U.S. 1104 (1975); United States v. Frumento, 426 F. Supp. 797, 802 (E.D. Pa. 1976), *aff'd.*, 552 F.2d 534 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976).

[66] 452 U.S. 576, 587 (1981).

Any application of the liberal construction clause to the RICO criminal provisions is an improper method of statutory interpretation and a violation of due process. The fundamental principle of statutory construction is the due process requirement that criminal statutes be construed in favor of lenity.[67] If the liberal construction clause is applicable to determine the scope of criminal liability under Title IX, the provision is therefore unconstitutional.[68]

In view of the constitutional proscription on broad construction of criminal statutes, it is inappropriate to apply the liberal construction clause to the RICO criminal provisions. Advocates of broad construction contend that RICO is a "remedial" statute and therefore exempt from the rule of narrow construction, which applies only to statutes characterized as "penal" in nature.[69] The courts, however, do not manipulate this distinction to apply a "remedial" label to statutes that are employed in formal criminal proceedings and that carry long prison terms. A remedial statute, generally, imposes money damages for compensation to an injured party,[70] and it is absurd to contend that a statute imposing a twenty-year prison term is remedial rather than penal.[71]

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[67] United States v. Bass, 404 U.S. 336, 348-49 (1971). In Dunn v. United States, 442 U.S. 100 (1979), the most recent Supreme Court application of this rule, the Court observed that this rule was "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." *Id.* at 112. *Dunn* cautioned against statutory constructions that impose punishment for actions that are not "plainly and unmistakably prohibited." *Id.* at 112-13. In *Bass* the Court stated:

> [B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the most instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should."

404 U.S. at 349 (quoting H. FRIENDLY, BENCHMARKS 209 (1967)).

[68] *See* United States v. Anderson, 626 F.2d 1358, 1369-70 (1980) (noting that judicial deference to the liberal construction clause is a questionable approach in view of due process requirement of narrow construction), *cert. denied*, 450 U.S. 912 (1981); *accord* Atkinson, *supra* note 17, at 14; Tarlow, *supra* note 1, at 177-80; Comment, *Racketeer Influenced and Corrupt Organizations Act (RICO)—Application of RICO in the Third Circuit*, 24 VILL. L. REV. 263, 276 (1979). *Contra* Note, *Liberal Construction Clause*, *supra* note 4, at 181-84.

[69] *See, e.g.*, Smith v. Equitable Life Assurance Soc'y, 614 F.2d 720, 723 (10th Cir. 1980); *cf.* Collins v. Kidd, 38 F. Supp. 634, 637 (E.D. Tex. 1941) (Fair Labor Standards Act construed favorably to the defendant because of penal component).

[70] *See* Brown v. Cummins Distilleries Corp., 56 F. Supp. 941 (W.D. Ky. 1944) (treble damages resulting from a violation of the 1942 Price Control Act are penal in nature and do not survive the death of the defendant).

[71] *Cf.* Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 376-77 (1973) (statute

Advocates of broad construction have suggested a second theory by which the traditional rule of narrow construction can be evaded. It is contended that because section 1962 establishes a standard for both civil and criminal violations, it defines only "unlawful" conduct and not "criminal" conduct.[72] Therefore, under this theory section 1962 is not a criminal statute subject to narrow construction. Proponents of this argument assume that where a statute establishes a common standard for both civil and criminal liability the standard is immune from the strict construction doctrine. This assumption squarely conflicts with Supreme Court case law,[73] holding that where a statute gives rise to both civil and criminal remedies even the civil remedies must be narrowly construed.[74] Applying this principle to RICO, section 1962 must be construed narrowly regardless of the fact that civil remedies are dependent on that standard.[75]

On the level of statutory interpretation, it is evident that the liberal construction clause was not meant to apply to the punitive

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imposing civil money penalty is not construed "as narrowly as a criminal statute providing graver penalties, such as prison terms").

[72] *See* Blakey & Gettings, *supra* note 4, at 1027 n.91. In another Article by the same authors, they assert: "RICO is not a criminal statute. Sec. 1962 says 'unlawful', not 'criminal'. Conduct may be unlawful either criminally or civilly. In fact, RICO does not draw the line between innocent and criminal conduct, since it requires the violation of two or more independent criminal statutes before it is violated." Blakey & Gettings, *supra* note 15, at 26, col. 4.

[73] *See* FCC v. American Broadcasting Co., 347 U.S. 284 (1954).

[74] *Id.* In *American Broadcasting*, the Court held that a statute proscribing broadcasts of lotteries was subject to strict construction even though the statute could be enforced in both FCC administrative hearings and in federal criminal prosecutions. The Court struck down FCC regulations that broadly construed the statute and concluded that the regulations had to be drafted in accord with the narrow construction rule applicable to criminal statutes. *Id.* at 296. The Court noted:

> It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly.

Id.

[75] It is noteworthy that the Sherman Act, 15 U.S.C. § 1 (1973), resembles RICO in that a single standard produces both criminal and civil remedies. Nevertheless, the Sherman Act, as a criminal statute, has been subjected to strict construction. *See* United States v. United States Gypsum Co., 438 U.S. 422, 443-44 & n.19 (1978).

provisions of 18 U.S.C. §§ 1961-1963.[76] This view is buttressed by the Supreme Court opinion in *United States v. United States Gypsum Co.*,[77] which indicated that a clause urging liberal construction to effectuate a remedial purpose is generally applicable only to statutes creating civil remedies and not to criminal statutes.[78] Courts interpreting RICO have stood this rule on its head by broadly construing the criminal provisions while narrowly construing the civil provisions.[79]

The confusion and uncertainty engendered by the liberal construction clause has caused the American Bar Association to recommend its repeal.[80] The commentary focused on the difficulty in reconciling that clause with the due process requirement of strict construction.[81]

III. Constitutional Challenges to RICO

Constitutional objections to Title IX have been frequently raised and just as frequently rejected. These objections, however, can

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[76] *See* United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). Seventh Circuit Judge Swygert has theorized that Congress probably intended the clause to apply only to the civil remedies, considered to be the major innovation of Title IX at the time of its passage. *See* United States v. Grzywacz, 603 F.2d 682, 691-92 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 446 U.S. 935 (1980).

[77] 438 U.S. 422 (1978).

[78] *Id.* at 443 n.19. In holding that intent was an element of Sherman Act criminal provisions, the Court observed:

> An accommodation of the civil and criminal provisions of the Act similar to that which we approve here was suggested by Senator Sherman in response to Senator George's argument during floor debate that the Act was primarily a penal statute to be construed narrowly in accord with traditional maxims:
>
> "The first section being a remedial statute, would be construed liberally with a view to promote its object. It defines a civil remedy, and the courts will construe it liberally . . . .
>
> "In providing a remedy the intention of the combination is immaterial. . . .
>
> "The third section is a criminal statute, which would be construed strictly and is difficult to be enforced. In the present state of the law it is impossible to describe, in precise language, the nature and limits of the offense in terms specific enough for an indictment." 21 Cong. Rec. 2456 (1890).
>
> Although the bill being debated by Senators George and Sherman differed in form from the Act as ultimately passed, the colloquy between them indicates that Congress was fully aware of the traditional distinctions between the elements of civil and criminal offenses and apparently did not intend to do away with them in the Act.

438 U.S. at 443 n.19.

[79] *See supra* text accompanying notes 41-53.

[80] *RICO Report*, *supra* note 7 at 12-13.

[81] *Id.* at 13.

have the salutary effect of requiring the courts to clarify the broad language of Title IX.[82]

A. *Congress's Authority Under the Commerce Clause*

Generally, statutes enacted by Congress pursuant to the commerce clause of the Constitution[83] require some nexus between the defendant's activities and interstate commerce.[84] Section 1962 requires only that the enterprise affect commerce,[85] a lesser standard of proof that has been upheld as permissible under the commerce clause.[86]

A similar claim is that RICO intrudes upon state sovereignty in violation of the ninth and tenth amendments because the racketeering acts need not affect interstate commerce. In *United States v. Martino*,[87] the court, rejecting this claim, reasoned that the essence of RICO proscribes "the furthering of the enterprise not the predicate acts"; consequently, those acts need not affect commerce.[88]

B. *Ex Post Facto Clause*

Although the problem has abated with the passage of time, RICO charges have frequently been challenged when the predicate racketeering acts were committed before the effective date of Title IX. Title IX may violate the constitutional prohibition on ex post facto laws[89] because it permits prosecution of activities occurring

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[82] *See, e.g.*, United States v. Thevis, 474 F. Supp. 134, 141-43 (N.D. Ga. 1979) (excluding forfeiture of profits from § 1963 in response to vagueness challenge to § 1963); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974) (adopting "common scheme" construction of "pattern" in response to vagueness objection to § 1962).

[83] U.S. CONST. art. I, § 8, cl. 3.

[84] *See* Comment, *supra* note 68, at 275.

[85] *See infra* text accompanying note 364.

[86] *See* United States v. Vignola, 464 F. Supp. 1091, 1097-1100 (E.D. Pa.), *aff'd mem.*, 605 F.2d 1199 (3d Cir. 1979); Atkinson, *supra* note 17, at 5-6. *But see* Comment, *supra* note 68, at 275.

[87] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[88] *Id.* at 381; *accord* United States v. Boffa, 513 F. Supp. 444, 465 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982).

[89] U.S. CONST. art. 1, § 9, cl. 3. The ex post facto clause states: "No Bill of Attainder or ex post facto Law shall be passed." An ex post facto law has been defined as one "that makes an action done before passing of the law, and which was *innocent when done* criminal." Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis added).

prior to its effective date.[90] This contention has been rejected based upon a statement in a Senate report on Title IX: "One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder."[91] In addition, at least one court has concluded that the ex post facto clause is not violated because the RICO offense is not complete until a racketeering act occurs after the effective date.[92] The statute theoretically notified the defendant, who committed racketeering acts prior to that date, that a further act would violate Title IX.[93]

A different form of ex post facto argument was raised in *United States v. Martino*.[94] The defendant claimed that the application of RICO to illegal enterprises is an unexpected judicial expansion of law that cannot be retroactively applied.[95] The court rejected this argument and indicated that the illegal enterprise concept was a foreseeable expansion.[96]

C. *Vagueness and Overbreadth*

The "less than pellucid" language of Title IX[97] has frequently precipitated the unsuccessful contention that various portions of Title IX are unconstitutionally vague.[98] The commonly applied

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[90] *See, e.g.*, United States v. Boffa, 688 F.2d 919, 937 (3d Cir. 1982). Other courts, however, have indicated that proper prosecution under Title IX may not violate the ex post facto clause. *See, e.g.*, United States v. Brown, 555 F.2d 407, 418-21 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); United States v. Campanale, 518 F.2d 352, 357, 364-65 (9th Cir. 1975), *cert. denied*, 432 U.S. 1050 (1976); United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977).

[91] S. REP. No. 617, 91st Cong., 1st Sess. 158 (1969), *cited in* United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978); *accord* United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976). This legislative comment is codified in 18 U.S.C. § 1961(5), which defines "pattern of racketeering activity" to require one act after the effective date. 18 U.S.C. § 1961(5) (1976).

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

[93] *Id.*

[94] 648 F.2d 367 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v. United States, 103 S. Ct. 721 (1983).

[95] *Id.* at 381.

[96] *Id.*

[97] United States v. Rubin, 559 F.2d 975, 990 (5th Cir. 1977), *vacated & remanded on other grounds*, 439 U.S. 810 (1978).

[98] *See* United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981), *rev'd on other grounds on rehearing en banc*, 681 F.2d 952 (5th Cir. 1982), *cert. granted sub nom.* Russello v.

constitutional standard for vagueness is that a criminal statute is void when it fails to give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[99]

The phrase "pattern of racketeering activity" is particularly vulnerable to a vagueness challenge. The Ninth Circuit has acknowledged that if "pattern of racketeering activity" were undefined, the term would be "unmanageable."[100] The court concluded that any ambiguity was cured by the definitions of "pattern" and "racketeering activity" in section 1961.[101] The court, however, ignored the fact that section 1961(5) does not define "pattern" but merely states that there can be no proof of a pattern that does not include proof of the two racketeering activities described in section 1961(5).[102]

The term "enterprise" also seems vulnerable when applied to an illegal enterprise because that construction conflicts with the legislative history.[103] Nevertheless, vagueness arguments have been rejected in this context.[104]

Some potential vagueness and overbreadth problems may remain. The District of Columbia Circuit has indicated that RICO

United States, 103 S. Ct. 721 (1983); United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Pantone, 609 F.2d 675, 679 (3d Cir. 1979); United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976); United States v. Parness, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975); United States v. Cappetto, 502 F.2d 1351, 1357-58 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975); United States v. Boffa, 513 F. Supp. 444, 460 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982); United States v. Thevis, 474 F. Supp. 134, 139-40 (N.D. Ga. 1979); United States v. Field, 432 F. Supp. 55, 60 (S.D.N.Y. 1977); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975); United States v. Stofsky, 409 F. Supp. 609, 612-13 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. Scalzitti, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975); United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974).

[99] United States v. Harriss, 347 U.S. 612, 617 (1954), *quoted in* Palmer v. City of Euclid, 402 U.S. 544, 545 (1971).

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

[101] *Id.*

[102] United States v. Ladmer, 429 F. Supp. 1231, 1244 (E.D.N.Y. 1977).

[103] *See* Tarlow, *supra* note 1, at 193-95.

[104] *See* United States v. Aleman, 609 F.2d 298, 305 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Hawes, 529 F.2d 472, 478-79 (5th Cir. 1976); United States v. Castellano, 416 F. Supp. 125, 128 (E.D.N.Y. 1975); United States v. Scalzitti, 408 F. Supp. 1014, 1015-16 (W.D. Pa. 1975).

may be overbroad when applied to "'small fry' with only a tangential relationship with a criminal enterprise."[105] In a related holding, *United States v. Boffa*,[106] a district court rejected a claim that RICO was vague "as applied" to the particular case.[107] The court implied that in some cases RICO might be vague as applied.[108]

IV. Section 1962(a) and (b)

A. *Section 1962(a)*

Section 1962(a) proscribes the acquisition or operation of an enterprise with income derived from a pattern of racketeering.[109] Proof of a section 1962(a) violation involves tracing money derived from a pattern of racketeering into the operation or acquisition of an interest in a business. Although some courts had concluded that section 1962(a) applied only to legitimate businesses,[110] the Su-

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[105] United States v. Swiderski, 593 F.2d 1246, 1249 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979) (while United States v. Elliott, 571 F.2d 880 (5th Cir. 1980), states that "the RICO net is woven tightly to trap even the smallest fish," *Swiderski* cautions that RICO cannot cast "too large a net"); *see also* Atkinson, *supra* note 17, at 4 (RICO can be unconstitutionally vague as applied to some individuals).

[106] 513 F. Supp. 444 (D. Del. 1980), *rev'd in part on other grounds*, 688 F.2d 919 (3d Cir. 1982).

[107] *Id.* at 460-63.

[108] *Id.* The court also rejected a claim that RICO was subject to the first amendment overbreadth doctrine, *id.* at 463-64, holding that RICO "does not affect any association protected by the First Amendment." *Id.* at 464.

[109] Section 1962(a) reads:

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

18 U.S.C. § 1962(a) (1976).

[110] *See* United States v. Sutton, 605 F.2d 260, 269 (6th Cir. 1979), *rev'd en banc*, 642 F.2d 1001 (1980), *cert. denied*, 453 U.S. 912 (1981); United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974).

preme Court held in *United States v. Turkette* that acquisition of an interest in an illegal enterprise is encompassed by section 1962(a).[111] Presumably, prosecutions of those investing in illegal enterprises under section 1962(a) will be extremely rare because an investment of "dirty money" in an illegal enterprise can be prosecuted as an illegal operation of an enterprise under section 1962(c).[112]

The second sentence of section 1962(a) establishes an exception to the offense for purchases of securities in the open market amounting to less than one percent of the securities of a class of stock. Unfortunately, there is no similar exemption for money used to operate an enterprise. Consequently, use of trivial amounts of "dirty money" to purchase janitorial supplies for the enterprise may violate section 1962(a). Theoretically, the problem of de minimis use of racketeering income could be remedied by congressional enactment of a one-percent exemption similar to the present exemption for an acquisition of an interest.[113]

The scope of the existing one-percent exemption may be limited by the fact that section 1962(a) applies not only to racketeering income but to proceeds of that income. One consequence of this extension to proceeds of income is that section 1962(a) may be applicable to money derived from racketeering, invested within the stock exception, and upon the sale of the stock reinvested outside the exception.[114]

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[111] 452 U.S. 576, 587 (1981).

[112] *See infra* text accompanying note 353.

[113] Unfortunately, it is difficult to draft language to reflect the concept that the use of racketeering income should be significant in relation to the magnitude of the enterprise's business activities. Those who draft an exemption for "operating" must answer the question: "Percent of what?" There are numerous figures to which the percentage could apply, including four percent of gross income, net income, or operating expenses. Unlike acquisitions, there is no figure that is applicable to all acts of "operating" an interest because the word "operating" is so broad that it can apply to a wide variety of acts. For example, an exemption for percent of operating expenses only responds to a situation where racketeering income is used to pay the expenses of the enterprise. This exemption would fail to resolve "operating" situations involving use of racketeering income to purchase capital assets for the enterprise or to pay off liens on the defendant's stock interest in the enterprise.

[114] *See* Tarlow, *supra* note 1, at 184-85. A somewhat similar issue is being litigated in United States v. Facuseh, No. 81-337 (S.D. Fla. filed July 31, 1981). In *Facuseh*, an indictment charging a Travel Act violation, 18 U.S.C. § 1952, involved two money brokers who allegedly sold cashier's checks and wire transfers to defendants who paid the brokers in cash from illegal drug transactions. The defendants moved to dismiss the indictment on numerous grounds, including a claim that the brokers' transmission of the cashier's checks and

1. Liability of Recipients and Investors of Racketeering Income. The Government has contended that section 1962(a) extends beyond the investor who participates in the racketeering to individuals, including accountants, attorneys, or investment advisers who are not involved in the racketeering but who invest or receive the invested money with or without knowledge of the nature of the illegal source.[115] This interpretation conflicts with the legislative history, which indicates that section 1962(a) is limited to those who are principals in the racketeering acts, excluding innocent recipients or investors who would be accessories after the fact.[116]

The liability of an investor of racketeering income under section 1962(a) and (d) was a pivotal issue in *United States v. Loften*,[117] where an attorney was indicted for conspiracy to violate section 1962(a) by investing a client's drug-related income in various commercial projects. He was not involved in the underlying drug racketeering activity, and the Government contended that it was not required to establish that the attorney knew the funds were drug related. The section 1962(d) conspiracy count alleged that the attorney was an investment adviser to those who committed the drug transactions. The attorney's alleged activities involved such innocuous acts as (1) payments to an engineer and a contractor for a commercial building; (2) discussion of an Arizona gold mine investment and a purchase of diamonds for resale in Asia; and (3) touring Arizona gold mine sites.[118] This was not a money-laundering operation; the defendant Loften wanted to place a large sign on the front of the building, naming it the "Loften Building."

The attorney in *Loften* was not a criminal lawyer and had never represented a defendant in a drug case. He was first asked to cooperate against the client and another lawyer. The Government contended that the attorney was liable even if he did not know that

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wire transfers was not a distribution of proceeds from the drug transactions within the meaning of § 1952. Unlike RICO, which applies to the proceeds of racketeering income, § 1952 applies only to the illegal income itself.

[115] *See, e.g.*, United States v. Rittenberg, No. 80-0256-S (S.D. Cal. Apr. 21, 1980) (§ 1962(a) count filed against an accountant who invested funds from racketeering in which he did not participate).

[116] The clause "in which such person has participated as a principal" was inserted at the suggestion of the Justice Department, which felt that § 1962(a) was directed at a person who was an active participant in the illegal activities. *See Hearings, supra* note 21, at 406.

[117] 518 F. Supp. 839 (S.D.N.Y. 1981).

[118] *Id.* at 842-48.

the client was engaged in drug transactions as long as he mistakenly suspected that the income was from an illegal activity such as gambling. When the prosecution was first asked how the lawyer should have known that his conduct was unlawful, the response was the following: "[H]is nose should have told him there was something wrong."[119] Ultimately, the court rejected this "proboscis" test and held that the Government must prove that the attorney knew that the money was from narcotics activity.[120]

At the trial in *Loften*, the Government attempted to establish the intent element by arguing that the attorney knew that his client had no legitimate source of income and that these clients derived profits from drugs. The Government contended that the attorney had set up a dummy corporation for his clients and was planning to phase out his law practice so that he could spend all of his time on the investments of his clients. Heroin placed in evidence by the Government was always piled high in front of the lawyer.[121]

The jury ultimately rejected the Government's argument by acquitting the attorney on the RICO count. The court acknowledged that section 1962(a) applied only to principals in the racketeering activities. *Loften* adopted this author's view that the section 1962(a) phrase "in which such person has participated as a principal" also applies to patterns of racketeering as the source of the tainted income.[122] Strangely, the Government apparently conceded this point in *Loften* despite filing an earlier section 1962(a) indict-

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[119] Kaiser, *John Martin's Rocky Start*, Am. Law., Feb. 1982, at 36.

[120] United States v. Loften, 518 F. Supp. 839, 856 (S.D.N.Y. 1981).

[121] Kaiser, *supra* note 119, at 36.

[122] The court commented:

> Subsection 1962(a) as it was originally proposed did not include the requirement that the offender must have been a principal in the racketeering operations. Thus, it was susceptible of the interpretation that the recipients of the racketeer's investments (owners, operators, and employees of the legitimate enterprise) would also be guilty of violating the law. In order to make it completely clear that the substantive offense was not directed at legitimate businessmen, the phrase "in which such person has participated as a principal" was inserted. . . .
>
> It is not clear from the face of the statute whether this phrase modifies both "pattern of racketeering activity" *and* "collection of an unlawful debt," or whether it applies only to the latter. The legislative history indicates (and the Government apparently concedes) that it modifies both. *See* Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 184-85 (1980).

518 F. Supp. at 851 & n.19 (emphasis in original) (footnotes omitted).

ment in *United States v. Rittenberg*[123] against a defendant who was an accountant investing funds from alleged drug transactions without participating in those transactions.

The district court opinion in *Loften*, however, establishes a disturbing precedent for lawyers, accountants, and investment advisors. In *Loften*, the Government avoided the restriction on section 1962(a) by indicting the attorney for a section 1962(d) conspiracy to violate section 1962(a). The court approved this indictment format holding that a nonprincipal in racketeering could be liable for a section 1962(d) conspiracy to violate section 1962(a) if the Government could show that he "had knowledge of the substantive statutory offense [§ 1962(a)] and agreed with others to violate it."[124]

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[123] No. 80-0256-S (S.D. Cal. 1980). The ABA has urged the Congress to clarify the statute so as to preclude § 1962(a) prosecutions of those who are not involved as principals in the pattern of racketeering activity. *RICO Report*, *supra* note 7, at 9.

One commentator has suggested that section 1962(a) liability can be imposed on an individual who did not commit the racketeering activity but arranged investments and had a financial stake in the racketeering acts because of an intent to profit. Note, *Aiding and Abetting the Investment of Dirty Money: Mens Rea and the Nonracketeer Under RICO Section 1962(a)*, 82 COLUM. L. REV. 574, 581-92 (1982). The Note relies on legislative history that indicates that the addition of the "participated as a principal" clause of section 1962(a) was intended to incorporate the "stake in the enterprise" test of earlier cases. *Id.* at 584. Although the discussion in this Note is balanced and well considered, the problem of statutory construction is somewhat more complex than the Note would imply. Arguably, the "participated as a principal" clause requires that the accused be a principal in specific racketeering acts. If this argument is correct, however, the "stake in the venture" test would not satisfy the explicit requirement of section 1962(a). To illustrate this point, assume that a drug trafficker has received money from two cocaine shipments and approaches an investment advisor about investing the dirty money. The trafficker specifically tells the advisor that the money is derived from the shipments and that the advisor will receive a 10% share of future racketeering profits if he invests the current and future profits in legitimate businesses. If the advisor proceeds to invest the money and receives the profits, can he be prosecuted under § 1962(a)? Applying the "stake in the enterprise" test, the advisor would be liable since, at the time of his investment activities, he had a share of the enterprise profits and intended to aid the racketeering by laundering the profits. The advisor could not be a principal in the two cocaine shipments occurring before his agreement with the trafficker since one cannot be a principal to a crime that has already occurred. *See, e.g.*, United States v. Shulman, 624 F.2d 384, 387 (2d Cir. 1980). As this hypothetical demonstrates, a person cannot act with a "stake in the enterprise" without violating § 1962(a) if the statute requires that the accused act as a principal to specific racketeering acts.

[124] United States v. Loften, 518 F. Supp. 839, 856 (S.D.N.Y. 1981). *See generally* Note, *supra* note 123. The *Loften* court's proposed intent requirement seems to apply only to § 1962(d). Whether § 1962(a) includes a mens rea requirement is an unresolved question. *See* Tarlow, *supra* note 1, at 180-83. The courts are split on the issue of intent in § 1962(c) cases. *See infra* text accompanying note 385.

The investor or recipient who is not involved in racketeering should be immune from RICO liability under either an aiding-or-abetting theory or a conspiracy theory. Where Congress specifically intends to exclude a class of people from liabiiity for an offense, as it did with section 1962(a), a person in that class is also exempt from conspiracy and aiding-or-abetting liability.[125]

2. *Proof of a Section 1962(a) Violation.* Theoretically, it may seem difficult to prove a section 1962(a) violation because of the need to trace the racketeering funds into the enterprise.[126] When the defendant commingles racketeering income with substantial amounts of legitimate income, the Government could encounter difficulty in determining which was the source of money invested in an enterprise.[127]

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[125] *See* Gebardi v. United States, 287 U.S. 112, 123 (1932) (the Court held that where Congress intended to exempt a woman from the Mann Act, she could not be guilty of conspiracy); United States v. Nasser, 476 F.2d 1111, 1118-20 (7th Cir. 1973) (statute prohibiting an ex-employee of the Federal Government from acting as attorney for a client in a matter he had personally participated in as an IRS employee did not provide for punishment of the client; therefore, neither the client nor the attorney could be charged with conspiracy to violate the statute).

[126] Ironically, the chief counsel to the Senate Subcommittee that drafted Title IX, Professor Blakey, believed that § 1962(a) is ineffective, because of the difficulty in uncovering evidence of how much illegitimate income has been gained by the defendant through racketeering activity. Blakey & Goldstock, *supra* note 4, at 356-57.

[127] Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491, 1511 n.97 (1974).

The Government may attempt to adopt theories originating in tax prosecutions. One widely employed theory is the "net worth" method under which the Government attempts to establish the total net value of the taxpayer's assets at the beginning and at the end of a given year. The taxpayer's nondeductible personal expenditures are added to the increase in net value. If this figure is substantially greater than the taxable income reported by the taxpayer, the excess may be considered unreportable taxable income. *See* Holland v. United States, 348 U.S. 121 (1954). The major difficulties encountered by the Government are proving a "firm" opening net worth (an approximation is not sufficient), *id.* at 132, and proof that either (1) the defendant had a likely source of illegal income or (2) the accused had no source of legal income. *Cf.* United States v. Costanzo, 581 F.2d 28, 32 (2d Cir. 1978) (Government successfully negated all possible sources of nontaxable income).

In tax cases, variations on the net worth theory have been developed: (1) the "expenditures" method under which the Government establishes the total cash expenditures, deducts reported income and nontaxable income, and produces a figure for unreported income, *see, e.g.*, Taglianetti v. United States, 398 F.2d 558, 562-63 (1st Cir. 1968); and (2) the "bank deposits" method under which the Government computes bank deposits exceeding reported income, an opening cash balance, an income source capable of producing receipts, and exceeding the reported income, *see, e.g.*, United States v. Slutsky, 487 F.2d 832, 836-37 (2d Cir. 1973). A third tax method, developed independently of the net worth concept, is the "specific items" method under which the Government directly proves that a specific deduc-

Surprisingly, the few section 1962(a) cases indicate that in practice tracing is not an insurmountable problem for the Government even in complex factual situations such as *United States v. Cauble*, which involved over $150,000,000 in assets.[128] For example, tracing was successful in *United States v. McNary*,[129] where the $103,000 enterprise investment was made from an account containing commingled funds that included $65,000 in racketeering income. In *McNary*, there was not enough "clean money" in the account to permit the defendant to invest without the illegal funds.

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tion or item of income was misstated or omitted on the tax return. *See, e.g.*, United States v. Rosenstein, 474 F.2d 705, 708-09 (2d Cir. 1973).

A recent legislative proposal, vetoed by the President, authorized a presumption of forfeitability under Title 21 of the *United States Code*. *See* S. 2320, 97th Cong., 2d Sess. (1982). Any property acquired during or shortly after a drug violation would have been presumed to be forfeitable if the defendant's legal sources of income were substantially insufficient to cover the purchases. *Id.*

[128] In United States v. Cauble, L.A. Times, Nov. 29, 1981, at 1, col. 1, tracing was successful even in a complex case. The Government succeeded in forfeiting between $40,000,000 and $80,000,000 in assets, which included bank accounts and a number of businesses and ranches. The Government was able to establish that $400,000 was derived from illegal transactions. *Id.*

Cauble amassed this wealth in the oil business by starting at age 17 as a roughneck and eventually buying a drill oil rig on credit. Ultimately, Cauble's holdings included large stock interests in three banks, a steel fabricating plant, a horse trailer company, a welding supply company, and six ranches in five counties. Cauble's prize possession was a golden palomino named Cutter Bill. To ensure that Cutter Bill lived comfortably, Cauble built a horse barn that was longer than a football field and wider than a freeway. Cauble later named his legendary clothing stores after his horse. *Id.*

The Government alleged a marijuana operation combining a Columbian source with Texas cowboy smugglers. The marijuana was off-loaded in Texas from shrimp boats. The evidence focused on the activities of "Muscles" Foster, a ranch hand who was both an employee and a friend of Cauble. Foster and another cowboy, Raymond Hawkins, arranged the marijuana shipments until a November, 1978, venture collapsed, resulting in the indictment of 24 people and the seizure of a 73-foot trawler, three trucks, and approximately 40,000 pounds of marijuana. Although nine defendants were convicted in the first trial, Muscles was found not guilty by reason of insanity. In a subsequent trial Cauble was convicted despite evidence that he refused to hire job applicants who had used drugs. *Id.*

[129] 620 F.2d 621 (7th Cir. 1980). In *McNary*, the prosecution alleged that the defendant, a mayor of a town, received payments from building developers in return for his exercise of influence with a zoning board to ensure favorable zoning. The § 1962(a) count arose from the defendant's investment of the proceeds in an enterprise, Ports of Call. The investment in Ports of Call was indirect since the proceeds were first deposited in an account of the mayor's business, B & M. The money from that account was subsequently transferred to Ports of Call. Even though the illegal money in the B & M account was commingled with legitimate income, the court held that this indirect investment was a violation of § 1962(a) because the $65,000 racketeering proceeds enabled the mayor to invest $103,000 in Ports of Call. *Id.* at 629.

The case, therefore, does not resolve the far more complex problem that occurs when $20,000 of dirty money is deposited in an account with $150,000 in clean money, $25,000 in intervening withdrawals occurs, and then $40,000 is invested in a legitimate business. The problem is not as difficult in cases where defendants do not have a large source of legitimate income to cover the expenditures. Juries will generally conclude that funds are obtained from racketeering acts when a defendant does not have a significant source of income.[130]

The tracing problem was more complex in *Balistrieri v. United States*,[131] which dealt with the question of whether the affidavits in support of a search warrant were sufficient to establish probable cause for a section 1962(a) violation. The affidavits included statements by Jimmy "the Weasel" Fratianno and three confidential sources. The defendant was Frank Balistrieri, the alleged head of the Milwaukee Chapter of La Cosa Nostra. Confidential source number three stated that Balistrieri owned various businesses and operated them through front people. Balistrieri paid bills incurred by the businesses from a general fund derived from all of his businesses, including illegal businesses. Confidential source number one confirmed this point. In addition, Fratianno stated that Balistrieri referred to receiving a "transfusion" for the operation of his business. The court held that this established probable cause to believe that section 1962(a) was violated.[132] The fact that a probable cause standard was involved may have obscured the fundamental problem of whether section 1962(a) applies to commingled funds. In this case, Balistrieri allegedly created a general fund that apparently commingled illegal and legal funds.

In the context of a RICO civil action, *Spencer Cos. v. Agency Rent-A-Car, Inc*,[133] a district court dismissed a pretrial challenge to a section 1962(a) count. The complaint alleged that the defendant filed misleading statements with the Securities and Exchange Commission in connection with its 1980 acquisition of $4,000,000 of Gateway stock. In February, 1981, the defendant al-

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[130] 620 F.2d at 628-29. One consequence of this phenomenon is that the Government encourages federal prosecutors to insist on jury trials on forfeiture issues rather than submitting the issue to the trial judge. *See* CRIMINAL FORFEITURES, *supra* note 61, at 18.

[131] 517 F. Supp. 935 (E.D. Wis. 1981).

[132] *Id.* at 941.

[133] [1981-1982] FED. SEC. L. REP. (CCH) ¶ 98,361 (D. Mass. Nov. 17, 1981).

legedly sold the Gateway stock for $6,000,000 and in the same month began acquiring the plaintiff's stock. The court held that these allegations stated a cause of action under section 1962(a) and rejected any requirement that the plaintiff show direct use of racketeering income to acquire an interest in the enterprise.[134] *McNary, Balistrieri,* and *Spencer Cos.* seem to indicate that courts are willing to find a cause of action under section 1962(a) no matter how complex and tenuous the tracing problem may be.

B. Section 1962(b)

Section 1962(b) applies to the acquisition of an interest in an enterprise through a pattern of racketeering rather than by the income derived from that activity. In practice, section 1962(b) prosecutions involve relatively simple fact patterns in which the defendant is charged with "muscling" into businesses through loansharking, bribery, extortion, or fraud. One of the few illustrations of a section 1962(b) offense is provided by the Second Circuit decision in *United States v. Jacobson,*[135] which involves the relationship between a financially troubled bagel bakery and a local loanshark, Jacobson. Jacobson made a series of usurious loans to the bakery, and, as security for a $15,000 loan, he received an assignment of the bakery's lease, which constituted the acquisition of an enterprise interest in violation of section 1962(b).

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[134] *Id.* at 92,215.

[135] 691 F.2d 110, 113 (2d Cir. 1982). The defense contended that the acquisition of the lease was not an acquisition of an "interest" and a "control" within the meaning of § 1962(b), which provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." The court rejected this argument and held that the lease was an interest in the enterprise under a broad view of the word "interest." *Id.* at 113. Some courts have regarded the term "interest" in RICO as connoting a capital interest in the enterprise, *see supra* note 62, a view implicitly in conflict with *Jacobson.* Arguably, the lender had an interest in the real property on which the enterprise was located without having a capital interest in the bakery itself. *Jacobson* further held that either the acquisition of the lease or the eviction could be regarded as the acquisition of control. *Id.* at 112. Although this holding seems to have some merit, it does serve as a reminder of the troubling ambiguity of § 1962(b). Specifically, it is not clear what constitutes "control" under § 1962(b). Is it enough merely to have some influence over the enterprise's affairs or must the defendant have something akin to majority control of the enterprise? Had Congress intended the broader view of "control," it would have drafted § 1962(b) to proscribe the acquisition of a "source of influence," the language used in § 1963(a).

V. Section 1962(c)

Section 1962(c) is the most frequently litigated offense applying to operation of an enterprise through a pattern of racketeering. The question of what constitutes an enterprise has been the most frequently litigated issue in section 1962(c) cases. The focal point of any analysis of an "enterprise" problem is the broad and ambiguous definition of enterprise in section 1961(4): "[E]nterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . ."[136]

A. Enterprise

1. Operation of Illegal Enterprise.

a. The Turkette *decision.* Prior to the Supreme Court opinion in *United States v. Turkette*,[137] the key issue involving the definition of enterprise was its applicability to illegal enterprises. The Government contended that the absence of any language limiting the term "enterprise" to legitimate organizations authorized prosecutions of those who illegally operate an illegal enterprise as well as those who illegally operate a legitimate one. The majority of courts permitted the Government to allege violations of section 1962(c) based on illegal activities unrelated to the acquisition or operation of legitimate entities such as businesses or unions.[138] Most commentators sharply criticized this view.[139]

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[136] 18 U.S.C. § 1961(4) (1976).

[137] 101 S. Ct. 2524 (1981), *rev'g* 632 F.2d 896 (1st Cir. 1980).

[138] *See, e.g.*, United States v. Sutton, 642 F.2d 1001, 1008 (6th Cir. 1980) (en banc), *rev'g* 605 F.2d 260 (1979), *cert. denied*, 452 U.S. 912 (1981); United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980); United States v. Rone, 598 F.2d 564, 568-69 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748, 754 n.3 (5th Cir. 1978), *cert. denied*, 440 U.S. 962 (1979). *But see* United States v. Turkette, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981); United States v. Anderson, 626 F.2d 1358 (8th Cir. 1980); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979).

[139] *See* Tarlow, *supra* note 1, at 191-99; Note, United States v. Sutton, *The Sixth Circuit Curbs Abuse of RICO: The Federal Racketeering Enterprise Statute*, 28 Cleve. St. L. Rev. 629 (1979); Note, *Statutory Interpretation—Racketeer Influenced and Corrupt Organizations Statute (RICO) Applies Only to "Legitimate" Enterprises:* United States v. Sutton, 11 U. Tol. L. Rev. 685 (1980); Comment, *The Scope of Title IX*, *supra* note 3; Comment, *The Enterprise Element*, *supra* note 3; Comment, *The Legitimate-Illegitimate Controversy*, *supra* note 3; Comment, *Runaway RICO*, *supra* note 3. *But see* Note, *The Liberal Construction Clause*, *supra* note 4, at 184-90; Note, *The Racketeer Influenced and Corrupt Organizations Act: Proscription of Illegitimate and Criminal Enterprises*, 10 Mem. St. U.L.

The majority view established in the cases was upheld by the Supreme Court decision in *Turkette*. The Court's decision was based primarily on the belief that the term "enterprise" was unambiguous and clearly included illegal operations.[140] Unfortunately, the Supreme Court failed to demonstrate the clarity of the "enterprise" concept by providing a workable test for determining when an individual or group of people engaged in illegal activities becomes an enterprise.

The Court implied that the commission of two racketeering acts by the same person or group of people does not by itself establish the existence of an illegal enterprise.[141] Other than this cautionary language, the Court's explanation of enterprise was limited to descriptions of an enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct"; and "an ongoing organization, formal or informal," in which "the various associates function as a continuing unit."[142]

b. Decisions construing Turkette. With this meager guidance, the lower courts must determine the factors that transform a per-

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Rev. 633 (1980); Note, *Construing Legislative History*, *supra* note 4, at 789-94.

[140] 452 U.S. 576, 580-87 (1981).

[141] *Id.* at 583 n.5.

[142] *Id.* at 583. One practical effect of the *Turkette* enterprise standard is to broaden the admissibility of otherwise prejudicial evidence. This point is illustrated by United States v. Dickens, 695 F.2d 765 (3d Cir. 1982). In *Dickens*, the 17 defendants were members of the "New World" religious organization, an offshoot of the Black Muslims. The leader of the group was an inmate of Rahway State Prison, who recruited other inmates to commit "missions," i.e., armed robberies. The group was a hierarchical paramilitary group with ranks ranging from "general," "major," "minister," and "captain" to "lieutenant" and "soldier." The defendants pooled the stolen money to purchase land in South Carolina where they were to establish a separatist community. After two rehearsal robberies of Cooper's Liquor Store and Smitty's Bar, the defendants conducted 12 armed bank robberies within a seven-month period. During one robbery, a police officer was killed. *Id.* at 771.

The defendants objected to the allegation of the New World religious organization as a RICO enterprise. However, this claim was seemingly based on the first amendment rather than on any claim that it could not be an enterprise as a matter of statutory construction. The first amendment argument was that the allegation of the "New World" as an enterprise chilled first amendment rights by effectively placing their unpopular religious beliefs on trial. The defendants claimed that the Government should have employed a simple group-of-associated-individuals enterprise without making reference to the religious goals of the New World. *Id.* at 772.

The *Dickens* court rejected this argument, holding that it was impossible for the Government to avoid the religious aspect of the enterprise. To prove an illegal enterprise, the Government would have to establish the existence of a "common purpose" and the New World's religious beliefs supplied this purpose. *Id.* at 773.

son or group into an enterprise. In addition to *Turkette*, some insights into the enterprise concept can be derived from the definition of "enterprise" in 29 U.S.C. § 203(r) of the Fair Labor Standards Act.[143] This definition of "enterprise" seems to require proof of three elements: (1) a relationship between the enterprise activities; (2) the existence of a "unified operation or common control"; and (3) the existence of a common business purpose. An additional factor may be the existence of a high degree of organization and structure. This factor is of paramount importance in Supreme Court case law on the applicability of the fifth amendment to the records of an organized entity.[144]

The Fourth Circuit opinion in *United States v. Griffin*[145] contains an extensive discussion of what constitutes an illegal enterprise after *Turkette*. In *Griffin*, the indictment charged section 1962(c) and (d) violations based on bribery of Baltimore police officers to protect gambling operations. The defendants were the bookmakers who made protection payments, and the enterprise was an illegal association of bookmakers. The enterprise purportedly began when defendant Garonzik made payments to an officer on behalf of a gambling operation run by defendant Diamond. Diamond told the officers that another gambling operation employing defendant Baumgarten would also make protection payments. Baumgarten subsequently paid $1,000 to the officers. Garonzik informed the officers that a third gambling operation run by Griffin wished to make protection payments, and Griffin subsequently made these payments.

The defendants in *Griffin* claimed that neither a conspiracy nor an illegal enterprise could be established where each bookmaker was concerned only with protecting his own gambling operation.[146] The court's analysis of this claim focused on the nature of a RICO enterprise. Citing *Turkette*, *Griffin* posited two types of enterprises: legal entities and associations in fact.[147] The court believed that there is no problem with proving a legal enterprise aside from proving its legal existence.[148] With respect to legal entities, the

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[143] 29 U.S.C. § 203(r) (1976).
[144] *See* Bellis v. United States, 417 U.S. 85, 94-101 (1974).
[145] 660 F.2d 996, 997-98 (4th Cir. 1981).
[146] *Id.* at 998.
[147] *Id.* at 999.
[148] *Id.*

court stated that "[n]either the actual nor ostensible purpose" is directly relevant proof of a RICO violation.[149] The court then discussed proof of an illegal enterprise and concluded that *Turkette* requires that an illegal enterprise have a "separate existence."[150] The court reasoned that separate existence could be determined from the purpose and composition of the association as controlling factors.[151]

The court commented that the RICO illegal enterprise was intended to remedy the problem of proving a traditional conspiracy by creating an association that is less difficult to prove.[152] The court, however, noted that neither conspiracy nor illegal enterprise can result in guilt by association and that RICO can reach only "purposeful associations of individuals."[153] The *Griffin* court required proof of a "common purpose," which can be established by evidence of a continuing unit characterized by "continuity, unity, shared purpose and identifiable structure."[154]

Although the question was a close one under the facts of *Griffin*, the court held that the jury could find that there was a common purpose to corrupt the police department.[155] Presumably, a significant factor in this decision was that defendants Garonzik and Diamond facilitated the making of protection payments by the other defendants. Had there been a "wheel" operation in which each bookmaker was unaware of the protection payment by other bookmakers,[156] the result should have been different.

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[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.* at 999-1000. This remark is based on the fictitious notion that Congress was aware that RICO created the illegal-enterprise concept when RICO was enacted. In fact, Congress was unaware of this concept and therefore was unaware that traditional conspiracies were being undermine ' by the RICO illegal enterprise. *See supra* text accompanying notes 202-05.

[153] *Id.* at 1000.

[154] *Id.* The conceptual difficulty in ment in *Griffin* is its differing proof requirements for legal entities and enterprises based on a group of associated individuals. The existence of a single definition of enterprise in § 1961(4) implies a single standard for proving any enterprise. *Griffin* creates two definitions of "enterprise" where only one existed before.

[155] *Id.* at 1000-01.

[156] *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 773-74 (1946). The major ambiguity in the *Griffin* holding is whether conspiracy principles are fully applicable to an illegal enterprise. Specifically, it is unclear whether proving a common purpose uniting an illegal enterprise is the same as proving a common agreement under conspiracy law.

Griffin has established the prevailing post-*Turkette* approach to the illegal enterprise problem. Under this approach, the requirements of *Turkette* are satisfied where a continuing entity is established by proof of facts independent of the racketeering pattern. For example, the Ninth Circuit applied this analysis in *United States v. De Rosa*,[157] which involved a relatively simple two-defendant drug enterprise charged under section 1962(c). In rejecting a series of challenges to the RICO count, the court considered the question of whether the ongoing relationship between the two defendants established the *Turkette* requirement of a continuing organization. The court held that this requirement was satisfied by facts independent of the pattern, including the following: (1) the two defendants had been associated for a long period of time; (2) on numerous occasions they sought to introduce undercover agents to drug sources in return for a percentage of profits; (3) they demanded payments from the agents for introducing the agents to drug sources and permitting the agents to distribute drugs in Los Angeles; and (4) one defendant attempted to provide an agent with a crew to facilitate drug distribution.[158]

Some guidance on the appropriate instructions for an illegal enterprise case is provided by *United States v. Errico*.[159] In *Errico*, the defendant was accused of bribing jockeys to hold horses and then informing bettors. The group of jockeys and bettors was the alleged enterprise. Judge Weinstein instructed the jury that an enterprise must continue in an "essentially unchanged form" during the alleged pattern, an element established when the core personnel remained the same.[160] The Second Circuit approved this instruction and held that the enterprise consisting of jockeys and bettors met this standard.[161] The court noted that the group of jockeys and the group of bettors were connected by a "community

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[157] 670 F.2d 889 (9th Cir. 1982).

[158] *Id.* at 896.

[159] 635 F.2d 152, 153-54 (2d Cir. 1980).

[160] The instruction read as follows:

> You may find that a group of individuals joined together to fix horse races is an enterprise as defined by this section. That enterprise must continue in an essentially unchanged form during substantially the entire period charged in the indictment. . . . Essentially unchanged. It doesn't mean that everybody has to be the same. Essentially, the core of it has to be the same throughout the period.

Id. at 155.

[161] *Id.* at 155-56.

of interest," profiting from illegal fixing of races, and "continuing core of personnel."[162]

c. Eighth Circuit cases. The Eighth Circuit definition of "enterprise" in *United States v. Anderson*,[163] which requires that an enterprise have some formal structure,[164] has been adopted in the Justice Department guidelines.[165] In *Anderson*, two Arkansas county administrators allegedly received kickbacks from a person selling construction goods to the counties in return for the defendants' approval of payment for goods that were never received. The court reversed the convictions where the alleged enterprise was a group of individuals (the two defendants and a prosecution witness). The illegal enterprise allegation failed to satisfy the court's requirement that the enterprise have "an ascertainable structure" that is directed toward an economic goal that can be

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[162] *Id.* at 156. The court reasoned:

> Errico's organization here satisfies RICO's enterprise requirement. A circle of jockeys . . . who were joined through Errico with a circle of bettors . . . regularly attempted to profit and did profit from the illegal fixing of races. The two circles came together and continued to operate with that single, illegal purpose from at least August 1974 through March 24, 1975. That community of interest and continuing core of personnel provides the "group of individuals associated in fact" that is required for a RICO conviction.

Id. at 156.

[163] 626 F.2d 1358 (8th Cir. 1980). *Anderson* was decided before the Supreme Court opinion in *Turkette* and consequently cannot be regarded as an authoritative interpretation of *Turkette*. Nevertheless, the Government seems to regard *Anderson* as persuasive authority, a fact demonstrated by its incorporation in the Justice Department Guidelines and the Justice Department's decision not to petition for certiorari in *Anderson*.

[164] The pivotal language in *Anderson* was the following:

> We hold that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity", as used in its definition of the term "enterprise" in section 1961(4), 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 existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity."

Id. at 1372.

[165] *See* Zuckerman, *Department of Justice's RICO Guidelines*, CHAMPION, Jan.-Feb. 1982, at 10. Justice Department Guideline VI essentially restates the language in *Anderson*:

> VI. No RICO Count Of An Indictment Shall Charge The Enterprise As A Group Associated In Fact, Unless The Association In Fact Has An Ascertainable Structure Which Exists For The Purpose Of Maintaining Operations Directed Toward An Economic Goal, That Has An Existence That Can Be Defined Apart From The Commission Of The Predicate Acts Constituting The Patterns Of Racketeering Activity.

UNITED STATES ATTORNEY'S MANUAL § 9.110.101 (Jan. 30, 1981).

defined apart from the predicate offenses.[166]

The *Anderson* holding is not free of ambiguity. It is unclear whether *Anderson* requires a focus on the existence of some transcendent economic goal or on the cohesive nature of the group itself. If proof of a distinct economic goal is sufficient, *Anderson* might not pose a significant problem of proof since that goal might simply be defined in every case as the intent to make money through repeated acts of racketeering. An "economic goal" test would preclude only RICO prosecutions of those operating militant political or religious enterprises that are not primarily directed at making money. For example, the Second Circuit in *United States v. Ivic*[167] reversed the RICO convictions of four Croation nationalist defendants who belonged to a group called OTPOR, an organization advocating the separation of Croatia from Yugoslavia and who were charged in a section 1962(d) count with operating a group of associated individuals through a pattern of abortive murder and arson attempts. Although a literal interpretation of the definition of "enterprise" in section 1961(4) supported the Government, the court examined the legislative history and existing case law and found that neither factor authorized the application of RICO to militant political groups. The court held "that when an indictment does not charge that an enterprise or the predicate acts have any financial purpose, it does not state a crime under § 1962(c)."[168] Assuming that the proper focus is on the cohesiveness

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[166] *See supra* note 164.

[167] United States v. Ivic, No. 81-1350 (2d Cir. Jan. 25, 1983). The defendants were convicted on the RICO counts and on five counts alleging the various predicate offenses but were acquitted on one of the arson attempt counts. *Id.*, slip op. at 1411-12.

The defendants' first alleged target was Joseph Badurina, a journalist who supported Croatian independence but opposed the violent tactics of OTPOR. The defendants planned to shoot Badurina from the rear window of a parked van. The FBI disrupted this plot before it came to fruition. *Id.* at 1414-16.

Subsequently, three of the defendants began acquiring dynamite and planning various bombings, the first of which was to be directed at a studio hosting a Yugoslavian Independence Day party. Yugoslavian diplomatic officials were expected to attend the party. The bomb was not placed because, as one defendant explained, "There was no place to park. And at the last moment you have to put that thing together . . . ." *Id.* at 1417. A second bombing was planned for a travel agency that specialized in arranging trips to Yugoslavia. This scheme was aborted when the defendants discovered loose wires indicating Government electronic surveillance.

[168] *Id.* at 1439. *Ivic* is a relatively simple case because the attempted murder and arson attempts produced no income. The harder problem, on which the *Ivic* court expressly refused to rule, *id.* at 1430 n.6, is one in which the political group engages in income-produc-

of the group, this test may be difficult to apply to most criminal ventures, which are generally unstable groups of people who occasionally come together for criminal activity. The test would be satisfied by illegal enterprises such as La Cosa Nostra[169] or dissident

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ing crimes but uses the money to further their political goals. The central ambiguity in *Ivic* is that the requirement of a "financial purpose" may attach to either the "enterprise" element or the "pattern" element. The difficult situation on which *Ivic* reserved judgment is where the pattern has a financial purpose but the enterprise does not. Virtually the entire analysis in *Ivic* focuses on whether the enterprise must have an economic purpose and indicates that the defendants might prevail even if the predicate offenses are crimes such as robbery or extortion. For example, the court's interpretation of the *Turkette* decision seemed to focus on whether the defendants' acts pose a threat to infiltrate legitimate businesses; that threat is probably minimal where the robberies or extortions do not produce income for commercial investment purposes but produce income only to further the defendants' political goals. *Id.* at 1426-39.

It can, however, be persuasively argued that the requirement of a financial purpose attaches only to the pattern; if the racketeering acts are intended to produce income, it is irrelevant that there is some larger goal for which the money will be used. It makes no sense to require that the enterprise have a financial purpose since many commonly accepted RICO enterprises such as police departments and courts do not have that purpose. *See, e.g.*, United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979) (police department); United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979) (city traffic court). However, it may be difficult to reconcile this interpretation with the basic thrust of the *Ivic* analysis focusing on the applicability of RICO to nonincome-producing enterprises.

These problems will be confronted in United States v. Ljubas, No. 81 Cr. 402 (S.D.N.Y. June 30, 1982) (available on LEXIS Genfed library, Dist file), involving a second RICO indictment of OTPOR members. In *Ljubas*, group members were charged with various acts of violence and arson to extort money and to promote their political views. The defendants allegedly stockpiled bombs, machine guns, rifles, silencers, and ammunition. They allegedly murdered those who failed to make extortion payments and those who opposed OTPOR or its methods. In addition, OTPOR members committed arson against those individuals. In the course of these activities, OTPOR members allegedly traveled to New York, Connecticut, Scotland, and West Germany to provide information and bomb construction. Further complicating the case was evidence barred by the trial judge that the Los Angeles police had discovered that one victim of OTPOR was a Yugoslavian agent bent on killing OTPOR members. Ultimately, 5 of the 10 defendants were acquitted on RICO charges. *Id.*

Ultimately, there is considerable merit to the view that if either the enterprise or the racketeering acts have a financial purpose, a RICO count is appropriate. This resolves a problem not discussed in *Ivic*: a profit-making enterprise may be engaged in racketeering acts that have no direct financial purpose. For example, members of an illegal gambling operation may kill a person in retaliation for testimony given by the victim against the gambling operation. Although the individual murder predicate offense may be motivated by vengeance rather than a desire to make money, it is absurd to hold that this act must be excluded from the RICO count where it is committed pursuant to a profit-making illegal enterprise.

[169] *See, e.g.*, United States v. Brooklier, 685 F.2d 1208 (9th Cir. 1982) (RICO indictment alleging operation of an enterprise described as the "Los Angeles Family of La Cosa Nostra," a family described in other circles as the "Mickey Mouse Mafia," *see supra* note 33), *discussed in* Marks, *Anatomy of a R.I.C.O. Prosecution*, CHAMPION, Jan.-Feb. 1981, at 7.

political groups such as the Weather Underground, which has been prosecuted for a series of robberies,[170] and which possesses far more formal structures than most criminal ventures.

The Eighth Circuit decision in *United States v. Bledsoe*[171] clarified the *Anderson* test and applied that standard to an extremely complex scheme of securities-fraud violations that involved several corporations and agricultural cooperatives. The alleged scheme involved the sale of an annuity contract called an estate builder. In the summer of 1972 defendant Phillips and Gibson, an attorney who became the Government's star witness, formed an agreement to sell these securities through agricultural cooperatives and to divide the profits. Pursuant to this agreement Phillips and Gibson formed UFA-Mo., a cooperative that had no significant business other than selling the estate builder security. In April, 1973, Phillips and Gibson terminated this relationship with Phillips leaving UFA-Mo. and Gibson continuing to operate UFA-Mo. until June,

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The defendants were charged with obstructing justice through the murder of Frank Bompensiero who was allegedly both head of the San Diego La Cosa Nostra and an FBI informant. In addition, the defendants were charged with the extortion of an FBI undercover business purporting to deal in imported South American pornographic films. The prosecution's major witness was the notorious Jimmy "The Weasel" Fratianno. Prior to the return of the indictment, federal officials leaked information to a national magazine concerning Fratianno's credibility and the imminent grand jury indictment. Marks, *supra*, at 7. Two indictments were dismissed for grand jury irregularities involving the number of grand jurors present when evidence was presented. *Id.* Further complicating the case was an alleged scheme involving Carlos Marcello to bribe the trial judge. *Id.* Ultimately, the defendants were acquitted of any involvement in the Bompensiero murder but were convicted on the RICO conspiracy count based on the jury's apparent confusion of overt acts with racketeering acts. *Id.* at 10. According to the circuit court, however, confusion, if any, helped the defendant. 685 F.2d at 1214. One issue on appeal involves repeated Government misrepresentations that certain defendants were implicated in the FBI sting operation. These false statements provided the basis for the trial court's denial of severance motion. Only during closing argument did the Government concede the falsity of its allegations. *See also* United States v. Tieri, No. 80-381 (S.D.N.Y. June 15, 1980).

[170] *See* N.Y. Times, Nov. 24, 1982, at B1, col. 2. The Government alleged a RICO illegal enterprise against members of the May 19 communist organization, a combination of the Weather Underground and the Black Liberation Army. The alleged pattern consisted of armored car robberies, three murders occurring in the course of the last robbery, and a 1979 New Jersey prison escape. The group allegedly used the proceeds of successful robberies to finance a collection of apartments and other residences known as "safe houses." The operation came to an end in an October 20, 1981, attempt to rob a Brink's truck in which the defendants allegedly attacked the truck, killed a guard, and escaped with $1.6 million. Shortly thereafter, they allegedly killed four police officers in a gun battle at a police roadblock.

[171] 674 F.2d 647 (8th Cir. 1982).

1975.

After the separation Phillips established PFA, another cooperative formed to sell securities. Phillips hired defendants Bledsoe, Burkes, and Cloninger and agreed that they would evenly share all profits derived from PFA. In addition, PFA hired defendants Moffitt and Stafford as salesmen. In May, 1975, Phillips and Gibson agreed to form a partnership to organize cooperatives in other states. Phillips received a share of Gibson's profits in these ventures. Gibson and Moffitt participated in the formation of a cooperative, UFA-OK, which sold the estate builder security. Stafford was also involved in UFA-OK sales activities. In November, 1975, Gibson participated in the formation of an Arkansas cooperative CFA, which hired Moffitt to sell estate builders.

The Government alleged that these cooperatives were used to divert revenue to the principal figures or their personal corporations.[172] The RICO counts charged under section 1962(c) and (d) contained over 150 predicate offenses and alleged an illegal enterprise consisting of an association in fact of twenty-two individual defendants.

The Eighth Circuit reversed the RICO convictions because the Government had not established the enterprise element.[173] In deciding the "enterprise" issue, the court rejected the Government's argument that any confederation, no matter how loose or temporary, can constitute an enterprise.[174] The court implicitly criticized the Seventh Circuit's decision in *United States v. Aleman*,[175] which seemed to permit a RICO prosecution of any association of individuals sporadically committing crimes.[176] The Eighth Circuit viewed RICO as directed at "organized crime" in the sense of crim-

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[172] *Id.* at 654.

[173] *Id.* at 667.

[174] *Id.* at 662.

[175] 609 F.2d 298 (7th Cir. 1979).

[176] 674 F.2d at 662. Although the central issue in *Bledsoe* was the question of what constitutes an enterprise, the court also expressed "grave doubts" as to the validity of opinions rejecting a common-scheme interpretation of pattern, *see* United States v. Weisman, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980), cases finding association with an enterprise based on indirect and tenuous participation, *see* United States v. Elliott, 571 F.2d 880, 903 (5th Cir. 1978), and cases rejecting a mens rea requirement, *see* United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980). *Bledsoe*, 674 F.2d at 661.

inal activities characterized by a level of organization above that of some "informal group created to perpetrate the acts of racketeering."[177] The court construed RICO as requiring proof "of some structure separate from the racketeering activity and distinct from the organization which is a necessary incident to the racketeering . . . ."[178]

The court specified three factors that characterized an illegal enterprise. With respect to the first factor, commonality of purpose, *Bledsoe* cautioned against undue emphasis on purpose and accurately observed that "[a]ny two wrongdoers who through concerted action commit two or more crimes share a purpose."[179] The court required proof of two factors in addition to common purpose: (1) continuity of both structure and personality (although the membership of an enterprise can change "if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before");[180] and (2) "'an ascertainable structure' distinct from that inherent in the conduct of a pattern of racketeering activity."[181] Citing the example of a La Cosa Nostra family, the court stated that this "structure" requirement could be established by proof "that a group engaged in a diverse pattern of crimes or that it has an organizational pattern or system of authority beyond what was necessary to perpetrate the predicate crimes."[182]

The *Bledsoe* opinion analyzed these factors in the context of the various stages of the alleged enterprise in the case. The initial stage, the agreement of Gibson and Phillips in 1972 to form the UFA-Mo. cooperatives, could not be regarded as the beginning of the charged enterprise because the agreement was dissolved in 1973.[183] The second stage involved the branching off of Gibson's UFA-Mo. operation from Phillips's formation of the PFA cooperative. The court held that the separate branches were not part of the same enterprise—there was no common purpose or entity that united UFA-Mo. and PFA.[184] The court also held that UFA-Mo.

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[177] 674 F.2d at 662-63.
[178] *Id.* at 664.
[179] *Id.* at 665.
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.* at 665-66.