An Introductory Examination of the Racketeer Influenced and Corrupt Organizations Act,

David E. Morris

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AN INTRODUCTORY EXAMINATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

I. Introduction

The Organized Crime Control Act of 1970 was enacted to help eradicate organized crime in the United States by providing law enforcement officials with sharper legal tools for gathering evidence, new substantive criminal prohibitions, more effective sanctions, and other novel remedies for unlawful activity. One of the substantive provisions of the Organized Crime Control Act is Title IX, which amends Title 18 of the United States Code by adding Chapter 96, entitled “Racketeer Influenced and Corrupt Organizations” (hereinafter RICO). RICO was originally conceived as a remedy for organized crime infiltration and control of legitimate business. However, since its enactment RICO has been criticized because it has been used as a weapon by the federal government to reach not only the legitimate business and illegitimate activities of organized crime but also white-collar crime unrelated to organized crime.


2 Examination of the legislative history of the Organized Crime Control Act shows Congress used the term “organized crime” to refer to the ethnic criminal association popularly known as the “Mafia” or “Cosa Nostra”, see infra notes 28-47. For a concise bibliography of Congressional inquiries into “organized crime” activities, see In re Grand Jury Subpoena of Persico, 522 F.2d 41, 46-49 (2d Cir. 1975). For background reading on ethnic concepts of organized crime, see generally D. CRESSEY, THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA (1969); F. IANNI, BLACK MAFIA: ETHNIC SUCCESSION IN ORGANIZED CRIME (1974); E. KEFAUVER, CRIME IN AMERICA (1951); P. MASS, THE VALACHI PAPERS (1968); R. SALERNO & J. TOMPKINS, THE CRIME CONFRERATION: COSA NOstra AND ALLIED OPERATIONS IN ORGANIZED CRIME (1969); THE PRESIDENT’S COMM’N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967) [hereinafter cited as REPORT: ORGANIZED CRIME].


4 Id. at §§ 1961-1968.

5 See infra notes 23-47 and accompanying text for legislative history of RICO; McClellan, supra note 1, at 140-46 (indicating Cosa Nostra infiltration of legitimate business was RICO’s intended target).

This metamorphosis into a weapon against white-collar crime and illicit business activity was possible because of RICO's unique provisions.8 RICO was designed not only to prosecute the individuals involved, but also to strike at the business or enterprise.9 To accomplish its objective RICO creates new criminal offenses and remedies,10 but does not criminalize previously innocent conduct. The crucial elements of a RICO offense are the proof of a “pattern of racketeering activity”11 coupled with an existing “enterprise”.12 “Enterprise” is a broad concept under RICO, and can be defined to include many diverse entities, including wholly illicit associations.13 A “pattern of racketeering activity” exists if there is a violation of any two or more enumerated existing state or federal offenses.14 RICO creates substantive offenses even though not complete and independent of other offenses,15 because its provisions create duties and obligations in addition to those created by the predicate offenses on which it relies.16 It is this reliance on the commission of these predicate offenses


9 The purpose of RICO is to “deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation.” United States v. Huber, 603 F.2d 387, 392 (2d Cir. 1979) (quoting S. Rep. No. 617, 91st Cong., 1st Sess. 78 (1969)), cert. denied, 445 U.S. 927 (1980).


11 Id. at § 1961(5) states that “pattern of racketeering activity” requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”

12 Id. at § 1961(4) states that “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.”

13 See infra notes 137-52 and accompanying text for a discussion of the breadth and scope of a RICO enterprise.


15 A substitute offense is “complete of itself and not dependent upon another.” BLACK'S LAW DICTIONARY 1281 (rev. 5th ed. 1979).

(offenses not exclusively restricted by their definitions\footnote{17} to commission by traditional organized crime groups\footnote{18}) that, in conjunction with the broad "enterprise" concept, enables prosecutors to apply RICO to many diverse types of organized and white-collar crime.\footnote{10} Recognition of RICO's adaptability and usefulness has not escaped the notice of state legislatures, several of which have enacted statutes modeled on RICO's provisions.\footnote{20}

This comment will attempt to serve as an introduction to RICO, addressed to those with little or no knowledge of either its provisions and intricacies, or its potential usefulness and adaptability as a prosecution tool. The recent criticism of RICO by the American Bar Association\footnote{21} will also be reviewed, as well as the ABA's proposed amendments to RICO.\footnote{22} Finally, the state RICO statutes will be discussed. The advantages they offer states currently without any substantive laws dealing directly and primarily with organized and white-collar crime will be examined.

\footnote{18}{See supra note 2 and its reference to the meaning of "organized crime."}
\footnote{19}{For examples of RICO's adaptability for use in prosecuting persons and reaching activities unconnected to traditional concepts of organized crime, see, e.g., United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) (judge of El Paso, Texas Municipal Court manipulated court docket and collected fees, along with several other persons, in exchange for favorable disposition of traffic citations); United States v. Peacock, 654 F.2d 339 (5th Cir. 1981) (individuals engaged in arson-for-profit and murder); United States v. Grapp, 653 F.2d 189 (5th Cir. 1981) (computer consulting company involved in intricate mail and wire fraud scheme); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981) (Florida state judge, court employees, and attorneys engaged in bribery, manipulation of grand juries, protection of illegal activities, and threats against prospective witnesses); United States v. Long, 651 F.2d 239 (4th Cir. 1981) (South Carolina state senator and other senate employees accepting bribes in exchange for state jobs); United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979), cert. denied. 100 S. Ct. 734 (1980) (individuals associated in fact to commit robbery and murder-for-hire); United States v. Forsythe, 594 F.2d 947 (3d Cir. 1979) (Allegheny County, Pa. magistrate and local bail bond agency engaged in bond fixing and referral kickback scheme); United States v. Hansen, 583 F.2d 325 (7th Cir. 1979), cert. denied, 439 U.S. 912 (1978) (father and son engaged with others in arson-for-profit scheme); United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied sub nom. Hawkins v. United States, 439 U.S. 953 (1978) (group involved in automobile theft, fencing stolen property, and murder).}
\footnote{21}{The Criminal Justice Section of the A.B.A. has a committee on RICO. The Criminal Justice Section Council recently approved a report of this committee recommending amendments to RICO. This report has been submitted and will be considered by the A.B.A. House of Delegates at the next meeting. If approved it will become official A.B.A. policy. Interestingly, the A.B.A. was in favor of RICO initially, recommending only minor amendments to Congress at the time of RICO's consideration. See Organized Crime Control: Hearings on S.30 Before the Subcomm. No. 5 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 537, 543-44, 548-51 (1970) (statement of Edward L. Wright, President-Elect, A.B.A.) [hereinafter cited as Organized Crime Control Hearings].}
The genesis of RICO is found in two Senate bills, S. 2048 and S. 2049, introduced in 1967 by Senator Hruska for use in fighting the infiltration and control of legitimate business by organized crime. These two bills proposed to combat organized crime through the use of antitrust law concepts and techniques, and the amendment of existing antitrust statutes. Neither bill, however, was reported out of committee, thus both perished with the adjournment of the 90th Congress.

On January 15, 1969, shortly after the start of the 91st Congress, Senator McClellan introduced S. 30, the Organized Crime Control Act of 1969. S. 30 attempted to implement some of the recommendations of the President's Commission on Law Enforcement and Administration of Justice, as well as providing other significant new tools to battle organized crime in America. As originally introduced S. 30 did not contain a RICO provision.

On March 20, 1969, Senator Hruska introduced S. 1623, the Criminal...
Activities Profits Act. This bill was a synthesis of S. 2048 and S. 2049, still using antitrust concepts, but seeking to add them to Title 18 (Crimes and Criminal Procedure) of the United States Code, instead of Title 15 (Commerce and Trade). After several days of hearings Senator Hruska joined Senator McClellan in introducing S. 1861, the Corrupt Organizations Act of 1969, which was based on the concepts of S. 1623, but contained broader and additional provisions. Additional hearings were held on S. 30, S. 1623, S. 1861, and related bills and it was decided to integrate S. 1861 into S. 30 as Title IX (RICO). S. 30 was considered, passed by the Senate, and sent to the House. After hearings S. 30 was amended in committee, considered, and passed by the House. Due to time constraints imposed by the impending conclusion of the 91st Congress, the Senate concurred in the House version of S. 30 without a conference. President Nixon signed the Organized Crime Control Act (including RICO) into law on October 15, 1970.

III. SYNOPSIS OF RICO'S MAJOR PROVISIONS

RICO's four criminal prohibitions are set forth in section 1962. Section 1962(a) directly addresses infiltration and control of legitimate

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36 Id.
37 Measures Relating to Organized Crime, supra note 27.
40 S. 30 passed the Senate by a vote of 73-1 on Jan. 23, 1970. Id. at 972.
41 Id. at 1103.
42 Organized Crime Control Hearings, supra note 21.
45 The vote was 341 to 26 on October 7, 1970. Id. at 35363.
46 Id. at 36280-36296.
47 Id. at 37264.
49 18 U.S.C. § 1962(a) (1976) provides, in pertinent part:

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 of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
businesses by prohibiting their legal acquisition with illegally-derived funds.\textsuperscript{50} Under section 1962(a), no person can use any income,\textsuperscript{51} or the proceeds of any income,\textsuperscript{52} derived directly or indirectly\textsuperscript{53} from a pattern of racketeering or any loan sharking activities in which such person participated as a principal,\textsuperscript{54} in order to establish, operate, or acquire any interest in

\textsuperscript{50} But 18 U.S.C. § 1962(a) (1976) may not be limited in application to only legitimate businesses. The Supreme Court, in the only RICO case it has decided on the merits, stated that although: “It is obvious that § 1962(a) and (b) address the infiltration by organized crime of legitimate businesses . . . we cannot agree that these sections were not also aimed at preventing racketeers from investing or reinvesting in wholly illegal enterprises and from acquiring through a pattern of racketeering activity wholly illegitimate enterprises. . . .” United States v. Turkette, 101 S. Ct. 2524, 2529 (1981).

\textsuperscript{51} 18 U.S.C. § 1961(3) (1976) states that, “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.” One court has held that “[i]t is clear from this definition that ‘individual’ is used differently from ‘person’ in the act to connote a living person.” United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1131 (E.D. Va. 1981). This would seem to preclude a group of corporations from fitting the enterprise definition under 18 U.S.C. § 1961(4) (1976), as they could not be a “group of individuals associated in fact” and their association may not fit within other parts of § 1961(4). However, the Computer Sciences court seems to read the definition too literally, for “includes” usually means that the list is illustrative and not exhaustive. See, e.g., Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 99-100 (1941); Highway & City Freight Drivers, Dockmen and Helpers Local Union No. 600 v. Gordon Trans., Inc., 576 F.2d 1285, 1289 (8th Cir.), cert. denied, 439 U.S. 1002 (1978). “Person” has been liberally construed to include diverse individuals and associations. See, e.g., United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 950 (1976).

\textsuperscript{52} The proof problems in tracing income are discussed at infra notes 57-59 and accompanying text. See generally Note, Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970, 83 YALE L.J. 1491 (1974) [hereinafter cited as Investing Dirty Money].

\textsuperscript{53} One of the few reported decisions concerning a § 1962(a) prosecution said, regarding this “directly or indirectly” language: These words demonstrate that the statute contemplates situations in which racketeering monies will not be directly or immediately employed to establish or operate interstate enterprise. Thus, the statute on its face does not require immediate or even direct use of illicit income . . . . Nor does it even require that the actual income itself be used or invested in an enterprise . . . . the statute is satisfied if the proceeds from such income are so used or invested. To require . . . . a direct employment of illicit income . . . . as a practical matter, would render the statute ineffective against the use of interim depositories, commingled funds, and other surrepticious accounting techniques designed to create significant obstacles to the tracing of illicit income.

United States v. McNary, 620 F.2d 621, 628 (7th Cir. 1980). See also Investing Dirty Money, supra note 52, at 1510-1514; Tarlow, supra note 8, at 183-84.

\textsuperscript{54} 18 U.S.C. § 2 (1976):

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The ABA Section of Criminal Justice has found this provision to be troublesome when it is read in conjunction with § 1962(a). It is unclear whether “participated in as a principal” in § 1962(a) modifies both “pattern of racketeering” and “collection of an unlawful debt,” or only “collection of an unlawful debt.” Criminal Justice Section Report, supra note 22, at 9. Other commentators have found the possibility of expanded liability resulting from the ambiguity unsatisfactory. See Tarlow, supra note 8, at 184-85; Investing Dirty Money, supra note 52, at 1496-97. The A.B.A. Criminal Justice Section recommends amending § 1962(a) to clarify that “participated as a principal” modifies both “pattern” and “collection.” Criminal Justice Section Report, supra note 22, at 9.

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any enterprise whose affairs affect interstate or foreign commerce. While the infiltration and control problem is directly addressed, the effectiveness of section 1962(a) is blunted by a major proof problem inherent within it. A key element of any prosecution for a violation of section 1962(a) is proof of the influx of "dirty" money into the enterprise. Since the tracing of illicit capital into the enterprise is itself a difficult task, and since it is equally difficult to demonstrate a tracing of illicit capital into an enterprise in open court, prosecutions under section 1962(a) are rare.

While section 1962(a) covers legal acquisitions with illegally-derived funds, section 1962(b) proscribes illegal takeovers through use of illegal means. Section 1962(b) prohibits any person from using a pattern of racketeering, or the collection of unlawful debt, to directly or indirectly acquire or maintain an interest in, or control of, any enterprise affecting interstate or foreign commerce. Thus, it covers illegal acquisition of an enterprise through use of extortion, bribery, fraud, loan sharking, or other racketeering acts. Unlike section 1962(a), there are no unusually diffi-

55 The prosecution must show that the enterprise, not the racketeering acts themselves, affects commerce, but the nexus need only be slight to establish an affect on commerce. See, e.g., United States v. Long, 651 F.2d 239, 241-42 (4th Cir. 1981), cert. denied, 50 U.S.L.W. 3278 (U.S. Oct. 13, 1981) (No. 81-281); United States v. Barton, 647 F.2d 224, 233 (2d Cir. 1981); United States v. Altomare, 625 F.2d 5, 8 & n.8 (4th Cir. 1980); United States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980).
56 See REPORT: ORGANIZED CRIME, supra note 2, at 4-5 for background.
57 "It shall be unlawful . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in . . . any enterprise which . . . [affects] interstate commerce." 18 U.S.C. § 1962(a) (1976).
58 For excellent discussions of this evidentiary horror, see Blakey & Goldstock, "On the Waterfront": RICO and Labor Racketeering, 17 AM. CRIM. L. REV. 341, 356-57 (1980); Tarlow, supra note 8, at 185-88; Investing Dirty Money, supra note 52, at 1510-14.
60 18 U.S.C. § 1962(b) (1976) states:
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.
62 See supra note 55.
63 See supra note 50 for a statement by the Supreme Court regarding the scope of § 1962(b). United States v. Turkette, 101 S. Ct. at 2529. The Court indicated § 1962(b) may not be limited to takeovers of only legitimate businesses.
cult proof problems inherent within section 1962(b), so it is employed more often than is section 1962(a).\textsuperscript{64}

Section 1962(c)\textsuperscript{65} is really the heart of section 1962, and it is used much more frequently than either 1962(a) or 1962(b).\textsuperscript{66} Section 1962(c) proscribes the illegal use of an enterprise by prohibiting any employee or any person associated with an enterprise from conducting or participating directly or indirectly in the conduct of the enterprise “through” a pattern of racketeering\textsuperscript{67} or collection of unlawful debt. Because “enterprise” is a broad concept, even including groups of individuals “associated in fact” for a wholly illicit purpose,\textsuperscript{68} section 1962(c) can be used in prosecuting a wide variety of white-collar, and other crime.

Interestingly, sections 1962(a)-(c) contain no \textit{mens rea} requirement beyond that necessary under each of the predicate offenses, and the few federal courts that have addressed this issue are in disagreement over what \textit{mens rea} RICO requires.\textsuperscript{69} Interestingly, some of the state RICO statutes include an element of scienter in addition to that contained within predicate


\textsuperscript{65} 18 U.S.C. § 1962(c) (1976): It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.


\textsuperscript{67} For discussion of the requirement of a nexus between the pattern of racketeering and the enterprises, see infra notes 153-155 and accompanying text.

\textsuperscript{68} Before the Supreme Court decision in United States v. Turkette, 101 S. Ct. 2524 (1981), the circuits were in conflict over the scope of a RICO enterprise, and whether illicit associations were also included. This is discussed further at infra notes 137-152 and accompanying text.

\textsuperscript{69} As introduced S. 1861, 91st Cong., 1st Sess. 6 (1969). Section 1962(a) of S. 1861, 115 Cong. Rec. 9512, 9568-71 (1969), required \textit{mens rea} but this requirement disappeared in later versions of RICO. Few federal courts have directly addressed the issue, and those that have are not in agreement over the \textit{mens rea} element. Compare United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), cert. denied, 101 S. Ct. 103 (1980), and United States v. Scotto, 641 F.2d 47, 55-56 (2d Cir. 1980), cert. denied, 101 S. Ct. 3109 (1981) where neither court required a scienter element beyond that required by the predicate offenses with United States v. Palmer, 630 F.2d 192, 203-04 (3d Cir. 1980), cert. denied, 101 S. Ct. 1520 (1981) which held that acts violating RICO must be voluntary, and so must be done knowingly.
offenses. The A.B.A. has recommended the addition of a scienter requirement to sections 1962(a)-(c) because of the severity of the penalties under RICO and traditional court aversion to strict liability offenses. The federal courts' apparent lack of interest in this issue may be related to the possible requirement of a nexus between the racketeering acts.

Finally, conspiracy to violate sections 1962(a), (b), or (c) is made a separate substantive offense under section 1962(d). Although common elements and events may be present in a case, any section 1962(d) conspiracy charge is distinct from a charge under the general federal statute on conspiracy. A RICO conspiracy is punishable to the same extent as the other substantive offenses. Section 1962(d) introduced a novel concept of "enterprise" into traditional conspiracy concepts which has been difficult for the courts to apply. The A.B.A. and some commentators feel section 1962(d) creates the possibility of multiple punishment for essentially one act and therefore should be repealed. The issues surrounding section 1962


\[\text{\textsuperscript{71}}\text{Criminal Justice Section Report, supra note 22, at 9-10.}\]

\[\text{\textsuperscript{72}}\text{See infra notes 153-155 and accompanying text.}\]

\[\text{\textsuperscript{73}}\text{18 U.S.C. § 1962(d) (1976) states, "[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."}\]

\[\text{\textsuperscript{74}}\text{See United States v. Barton, 647 F.2d 224, 236-38 (2d Cir. 1981). The general conspiracy statute, 18 U.S.C. § 371 (1976), requires two or more persons to agree to commit some offense, plus some overt act by one of the conspirators to effect the object of the conspiracy. Conviction can result in a fine of up to $10,000, imprisonment for up to five years, or both.}\]

\[\text{\textsuperscript{75}}\text{18 U.S.C. § 1963(a) (1976).}\]


\[\text{\textsuperscript{77}}\text{Criminal Justice Section report, supra note 22, at 10-12.}\]

\[\text{\textsuperscript{78}}\text{See Bradley, supra note 8, at 876-88; Tarlow, supra note 8, at 245-57; Note, Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO, 65 VA. L. REV. 109 (1979). But see Blakey & Goldstock, supra note 58, at 360-62.}\]

\[\text{\textsuperscript{79}}\text{Criminal Justice Section Report, supra note 22, at 10-11. The A.B.A. stated that the possibility of multiple punishment for offenses which are essentially one act is the primary reason that 18 U.S.C. 1962(d) (1976) should be repealed, and cited United States v. Sutton, 642 F.2d 1001 (6th Cir. 1979) (en banc), which struck down consecutive sentences for violations of §§ 1962(c) and (d) where the proofs in the record were identical as illustrative of the multiple punishment problem created by § 1962(d). The A.B.A. also points out that the proofs often identical to §§ 1962(c) and (d) charges, therefore, § 1962(d) adds nothing except a possible increase in sentence which is itself objectionable in these cases.}\]
Section 1963 provides the criminal penalties for section 1962 offenses, and includes the extraordinary penalty of forfeiture. Under section 1963 (a) a violation of section 1962 can result in a fine of up to $25,000, imprisonment for up to twenty-five years, or both. One aspect of section 1963 (a) and section 1962 not specifically addressed until recently is the question of the definition of a RICO "unit of prosecution" (count). Does this depend on the number of "enterprises" alleged, or on the number of different "patterns of racketeering activity" proven? This will be examined later.

Section 1963 (a) also mandates that offenders:

shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established operated (sic), controlled, conducted, or participated in the conduct of, in violation of section 1962.

Courts construing section 1963 (a) have found that criminal forfeiture is mandatory, allowing the trial judge no discretion. This result has been criticized, and the A.B.A. recommends that section 1963 (a) be amended to read "may have forfeited" in place of the current language. The A.B.A.'s and courts' concern about the "shall forfeit" language is based on two grounds. First, in some cases the forfeiture could be so disproportionate to the offense as to constitute a violation of the fifth and eighth amendments. However, the statute could be constitutional if the judge had some

80 Compare United States v. Sutherland, 656 F.2d 1181 (5th Cir. 1981) with United States v. Elliott, 571 F.2d 880 (5th Cir. 1978), cert. denied sub nom., 439 U.S. 953 (1978), for examples of one circuit's wrestling with RICO conspiracy; and then review United States v. Bright, 630 F.2d 804 (5th Cir. 1980). See also supra note 78, for background reading.


83 See United States v. Dean, 647 F.2d 779 (8th Cir. 1981).

84 See infra notes 156-158 and accompanying text.


87 See Criminal Justice Section Report, note 22, at 14-16.

88 Id. at 14.

89 See United States v. Marubeni America Corp., 611 F.2d 763, 769-70 n.12 (9th Cir. 1980); United States v. Hüber, 603 F.2d 387, 397 (2d Cir. 1979), cert. denied, 100 S. Ct. 1312 (1980).
discretion to determine whether or not there was a forfeiture. Second, there is the possible *in terrorem* effect that the provision may have on persons charged under RICO. Also to be considered is the long-standing American antipathy for criminal forfeiture penalties, which has been evidenced by the courts narrow construction of section 1963. A final problem with section 1963(a) found by the A.B.A. is the lack of a hearing prior to forfeiture in cases where third parties assert interest in property subject to forfeiture. The A.B.A. suggests that a hearing and trial by jury be provided after conviction of the offender(s) but before any actual forfeiture is ordered by the court.

Section 1963(b) gives the district courts power to issue restraining orders, prohibitions, or whatever is necessary to insure that any property subject to forfeiture under section 1963(a) remains reachable after conviction. The A.B.A. recommends that this section be amended to provide a hearing under rule 65 of the Federal Rules of Civil Procedure. Pre-trial attachment would be available in appropriate cases, while also insuring that the rights and interests of the accused are protected.

Section 1964 contains the civil remedies available under RICO. Although they include treble damages, reasonable attorney’s fees, and other attractive remedies from antitrust law, there have been few private suits

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90 See Criminal Justice Section Report, *supra* note 22, at 15.
92 The first prohibition of forfeiture as a penalty was contained in an act of the First Congress, the Act of April 30, 1790, ch. IX, § 24, 1 Stat. 117 (1790) (current version at 18 U.S.C. §3563 (1976)). Other statutes provide for *in rem* forfeiture, see e.g., 18 U.S.C. § 1082 (1976) (property connected with illegal gambling), and 49 U.S.C. § 782 (1976) (property used in connection with narcotics offenses). But forfeiture under 18 U.S.C. § 1963 (1976) is an *in personam* forfeiture, a type supposedly prohibited by § 3563. However, the question of whether § 1963(a) repeals § 3563 by implication, as stated in S. Rep. No. 617, 91st Cong., 1st Sess. 80 (1969) is undecided at this time.
95 *Id.* at 16.
97 Criminal Justice Section Report, *supra* note 22, at 20. Note that Fed. R. Civ. P. 65 deals with the issuing of injunctions, and the notice and hearing requirements to be followed.
98 *Id.* The government could still obtain pre-trial attachment by demonstrating the need in a hearing similar to the one required before an injunction is issued, and the accused would use the hearing to rebut the government’s case for forfeiture.
brought under this section.\textsuperscript{101} The civil remedies are distinct from the criminal ones, but section 1964(d)\textsuperscript{102} contains a collateral estoppel provision which allows civil litigants to use a prior criminal RICO conviction against their civil opponent.

A final RICO provision of interest is one not codified in the United States Code. Section 904(a) provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."\textsuperscript{103} This liberal construction clause has been cited to support expansions of criminal liability,\textsuperscript{104} and this has caused some criticism.\textsuperscript{105} The A.B.A. wants the section repealed, and many commentators agree,\textsuperscript{106} believing the clause violates canons of construction and possibly the Due Process clause.\textsuperscript{107}

The sections discussed above are the salient features of RICO. Before investigating more complex RICO issues, the constitutionality of its provisions will be examined.

\section*{IV. Constitutional Challenges to RICO}

Some of the attacks on RICO have focused on the constitutionality of its enactment by Congress pursuant to the Commerce clause.\textsuperscript{108} RICO incorporates several state crimes into its provisions (in effect also making them federal offenses),\textsuperscript{109} and it has been argued this unduly interferes with the separation of powers between the federal and state governments.\textsuperscript{110} However, the courts have recognized the power of Congress to "prohibit activities made unlawful by state law which take place in or in any way affect interstate commerce without disturbing the delicate state and federal re-


\textsuperscript{105} \textit{See} Tarlow, \textit{supra} note 8, at 177-80. \textit{But see} Blakey & Gettings, \textit{supra} note 7, at 1031-33.

\textsuperscript{106} \textit{See} Criminal Justice Section Report, \textit{supra} note 22, at 12-14.

\textsuperscript{107} \textit{Id.}


\textsuperscript{110} \textit{See, e.g.}, United States v. Martino, 648 F.2d 367, 381 (5th Cir. 1981).
lationship," and have not recognized challenges to RICO based on federalism.\textsuperscript{112}

Despite the amount of litigation over the meaning of some RICO provisions, notably the elements of "enterprise" and "pattern of racketeering," courts have not found RICO violative of the Due Process clause\textsuperscript{114} due to vagueness\textsuperscript{115} or as a status offense.\textsuperscript{116}

 Claims that RICO is violative of the Double Jeopardy clause\textsuperscript{117} have also been rejected. When state crimes comprise the predicate offenses used to establish a pattern of racketeering under RICO, the "dual sovereignty" doctrine, that the Double Jeopardy clause does not prohibit prosecution of an individual by different sovereignties where the same criminal acts constitute a separate offense against each sovereignty, has been utilized to dismiss double jeopardy claims against RICO.\textsuperscript{118} When federal offenses


\textsuperscript{114} See infra notes 137-155 and accompanying text.

\textsuperscript{115} "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.


\textsuperscript{118} "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Double Jeopardy clause "establishes three distinct protections: (1) against a second prosecution for the same offense after acquittal; (2) against a second prosecution for the same offense after conviction; (3) against multiple punishments for the same offense." United States v. Brooklier, 637 F.2d 620, 621, (9th Cir. 1980), cert. denied, 101 S. Ct. 1514 (1981).

\textsuperscript{119} See, e.g., United States v. Aleman, 609 F.2d 298 (7th Cir. 1979), cert. denied, 100 S. Ct. 1345 (1980); United States v. Solano, 605 F.2d 1141 (9th Cir. 1979), cert. denied, 100 S. Ct. 677 (1980); United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978), cert. denied, 100 S. Ct. 91 (1979); United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978). See generally Abbate v. United States, 359 U.S. 187 (1959) and Bartkus v. Illinois, 359 U.S. 121 (1959) where the doctrine of dual sovereignty is reaffirmed.
are used to establish a racketeering pattern, the *Blockburger* test\(^{110}\) has been applied to uphold the validity of prosecutions for both RICO and the predicate federal offenses.\(^{120}\)

Because criminal acts committed before its effective date may, under the definition stated in section 1961(5),\(^{121}\) be employed by the prosecution in proving the element of a pattern of racketeering activity, RICO has been attacked as an *ex post facto* law.\(^{122}\) But, section 1961(5) was drafted to avoid the *ex post facto* prohibition by requiring that at least one of the two or more requisite predicate offenses be committed after RICO's effective date,\(^{123}\) and the courts have not construed RICO as an *ex post facto* law.\(^{124}\)

Another argument often made in conjunction with the *ex post facto* claim is that RICO is used to circumvent the applicable state or federal statute of limitations.\(^{125}\) Courts have found that even where state offenses form the pattern of racketeering, it is the federal rather than the state statute of limitations that applies.\(^{126}\) The main reasons supporting this posi-

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\(^{110}\) Regarding double jeopardy "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).


\(^{122}\) *Ex post facto* laws are prohibited by U.S. Const. art. I, § 9, cl. 3.

An *ex post facto* law is one which "makes an action done before the passing of the law, which was innocent when done, criminal; and punishes the action," or which "aggravates a crime, or makes it greater than it was, when committed," or which "changes the punishment, and inflicts greater punishment, then the law annexed to the crime, when committed".


\(^{123}\) Any person who had committed any act(s) of racketeering activity prior to the effective date would be "on notice that the commission of a further such act within the prohibition of the Statute will subject him to liability for a new offense," and "this is all that the *ex post facto* clause requires." *United States v. Field*, 432 F. Supp. 55, 59 (S.D.N.Y. 1977).


tion are: (1) the state offenses are used for definition only and it is not necessary that the state still be able to prosecute the offenders at the time the RICO charge is made, and (2) any other result would lead to unequal enforcement of federal law. One problem remains because the courts have held that only the last predicate offense must be committed within the five-year limitation period. Any of the others may have been committed at any time before, so long as the period between any of these previous racketeering acts is no greater than ten years. Theoretically, the pattern could extend back in time without limitation, so long as the ten-year interval is never exceeded. This may not be consistent with the purpose of the statute of limitations, and the A.B.A. recommends amending RICO to require that all the racketeering acts occur within the existing five-year limitation period.

Finally, several aspects of RICO have been alleged to violate the constitutional ban on cruel and unusual punishment because sentences for RICO offenses can exceed the aggregate of sentences for the predicate offense and all sentences may run consecutively. However, the courts have held that this is permissible. American dislike for in personam forfeiture has led to attack on section 1963(a), but the courts have also upheld it against charges of cruel and unusual punishment.

Although attacked under many different constitutional provisions, RICO to date has survived every challenge. RICO's constitutionality may seem even more extraordinary after considering the discussion of some of RICO's more intricate elements.

128 If each of the states applied their own limitations period, it would inevitably lead to claims of denial of equal protection and violation of due process, plus leading to uncertain application of federal law.
130 See text of § 1961(5), supra note 11.

According to the Supreme Court the policies served by statutes of limitation are: (1) protecting individuals against prosecution for acts which occurred so long ago in time that the person can no longer compile evidence for himself to rebut the charge, and (2) encouraging prompt investigation by law enforcement officials of suspected criminal activity. See Toussie v. United States, 397 U.S. 112, 114-15 (1970).

131 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

132 Criminal Justice Section Report, supra note 22, at 4-5. This would allow prosecution under RICO and for the predicate offenses in every case where federal crimes were used as the pattern of racketeering activity.


134 See supra note 92 and accompanying text.

135 See supra note 92 and accompanying text.
V. SELECTED RICO ELEMENTS

The courts have said that "the 'enterprise' element stands as the focal point of the [RICO] offense." 137 The scope and meaning of "enterprise" under section 1961(4) 138 has been discussed at length by the courts, 139 with controversy centered mainly on two questions. First, does section 1961(4) include entirely illegitimate associations and entities, or is it limited to legitimate activities? Second, what, if any, governmental or public entities can be a RICO enterprise?

The recent Supreme Court decision, United States v. Turkette, 140 settled two ambiguities concerning the RICO element of enterprise. Turkette held that "enterprise" is a separate element of a RICO offense, distinct from a "pattern of racketeering activity," 141 which must be proven as part of the prosecution's case-in-chief. 142 Turkette also finally resolved a long-standing question by holding that illegitimate and illicit associations and entities are included within the RICO "enterprise" concept. 143 Thus, section 1962(c) 144 can be expanded for use against illicit activities, e.g., arson-for-profit rings, 145 narcotics operations, 146 illegal gambling networks, 147 and other illicit activities, 148 making RICO a formidable prosecution weapon against all types of organized criminal activity of whatever nature.

Although the Supreme Court has not ruled on the second major question, the courts of appeals have pretty well settled what public entities fall within RICO's "enterprise" definition. Such diverse entities as county sheriff's

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141 Id. at 2528. This was previously an ambiguous question, see e.g., United States v. Stratton, 649 F.2d 1066, 1075 (5th Cir. 1981).
142 Id. at 2527-34.
offices, police departments, court districts, and other state offices have been included in RICO enterprises. Thus, an “enterprise” can consist of legitimate or illegitimate entities, and may include public as well as private entities.

Another key element in a RICO prosecution is the “pattern of racketeering activity.” It is clear that at least two acts of “racketeering activity” are required, but some questions still arise under section 1961(5). Primarily, must the acts of racketeering be related to one another in order to form a pattern? Some courts have found a need for a common plan or scheme, based on their reading of RICO’s legislative history. However, the majority position requires only that the acts be related to the enterprise itself and not necessarily to one another.

Related to the “pattern” question is the uncertainty United States v. Dean created as to the correct definition of a RICO count. Until the Dean decision, RICO counts had been apparently based on the number of enterprises involved with numerous racketeering acts making up the requisite pattern. Dean, used instead the number of patterns to determine the proper number of RICO counts. In doing so, Dean used a conspiracy law analogy

149 E.g., United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Baker, 617 F.2d 1060 (4th Cir. 1980).
150 United States v. Brown, 555 F.2d 407 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979), cert. denied, 100 S. Ct. 2152 (1980).
151 E.g., United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981) (third judicial district in Florida, including judges, attorneys, etc.).
156 647 F.2d 779 (8th Cir. 1981).
157 See, e.g., United States v. Peacock, 654 F.2d 339 (5th Cir. 1981) (several arsons and murder made up single pattern); United States v. Stratton, 649 F.2d 1066 (5th Cir. 1981) (judge, attorneys engaged in acts of bribery, manipulation of jurors all one pattern).
to determine what constituted a distinct pattern. This both narrows and expands RICO’s reach. In using the number of patterns as the measure for the number of counts possible, Dean greatly expands RICO’s reach. However, if these patterns are determined through use of a formula that considers interrelatedness of the acts, then liability will be narrowed. This will be the next area of controversy under RICO, replacing the enterprise turmoil of the 1970’s. Since RICO’s primary goal is to address the problem of “enterprise” criminality, it would seem that the correct measure of a RICO count should be the number of “enterprises.”

VI. CONCLUSION

Since its enactment in 1970 as one of the elements of the Organized Crime Control Act, RICO has evolved from a particularized weapon aimed specifically at the infiltration of legitimate business by organized crime into a multipotent prosecution tool increasingly employed by the federal government against many varied types of organized criminal activity. This increased use has spurred interest in RICO, and after two years of study the A.B.A. Section of Criminal Justice Committee on Prosecution and Defense of RICO Cases has issued a report recommending several amendments to the present RICO statute. These proposed amendments are an attempt to fine-tune RICO to insure its fair application without impairing its effectiveness. The merits of all the Committee proposals will be thoroughly debated when the report is presented to the A.B.A. House of Delegates for approval later this year, but a few of the more important changes proposed have been discussed in this comment. These proposals deserve serious consideration, especially by any state contemplating enactment of a RICO statute at some time in the future.

Several states have already adopted RICO statutes modeled on the

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158 647 F.2d at 786-88. Dean utilizes five factors borrowed from conspiracy law to evaluate the relation of acts and patterns. These factors are: (1) the time of the acts charged as making up separate patterns, (2) identity of the persons involved in each of these acts, (3) the statutory offenses involved, (4) the nature and scope of the activity the government is seeking to curtail and prosecute, and (5) the places where the acts occurred. 647 F.2d at 788. This focus on pattern expands the possible number of RICO counts, possibly beyond a tolerable limit. For example, four acts of mail fraud, each act involving a separate mailing, could result in a two-count indictment using the Dean theory.

159 See, e.g., McClellan, supra note 1, at 141.

160 See, e.g., cases cited at supra notes 19, 145-152.

161 See supra note 22.

162 See supra notes 71, 77, 79, 87-95, 97, 98, 106, 107 and accompanying text.

163 Some of the proposed changes have merit, but it is probable that any change in the federal RICO statute will only be accomplished as part of the comprehensive reform of the federal criminal code which Congress has been debating for the last few years. However, states considering adoption of new laws could decide to include some or all of the A.B.A. Committee proposals in their new legislation. Instead of modeling existing state or federal RICO statutes enacted long before the proposed amendments were formulated, these states currently contemplating new legislation should seriously review the proposed amendments and the rationale supporting them.
federal RICO act. These states have apparently recognized the advantages RICO offers to states in need of a tool to fight organized criminal activity. First, any RICO statute's definition of "racketeering activity" may be formulated with specific local problems in view. Second, a RICO statute can be easily adapted to deal with novel organized criminal activities as they arise simply by amending the definition of "racketeering activity" to include the problem activity. This flexibility in structure enables RICO to effectively cover organized activity regardless of its precise nature at any given time. Third, the constitutionality of RICO has been extensively litigated in the federal courts. Any state contemplating the adoption of new legislation to deal with organized crime could adopt a RICO statute without the usual uncertainty accompanying new legislation regarding its constitutionality. Fourth, the courts of a state adopting a RICO statute would have a considerable body of prior federal court decisions interpreting RICO's provisions upon which to rely for guidance in construing and applying a state RICO statute modeled on the federal RICO act. Finally, state prosecutors could turn to federal prosecutors already familiar with the intricacy and complexity of RICO for technical and practical advice on RICO prosecutions. This would enable state RICO prosecutions to be commenced and effectively pursued within a relatively short time after the enactment of a state RICO statute. RICO therefore offers states several unique advantages and should be seriously considered by states contemplating additional legislation to deal with organized criminal enterprises.

164 See statutes cited at supra note 20.


166 As Senator McClellan pointed out, "Members of La Cosa Nostra and smaller organized crime groups are sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit." McClellan, supra note 1, at 143. Although speaking only of traditional ethnic "organized crime" groups, Senator McClellan's remarks apply equally to any individuals associated for criminal gain, and state statutes should be flexible enough to deal quickly and efficiently with novel criminal schemes.

167 See supra notes 113-136 and accompanying text.

168 For example, OHIO REV. CODE ANN. § 2923.04 (Page 1975), enacted in 1974, established the offense of engaging in organized crime, a first degree felony. However, this statute was subsequently declared unconstitutionally vague by the Ohio Supreme Court in State v. Young, 62 Ohio St. 2d 370, 406 N.E.2d 499, cert. denied, 101 S. Ct. 281 (1980). Ohio currently has had no enforceable law dealing directly with organized criminal activity. Adoption of a statute modeled on RICO could remove uncertainty over constitutionality of any new legislation.

169 Ohio is now contemplating new legislation to replace the offense declared unconstitutional. H.R. 225, 114th Gen. Assembly, Regular Sess. (1981-1982) has already passed the Ohio House, and is an attempt to revise the language of § 2923.04 to meet the Ohio Supreme Court's objections. Another bill, S. 361, 114th Gen. Assembly, Regular Sess. (1981-1982), is a RICO-type statute modeled on the federal RICO and on some state RICO laws. Thus, Ohio is currently facing the situation described in this comment. Hopefully, the Ohio General Assembly will consider the advantages RICO offers and the merit in that alternative.
Thus, it should be apparent that RICO statutes hold great promise in dealing with any type of organized criminal endeavor. State legislatures especially should note RICO's adaptability, and seriously consider adopting a RICO statute if organized criminality is a problem within a state. Hopefully, this comment will serve as a useful guide for those interested in a more thorough exploration of RICO.

DAVID E. MORRIS