The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions

INTRODUCTION

Because of its concern about the infiltration of organized crime into legitimate business and the resulting drain on the American economy, Congress sought to devise remedies in the Racketeer Influenced and Corrupt Organization Act (RICO).[1] Congress' statement of Findings and Purpose explained that "[i]t is the purpose of this Act to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions to deal with the unlawful activities of those engaged in organized crime."[2] Congress probably could not have made it illegal to be a member of organized crime because that would unconstitutionally punish status.[3] Therefore, the Act is structured to punish not organized crime membership itself but rather the activities which Congress believed organized members engage in.[4]

The heart of RICO consists of four sections: one definitional,[5] one substantive,[6] one prescribing criminal penalties,[7] and one prescribing

1. 18 U.S.C. §§ 1961-1968 (1976 & Supp. III 1979). RICO is Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 81 Stat. 941 (1970).

2. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose). *See also* S. REP. No. 617, 91st Cong., 1st Sess. 79 (1969) [hereinafter cited as SENATE REPORT]; United States v. Marubeni Am. Corp., 611 F.2d 763, 769 n.11 (9th Cir. 1980) ("We believe anyone who reads the legislative history must be struck by the singlemindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime."). In *United States v. Turkette*, the only United States Supreme Court RICO case, the Court acknowledged that "the legislative history forcefully supports the view that the major purpose of Title IX is to address the infiltration of legitimate business by organized crime." United States v. Turkette, 101 S. Ct. 2524, 2532 (1981).

3. *See* Margolis, *Elements of the RICO Statutes Summarized by the Prosecution*, in A.B.A. SECTION OF CRIMINAL JUSTICE, THE PROSECUTION AND DEFENSE OF RICO AND MAIL FRAUD CASES 3 (1980) [hereinafter cited as PROSECUTION AND DEFENSE OF RICO CASES]. An additional problem would have been to define organized crime. During debate in the House of Representatives, Rep. Mikva noted: "One of the major draftsmen of the bill [told me] that there is no definition [because] it is very hard to try to agree on a single definition of organized crime." 116 CONG. REC. 35,196 (1970). Rep. Mikva nonetheless objected to the lack of definition. For further discussion of the meaning of "organized crime" see *infra* note 25.

4. *See* PROSECUTION AND DEFENSE OF RICO CASES, *supra* note 3, at 3.

5. 18 U.S.C. § 1961 (1976 & Supp. III 1979).

6. *Id.* § 1962 (1976).

civil remedies.[8] Section 1961 defines some of the Act's key terms and also defines a number of state and federal crimes.[9] These crimes are the so-called "predicate offenses," any two of which constitute a pattern of racketeering activity.[10] In order to be found guilty of violating RICO, a defendant must have committed at least two of these predicate offenses.[11] Once the prosecution has established that the defendant is guilty of the predicate offenses, it must then prove that the defendant has engaged in additional conduct violative of the Act. This additional conduct, prohibited by section 1962, consists of investing income derived from a pattern of racketeering in an enterprise[12] engaged in or affecting interstate commerce,[13] acquiring an interest in such an enterprise through a pattern of racketeering,[14] conducting such an enterprise's affairs through a pattern of racketeering,[15] or conspiring to do any of these three things.[16]

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7. *Id.* § 1963.

8. *Id.* § 1964.

9. *Id.* § 1961 (1976 & Supp. III 1979). The state crimes are or involve murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in dangerous drugs. *Id.* § 1961(1)(A) (1976 & Supp. III 1979). The federal crimes include such obvious organized-crime related activities as bribery, counterfeiting, embezzlement from pension and welfare funds, mail fraud, obstruction of justice, extortion, illegal gambling, and manufacturing narcotics. *See* 18 U.S.C. § 1961(1)(B).

10. *Id.* § 1961(5) (1976). The two acts must have occurred within ten years of each other.

11. The government must prove beyond a reasonable doubt each element of each predicate offense. United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (concurring with the district court's opinion in United States v. Parness, No. 73 Cr. 157 (S.D.N.Y. May 17, 1973)), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* United States v. Pray, 452 F. Supp. 788, 801 (M.D. Pa. 1978) ("The Court does not believe that the Government can charge someone . . . only with engaging in racketeering activity without being able to convict with respect to the underlying crimes.").

12. "Enterprise" is defined in § 1961 as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976). The Supreme Court has recently held that the term enterprise includes illegitimate as well as legitimate associations. United States v. Turkette, 101 S. Ct. 2524 (1981).

13. 18 U.S.C. § 1962(a) (1976): "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 . . . 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."

14. *Id.* § 1962(b): "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

15. *Id.* § 1962(c): "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

16. *Id.* § 1962(d): "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section."

Section 1963 prescribes criminal penalties. A defendant convicted under section 1962 may be imprisoned not more than twenty years, or fined not more than $25,000, or both.[17] In addition, the property which the defendant has acquired or maintained in violation of section 1962 may be forfeited to the United States.[18] Section 1964 provides that either the government[19] or a private party[20] may bring a RICO civil action. Federal district courts may order divestiture of a defendant's interest in an enterprise, and can make other orders designed to separate him from the enterprise.[21]

Thus, a person can be charged under RICO if he has committed two of the specified crimes within ten years; if there is some sort of entity, engaged in or affecting interstate commerce, that can be characterized as an enterprise; and if the defendant has invested income derived from the crimes in that enterprise, or if he has acquired or conducted the enterprise through those crimes; or if he has conspired to do any of the above.

Clearly, RICO's scope is very broad. Although the Act may have been designed to eliminate organized crime, it can catch any number of

17. *Id.* § 1963(a).

18. *Id.* §§ 1963(a)(1)-(2). A much-debated issue is whether §§ 1963(a)(1)-(2) authorize forfeiture only of proprietary interests or whether the fruits of illegal activity (i.e. income derived from racketeering) can also be forfeited. Courts so far have limited forfeiture to proprietary interests. United States v. Marubeni Am. Corp., 611 F.2d 762, 766-70 (9th Cir. 1980); United States v. Thevis, 474 F. Supp. 134, 140-44 (N.D. Ga. 1979), *aff'd on other grounds*, 665 F.2d 616 (5th Cir. 1982); United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977). The Fifth Circuit agreed with this position in United States v. Martino, 648 F.2d 367 (5th Cir.), *reh'g granted*, 648 F.2d 407 (1981). *See also* United States v. Peacock, 654 F.2d 339, 351 (5th Cir. 1981). In accord with the courts are Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 891 (1980); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 290-91 (1980); and Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 AMER. CRIM. L. REV. 279, 380-87 (1980) [hereinafter cited as Taylor]. *Contra*, Blakey & Gettings, *RICO: Evening Up the Odds*, 16 TRIAL 58, 59, 85 n.48 (1980); Trojanowski, *RICO Forfeitures: Tracing and Procedure*, in 1 CORNELL INSTITUTE ON ORGANIZED CRIME, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME 353, 378a-jj (1979) [hereinafter cited as CORNELL MATERIALS]; TWISS, *Impact of RICO Upon Labor Unions*, 14 AKRON L. REV. 49, 62-64 (1980).

19. 18 U.S.C. § 1964(b) (1976). A RICO civil defendant need not have been the subject of a prior criminal prosecution under § 1962. But if he was, then a criminal judgment against him acts as collateral estoppel in a civil proceeding. *Id.* § 1964(d).

20. *Id.* § 1964(c). A private plaintiff may recover treble damages for injuries sustained to his business or property by reason of a § 1962 violation.

21. *Id.* § 1964(a). Such orders include "imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

The remaining sections of Title IX of the Organized Crime Control Act govern venue and service of process, *id.* § 1965, expedition of cases, *id.* § 1966, public access to the proceedings, *id.* § 1967, public access to the proceedings, *id.* § 1967 and the use of the civil investigative demand, *id.* § 1968.

nonorganized criminals in its net. In short, RICO's structure gives federal prosecutors considerable discretion; and once they decide to use RICO against a criminal or civil defendant, that person faces heavy penalties. In addition to the long prison term and fine, there are severe economic harms that may result from forfeiture or divestiture. Given the serious consequences of a RICO prosecution and the wide discretion prosecutors have to bring such prosecutions, it is imperative that criminal and civil defendants alike be protected against both substantive and procedural constitutional violations.[22]

To highlight how widespread the possibilities for abuse are, this Comment examines two areas in which RICO defendants are vulnerable. It explains how criminal defendants often face multiple punishment or prosecution for what would appear to be the same offenses, and how civil defendants lack such important procedural safeguards as a heightened burden of proof on the government and the exclusionary rule.

Certainly, RICO serves an important function. The Act reflected the "public hysteria" caused by the escalation of crime and the infiltration of racketeers in legitimate business organizations.[23] The threat posed by organized crime to the nation's commerce has been amply documented for a number of years.[24] No statute designed to eliminate such a threat can be wholly unwelcome. But since RICO can and does apply to defendants who are not connected with organized crime,[25] spe-

22. For discussion of RICO's potential for misuse, *see generally* Atkinson, *RICO: Broadest of the Federal Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1 (1978); Bradley, *supra* note 18; Tarlow, *supra* note 18; Taylor, *supra* note 18.

23. 116 CONG. REC. 35,196 (1970) (statement of Rep. Celler).

24. *See, e.g.*, S. REP. NO. 2370, 81st Cong., 2d Sess. 16 (1950); D. CRESSEY, THEFT OF THE NATION (1969); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1 (1967); G. TYLER, ORGANIZED CRIME IN AMERICA (1962). *See also Report of the Antitrust Section of the American Bar Association on S. 2043 and S. 2049 in Hearings on Measures Relating to Organized Crime Before the Sen. Subcomm. on the Judiciary*, 91st Cong., 1st Sess. 556-57 (1969) [hereinafter cited as *Senate Hearings*] (concluding that organized crime has broadened its operations by infiltrating and taking over a considerable number of legitimate businesses, and noting that once a legitimate business is infiltrated by organized crime, it functions as a monopoly and is even more unwholesome than other monopolies because its position does not rest on economic superiority but on violence and intimidation).

25. Organized crime is an elusive term, subject to many different definitions. *See generally* Lynch & Phillips, *Organized Crime—Violence and Corruption*, 20 J. PUB. L. 59 (1971); McKeon, *The Incursion By Organized Crime Into Legitimate Business*, 20 J. PUB. L. 117 (1971); Thrower, *Introduction, Symposium: Organized Crime*, 20 J. PUB. L. 33 (1971); Tyler, *Sociodynamics of Organized Crime*, 20 J. PUB. L. 41 (1971); R. Blakey & R. Goldstock, Uses of the Phrase Organized Crime, Cornell Institute on Organized Crime, in 1977 Summer Seminar Program, The Investigation & Prosecution of Organized Crime & Corrupt Activities (microfiche materials on file with the *California Law Review*) [hereinafter cited as Cornell Microfiche Materials]. For analytical purposes this Comment adopts Thomas McKeon's definition of organized crime as a sophisticated monopoly engaged in making profit, whether it is providing an unlawful service such as gambling

cial care should be taken lest enthusiasm for the Act's laudable aim cause defendants' rights to be ignored.

This Comment argues that RICO's purpose of eliminating organized crime can be achieved without governmental conduct that violates the constitutional rights of criminal and civil defendants. Part One argnes that criminal defendants should get as much protection from multiple prosecution and punishment as is consistent with the current state of double jeopardy law. Part Two argnes that section 1964 is in reality a quasi-criminal statute and that defendants proceeded against by the government under it are entitled to certain procedural rights; most notably, that the government be required to prove its case by clear and convincing evidence, and to conform to the requirements of the exclusionary rule in gathering and presenting such evidence.

PART ONE: RICO AND DOUBLE JEOPARDY

PREFACE

The structure of RICO gives federal prosecutors considerable discretion.[26] Although the Act was designed to eliminate organized crime, it can be applied to any criminal defendant who has allegedly performed the specified number and kind of crimes. For instance, a person who participates with another in two robberies in different states within ten years could, if convicted, be jailed for twenty years under RICO. Could he also receive individual prison terms for each robbery? Alternatively, once convicted or acquitted of two predicate offenses, may the individual subsequently be punished under RICO? This hypothetical robber could be subject to multiple punishment under a statute designed to punish criminals participating in organized crime. Whether or not he is charged under RICO becomes extremely important, and this decision is made by federal prosecutors.

When a defendant is tried for a crime, and then another that incorporates that initial offense, has he not been placed in double jeopardy, which is prohibited by the fifth amendment to the Constitution?[27] In fact, this question is one that has been raised frequently by defendants under RICO, who often challenge their convictions as violations of the double jeopardy clause.[28] RICO might not cause grave concern if the

or prostitution, or laundering illegally obtained funds through appareutly legitimate businesses such as grocery stores, restaurants, or construction companies. *See* McKeon, *supra*, at 119-20.

26. Tarlow, *supra* note 18, at 171.

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

28. *See, e.g.*, United States v. Hawkins, 658 F.2d 279, 285-88 (5th Cir. 1981); United States v. Peacock, 654 F.2d 339, 348-49 (5th Cir. 1981); United States v. Boylan, 620 F.2d 359, 360-61 (2d

only possibility for double punishment under it were enhanced sentences for organized criminals. But RICO catches other criminal defendants in its net, since the prosecutor's discretion to charge under RICO is virtually unlimited.

This Comment argues that because of the broadness of RICO's scope, it is important to give as much protection against double jeopardy to RICO defendants as is possible within the current narrow limits of the law.[29] Otherwise, there is too great a chance that criminal defendants for whom the Act was not designed may suffer excessive punishment. If the double jeopardy clause is interpreted broadly in the RICO context, nonorganized criminals will not be punished beyond what Congress contemplated and the Constitution allows. On the other hand, such a broad interpretation will not thwart Congress' purpose, because the kind of criminal defendant for whom RICO was intended will still receive the enhanced sanctions built into the Act.

Section I of this Part examines relevant double jeopardy law as interpreted by the Supreme Court and by RICO courts. It is argued that the federal judiciary's double jeopardy decisions do not compel lower courts to allow multiple punishment of RICO defendants in all cases. Section II argues that most organized criminals can be sufficiently punished under RICO even if double jeopardy considerations are strictly observed.

I
RICO AND CURRENT DOUBLE JEOPARDY LAW

A. Potential for Double Jeopardy

In RICO prosecutions there are three possible situations in which a defendant could be placed in double jeopardy: where the defendant faces successive state and federal prosecutions, where the defendant faces successive federal prosecutions, and where the defendant is indicted for multiple charges. The first instance involves a defendant

Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Brooklier, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); United States v. Aleman, 609 F.2d 298, 309-11 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Solano, 605 F.2d 1141, 1143-45 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); United States v. Rone, 598 F.2d 564, 571-72 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Malatesta, 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979); United States v. Smith, 574 F.2d 308, 309-11 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); United States v. Frumento, 563 F.2d 1083, 1086-89 (3d Cir. 1977), *cert. denied*, 434 U.S. 1072 (1978); United States v. Meinster, 475 F. Supp. 1093, 1095-96 (S.D. Fla. 1979), *aff'd sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); United States v. Pray, 452 F. Supp. 788, 800-01 (M.D. Pa. 1978); United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617-18 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

29. *See infra* notes 66-96 and accompanying text.

who is acquitted or convicted in state court of one or more offenses that are later used as the basis for a RICO prosecution. The second arises when a defendant is acquitted or convicted in federal court of substantive crimes upon which a later RICO prosecution is based. In the third genre of double jeopardy cases, both the substantive crimes and the RICO counts based on them are charged in the same federal indictment.[30]

The Supreme Court has treated cases involving a state prosecution followed by a federal prosecution differently from cases of successive federal prosecutions. In contrast, both successive federal prosecution and multiplicity cases may be subjected to the same analysis. Therefore, Subsection B will examine the law on successive state and federal prosecutions, while Subsection C will deal with successive federal prosecutions and multiplicity together.

B. Successive State and Federal Prosecutions

1. The Dual Sovereignty Principle of Abbate

Where there are successive state and federal prosecutions, the double jeopardy challenge has been rejected by all courts on the basis of the *Abbate* line of cases. In *Abbate v. United States*[31] and *Bartkus v. Illinois*,[32] the United States Supreme Court formulated and affirmed what has become known as the dual sovereignty doctrine. State and federal governments are "two sovereignties, deriving power from different sources."[33] Accordingly, "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."[34] Hence, successive state and federal prosecutions arising out of one criminal transaction do not violate the double jeopardy clause.

The *Abbate* doctrine has been applied consistently to RICO cases. In *United States v. Aleman*,[35] a RICO count was based on a pattern of racketeering consisting of three home robberies in two states. One of the defendants had been convicted in state court of one of the robberies. In disposing of this defendant's double jeopardy claim, the court

30. Both successive prosecutions and multiplicity are potentially violative of the double jeopardy clause. The double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." United States v. Wilson, 420 U.S. 332, 343 (1975) (quoting North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

31. 359 U.S. 187 (1959).

32. 359 U.S. 121 (1959).

33. Abbate v. United States, 359 U.S. at 194 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).

34. *Id.*

35. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

explained that the dual sovereignty doctrine "simply means that the same single act of a defendant may constitute more than one offense as he may have violated both federal and state laws for which he may be prosecuted."[36] The result is the same if the defendant was acquitted in state court. In *United States v. Malatesta*,[37] a defendant had been acquitted in state court of kidnapping and robbery. These crimes formed the basis of RICO counts of which he was later convicted in federal court. The Court of Appeals for the Fifth Circuit maintained that under *Abbate* and its progeny, a federal prosecution after a state acquittal did not place the defendant in double jeopardy.[38]

The *Abbate* doctrine arguably fails to recognize the policy against multiple prosecutions. It has been criticized as "counter to the conceptual underpinnings of the Double Jeopardy Clause."[39] The basic concept of the clause was stated most eloquently by Justice Black in *Green v. United States*:

> The underlying idea [of the Clause], one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[40]

This policy is to protect the interest of the defendant to be free from the ordeal of continual trials, and this interest is no less affected by prosecutions by two sovereigns rather than one.

Abbate nonetheless remains good law, if not necessarily good policy.[41] In *United States v. Wheeler*,[42] the United States Supreme Court

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36. *Id.* at 309.

37. 583 F.2d 748 (5th Cir. 1978), *cert. denied*, 444 U.S. 846 (1979).

38. *Id.* at 757.

39. United States v. Frumento, 563 F.2d 1083, 1092 (3d Cir. 1977) (Aldisert, J., dissenting), *cert. denied*, 434 U.S. 1072 (1978). *See also* Tarlow, *supra* note 18, at 265. Tarlow maintains that the application of *Abbate* to RICO cases is ironic: the dual sovereignty doctrine resulted from the Court's fear that a contrary result would lessen the states' principal responsibility for defining and prosecuting crimes, but in fact when the doctrine is applied to RICO there results a change in the distribution of powers such that the federal government's jurisdiction to define and prosecute crimes is substantially extended. *Id.*

40. 355 U.S. 184, 187-88 (1957). Justice Black dissented in both *Abbate*, 359 U.S. at 201-04, and *Bartkus*, 359 U.S. at 150-70, for reasons suggested by this excerpt.

41. In the late 1970's, it looked as though the United States Supreme Court was getting ready to overrule *Abbate*. *See* Atkinson, *supra* note 22, at 9 & n.65. The defendants in *United States v. Frumento* argued that the dual sovereignty doctrine had been eroded in recent years, 563 F.2d at 1088, and Judge Aldisert, dissenting in *Frumento*, pointed to a line of cases weakening *Abbate*. This line includes Brown v. Ohio, 432 U.S. 161 (1977) (one convicted of a greater offense may not be subjected to a second prosecution for a lesser included offense, and vice versa); Jeffers v. United States, 432 U.S. 137 (1977) (same); Abney v. United States, 431 U.S. 651 (1977) (because the double jeopardy clause prevents not only double punishment for the same offense but also

had a clear opportunity to modify or overrule the dual sovereignty doctrine, but chose not to do so. In *Wheeler*, the defendant, a Navajo Indian, pleaded guilty in a tribal court to a charge of contributing to the delinquency of a minor. He was sentenced and later indicted by a federal grand jury for statutory rape arising out of the same incident. The Court held that Indian tribes retained sovereign qualities, reiterated the *Abbate* rule, and concluded that there had been no violation of the double jeopardy clause.[43]

2. *Protection Against Successive Prosecution: The* Petite *Policy*

The Department of Justice has not been unmindful of the potential for unfairness present in the dual sovereignty doctrine. Shortly after the *Abbate* decision was announced, the Attorney General issued a memorandum to United States Attorneys formulating what has become known as the *Petite* policy.[44] The *Petite* policy states that no federal prosecution should follow a state proseeution for substantially the same act. In no case is such a duplicate prosecution to occur without prior approval of an Assistant Attorney General, who will determine whether the federal prosecution will serve "compelling interests of federal law enforcement."[45]

The *Petite* policy is to be observed in RICO cases. David Margolis, Chief of the Organized Crime and Racketeering Section of the Department of Justice's Criminal Division, has said that approval from the Attorney General for a duplicative RICO prosecution would be

being twice put to trial for the same offense, a pretrial order denying a defendant's motion to dismiss an indictment on double jeopardy grounds is immediately appealable); Waller v. Florida, 397 U.S. 387 (1970) (the *Abbate* rule does not apply to successive city/state prosecutions); and Ashe v. Swenson, 397 U.S. 436 (1970) (the doctrine of collateral estoppel applies to successive state prosecutions).

In addition, the application of the double jeopardy clause to the states via the fourteenth amendment also suggested the expansion of the double jeopardy concept. The double jeopardy clause was applied to the states in Benton v. Maryland, 395 U.S. 784 (1969). In *United States v. Lanza*, the case that first enunciated the dual sovereignty Chief Justice Taft stressed that the fifth amendment did not apply to the states. United States v. Lanza, 260 U.S. 377, 382 (1922). The same was true at the time of *Abbate*. The application of the double jeopardy clause to the states did not technically make any difference to the dual sovereignty doctrine; the concept of two sovereignties each having its own jurisdiction is undisturbed by the fact that each must honor the double jeopardy clause. Nonetheless, the clause's incorporation could be seen as symbolically relevant since it suggested that the two sovereignties were no longer so separate. It could no longer be maintained, as Justice Taft had done, that the double jeopardy clause applied only to federal proceedings, with the states free to do as they liked.

42. 433 U.S. 313 (1978).

43. *Id.*

44. *See* Thompson v. United States, 444 U.S. 248 (1980); Petite v. United States, 361 U.S. 529, 530-31 (1960). *Petite* was the first Supreme Court case to recognize this policy, hence its denomination.

45. Thompson v. United States, 444 U.S. at 248 (footnote omitted).

given "only in unusual cases—such as the type of case where there was jury tampering."[46] Margolis acknowledged that the dual sovereignty principle would allow a later federal prosecution, but "it is a rarely used procedure."[47]

Despite Margolis' assurances, federal prosecutors do violate the spirit of the *Petite* policy by charging defendants with offenses for which they have already been prosecuted in state court. One *Aleman* defendant, for instance, was convicted of a robbery in state court, served a prison term, and then was prosecuted under RICO based on a pattern of racketeering activity consisting of that robbery and two others.[48] The basic purpose of RICO,[49] and indeed the compelling interest of federal law enforcement behind RICO, is the eradication of organized crime. This purpose hardly is served by reprosecuting defendants who by no stretch of the imagination are organized crime members. Thus, the *Aleman* case did not present the compelling need that the *Petite* policy seems to require before a duplicative RICO prosecution is undertaken.

3. Protection Against Successive Prosecutions: Due Process

Courts cannot force the Department of Justice to obey internal departmental policies, including the *Petite* policy.[50] Courts can, however, make a due process determination, looking to the *Petite* policy as a guideline. That successive trials can violate due process is suggested in *United States v. Meinster*.[51] *Meinster* involved successive federal prosecutions, with the defendants claiming that all federal charges against them should have been brought at once. The court concluded that "the defendants' claims are really due process claims that have been mischaracterized as double jeopardy claims. There may be a point at which successive trials of one defendant for crimes arising out of the same series of transactions abridge fundamental fairness and constitute a violation of due process."[52] This argument might well be applied to successive state and federal prosecutions. The dual sovereignty doctrine, which responds to double jeopardy concerns, must be applied

46. PROSECUTION AND DEFENSE OF RICO CASES, *supra* note 3, at 18.

47. *Id.*

48. 609 F.2d at 309.

49. *See supra* note 2 and accompanying text.

50. United States v. Snell, 592 F.2d 1083, 1087 (9th Cir.) (a violation of the "internal housekeeping rules of the Department of Justice" does not entitle defendant to have indictment dismissed), *cert. denied*, 442 U.S. 944 (1979). Note, however, that the Supreme Court consistently grants certiorari and vacates judgements when the government asks for the dismissal of charges on the grounds that the *Petite* policy has not been complied with. *See, e.g.*, Thompson v. United States, 444 U.S. 248, 249-50 (1980).

51. 475 F. Supp. 1093 (S.D. Fla. 1979).

52. *Id.* at 1096.

within the boundaries of due process. The *Petite* policy serves as one possible demarcation of this boundary: absent compelling interests of federal law enforcement, no duplicative prosecution should occur.

If courts were to dismiss counts of an indictment that duplicate prior state prosecutions they would clearly uphold double jeopardy protections, without frustrating Congress' aim. In most cases the entire indictment, or even an entire count, would not have to be dismissed. Rather, the court could order the government to delete from a RICO count those racketeering acts for which the defendant had already been prosecuted.[53] Since most RICO indictments are very long and allege numerous racketeering acts, far more than the two the Act requires, most prosecutions would not be disturbed by such a procedure. However, there would be cases in which eliminating duplicative crimes from the RICO count would mean that the RICO prosecution could not proceed, because the government could not show a pattern of racketeering activity if there were fewer than two offenses for which the defendant had not been previously prosecuted. In those cases, it would seem patently unfair, and arguably violative of due process, for there to be a federal prosecution in the first place, as the *Petite* policy in effect recognizes.

4. *Protection Against Successive Prosecutions in the Absence of Dual Interests*

One RICO opinion has cast doubt on whether successive prosecution of alleged racketeers involves any federal interest, much less a compelling one. In *United States v. Frumento*, dissenting Judge Aldisert contended that in RICO cases there is no federal interest per se.[54] Congress constitutionally legislates against racketeering; but where the state courts have already acted on the offense included within Congress' definition of racketeering, the federal government no longer has

53. Such a course was recommended at a continuing legal education program on RICO sponsored by the Criminal Justice Section of the American Bar Association during the A.B.A. annual meeting in 1979. PROSECUTION AND DEFENSE OF RICO CASES, *supra* note 3, at 17. At the program, a simulated RICO case was presented along with motions to dismiss counts. One issue presented was whether RICO counts should be dismissed against two defendants who had been, respectively, convicted and acquitted in state courts of offenses which formed part of the pattern of racketeering underlying the RICO counts. The answer was that the entire RICO counts should not be dismissed but that those offenses for which defendants had been previously prosecuted should be stricken from the RICO count. The panel that prepared the answer pointed out that the requirement of "fresh" crimes is supported by the only statement on this point in RICO's legislative history, where Rep. William F. Ryan stated that "the prosecution, *absent any prior conviction*, would have to prove beyond a reasonable doubt two illegal acts in order to establish the 'pattern.'" *Id.* (quoting 116 CONG. REC. 35,208) (emphasis added). David Margolis, of the Department of Justice, agreed with this analysis of the problem. *Id.* at 18.

54. 563 F.2d 1083, 1097-98 (3d Cir. 1977) (Aldisert, J., dissenting), *cert. denied*, 434 U.S. 1072 (1978).

an interest in punishing the act.[55] Thus, RICO cases are distinguishable from *Abbate*, which involved statutes designed to protect both state and federal governments.[56]

Congress passed the Organized Crime Control Act because it felt compelled to respond to the threat posed by organized crime, not because it identified a federal as opposed to a state interest. In other words, Congress intended that such criminal behavior be punished, not that it be punished repeatedly. Thus, if conduct which the Act treats as characteristic of organized crime has already been punished by the state, then the federal government does not have a separate interest in punishing it.[57]

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55. *Id.* at 1098 (Aldisert, J., dissenting). Judge Aldisert went on to argue that if the federal offense of racketeering is perceived as greater or lesser than the state offense, then the rule of Brown v. Ohio, 432 U.S. 161 (1977) (acquittal of a greater offense precludes later prosecution of a lesser offense, and vice versa), should control. If, however, the federal offense is neither greater nor lesser than the state offense but rather is separate, then the *Blockburger* test should be met. 563 F.2d at 1098. For discussion of the *Blockburger* test, see *infra* notes 66-88 and accompanying text.

56. In *Abbate*, the defendants conspired to dynamite telephone company facilities. They were convicted in state court of conspiracy to destroy the property of others in violation of state law. They were later prosecuted in federal court for the federal offense of conspiring to destroy communication facilities operated or controlled by the United States. 359 U.S. at 188-89.

57. In addition to Judge Aldisert's lack of federal interest argument, the *Frumento* Court considered other attacks on the dual sovereiguty doctrine. The *Frumento* defendants tried to distinguish their case from *Abbate*. They were involved in a scheme to smuggle cigarettes into Pennsylvania for resale without payment of the state cigarette tax. They were acquitted of bribery, extortion and conspiracy in state court, and convicted of RICO substantive and conspiracy counts in federal court. Their argument was that in *Abbate*, the same activity resulted in successive prosecutions for violations of two different statutes. In their case, however, the same activity resulted in successive prosecutions for the same violation, since 18 U.S.C. § 1961(1) incorporates the state statute into the federal act.

The *Frumento* defendants' argument was elaborated on by Judge Aldisert in his dissenting opinion. He said that since the defendants here had been acquitted by the state, they could not be charged by the state again for the same crime. Hence the crime is not "chargeable under State law," as required by 18 U.S.C. § 1961(1)(A) for predicate offenses. *Id.* at 1096-97 (Aldisert, J., dissenting). Section 1961(1) reads, " 'Racketeering activity' means (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 . . . ." (emphasis added). Judge Aldisert's reading of "chargeable" is endorsed in PROSECUTION AND DEFENSE OF RICO CASES, *supra* note 3, at 17, and by Tarlow, *supra* note 18, at 264-66.

The same argument can be applied to the successive federal prosecutions situation, using § 1961(1)(B): " 'Racketeering activity' means . . . (B) any act which is indictable under any of the following provisions of title 18. . . ." Presumably, an act would not be *indictable* under 18 U.S.C. § 1961(1)(B) if the defendant had already been proseeuted for the same act in federal court.

The *Frumento* majority rejected this argument. The court maintained that the same crimes were not being punished because state offenses incorporated in section 1961 are "definitional ouly." That is, "[s]ection 1961 rcquires . . . only that the *conduct* on which the federal charge is based be typical of the scrious crime dealt with by the state statute, not that the particular defendant be 'chargeable nnder State law' at the time of the federal indictment." 563 F.2d at 1087 n.8A (emphasis in original).

A related means of challenging a RICO prosecution following a state prosecution was suggested in *Aleman*[58] where the court considered the merger of federal and state investigations. The court noted that "[t]he dual sovereignty doctrine is subject to the qualification . . . that a state prosecution cannot be used merely as a cover and a tool of federal authorities."[59] That is, federal authorities may not orchestrate the state prosecution in order to produce a state conviction on which to develop a RICO indictment. The *Aleman* court rejected the defendant's contention that this had happened in his case;[60] but where there is a suspiciously great involvement of federal authorities in a state prosecution, the presumption of dual sovereignty is undermined, and *Abbate* should not be applied.

The implications of the *Petite* policy and the *Frumento* dissent are that the dual sovereignty doctrine rests not on the existence of two sovereigns, but on the existence of separate interests that may be offended. While the goals of a state in prosecuting predicate offenses and the goals of the federal government in prosecuting a statutory crime based on those offenses appear to be distinct, the state interests in punishing offenses that amount to predicate offenses subsume the federal interest in punishing organized crime. Thus, the differences between state and federal interests are less pronounced than is suggested by the different scopes of the state and federal statutes. Moreover, it is not clear that the federal interest is so different and so compelling as to warrant a federal court to entertain the prosecution of a case that violates the *Petite* policy and perhaps even due process.

C. Successive Federal Prosecutions and Multiplicity

1. Possibilities for Protection

In the second and third double jeopardy situations, successive federal prosecutions, and multiplicity, the courts have more latitude to grant maximum protection against double jeopardy to RICO defendants. As the law in double jeopardy has evolved from the *Blockburger*[61] case to the Supreme Court's pronouncements in *Albernaz v. United States*,[62] the venerable "same evidence test" has been used,

58. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

59. 609 F.2d at 309. The qualification was mentioned in Bartkus v. Illinois, 359 U.S. 121, 123-24 (1959).

60. 609 F.2d at 309. The defendant's claim was based on the fact that an FBI Special Agent testified at his state trial and that a federal prosecutor was listed as a possible witness. The court characterized the situation as "cooperation between state and federal authorities" but did not specify where cooperation might end and orchestration begin. *Id.*

61. 284 U.S. 299 (1932).

62. 450 U.S. 333 (1981).

originally as a constitutional litmus test,[63] and now as a gauge for legislative intent. This Comment argues that the same evidence test should be applied as a constitutional test in all instances, and certainly must be applied where the legislative intent is uncertain, as is arguably the case in RICO.

2. *The Evolution of Double Jeopardy Law*

a. *The* Blockburger *Test*

The evolution of double jeopardy law has been complex; indeed, Justice Rehnquist recently referred to this area as "a veritable Sargasso Sea."[64] In the areas of multiplicity and successive federal prosecutions, the double jeopardy clause began in this century to pose serious problems because of the proliferation of criminal statutes, many of which overlapped.[65] To determine whether there had been a double jeopardy violation, the Court first developed what became known as the *Blockburger* test, or same evidence test.[66] Within the past two years, however, the Court has started to treat *Blockburger* less as a constitutional test and more as a gauge of legislative intent.[67] Thus, the question has become not whether multiple punishments or prosecutions violate the double jeopardy clause according to some Court-developed criterion, but rather whether Congress intended such multiple punishment to be imposed.[68]

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63. *See infra* notes 69-77 and accompanying text. The "litmus test" language comes from United States v. Hawkins, 658 F.2d 279, 287 (5th Cir. 1981), which, however, rejected that concept.

64. Albernaz v. United States, 450 U.S. 333, 343 (1981).

65. Courts and commentators have often pointed out that the number of different criminal statutes has increased tremendously since the eighteenth century. The increasing number of crimes means there are numerous possible ways for prosecutors to charge the same act, and this in turn creates double jeopardy problems. *See* Ashe v. Swenson, 397 U.S. at 445 n.10; J. SIGLER, DOUBLE JEOPARDY 64 (1969).

66. Blockburger v. United States, 284 U.S. 299, 304 (1932).

67. Albernaz v. United States, 450 U.S. 333 (1981); Whalen v. United States, 445 U.S. 684 (1980).

68. On the question of the constitutional value of the rule that a criminal defendant may not be punished twice for the same offense, see Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1023-32 (1980) [hereinafter cited as Westen]. According to this analysis, there are three possible ways of interpreting the double jeopardy clause in the multiplicity context: 1) the clause contains "an independent standard of its own for defining the existence of a criminal offense and for establishing the maximum permissible sentence for such an offense," *id.* at 1024; 2) the clause "merely incorporates by reference whatever the domestic law—state or federal—defines as an offense," *id.* at 1025; 3) the clause "operates as a *presumption* against finding that domestic law intends multiple offenses and multiple punishment, a presumption that can be overcome only by 'clear and unmistakable' evidence that the domestic law intends offenses and sentences to be cumulated," *id.* at 1026 (emphasis in original) (quoting Iannelli v. United States, 420 U.S. 770, 791 (1975)).

Professor Westen dismisses both the first and second possible interpretations. The first, that the clause has independent content of its own, is wrong because it is both superfluous and innocu-

The *Blockburger* test, or the same evidence test, was originally designed for multiplicity situations, but has come to be applied, albeit with some confusion, in successive prosecution situations. It is an old test, having its roots in the nineteenth century,[69] but it is still followed, and it figures prominently in RICO cases.[70] As set out in *Blockburger v. United States* the test is as follows: "The 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 a fact which the other does not."[71]

The *Blockburger* test thus has two prongs. In deciding whether RICO charges are multiplicitous, the two prongs are: first, the predicate offenses must require proof of a fact that the RICO count does not require; and second, the RICO count must require proof of a fact that the predicate offense does not require.

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ous. *Id.* at 1025. It is superfluous because excessive punishment is already protected against by the eighth amendment's cruel and unusual punishment clause and by the fifth and fourteenth amendment's due process clauses, and innocuous because its limitations are too lax and too general. *Id.* The second interpretation, that the clause merely incorporates legislative intent, is also superfluous; if the clause does not more than this, then a constitutional analysis is no different from a statutory analysis. *Id.* at 1025-26.

Professor Westen puts forward his third possible interpretation as the correct one. Only if a legislature clearly indicates its intent to impose multiple punishment should such punishment be imposed. This interpretation accordingly preserves some constitutional content for the double jeopardy clause since it "authoriz[es] the courts to subject multiple punishment to constitutional review," *id.* at 1027, that is, to decide "whether the state law is sufficiently 'clear and unmistakable' to justify the imposition of multiple punishment," *id.* at 1027 n.81 (quoting Iannelli v. United States, 420 U.S. 770, 791 (1975)).

Professor Westen's analysis would cut in favor of upholding double jeopardy challenges in RICO cases: since legislative intent is unclear, *see infra* notes 102-28 and accompanying text, the presumption against the imposition of multiple sentences should control.

69. The *Blockburger* test was actually lifted from Gavieres v. United States, 220 U.S. 338, 342 (1911), and *Gavieres* in turn derived it from a Massachusetts Supreme Court case, Morey v. Commonwealth, 108 Mass. 433, 434 (1871).

70. *E.g.*, United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981); United States v. Brooklier, 637 F.2d 620, 621-24 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Aleman, 609 F.2d 298, 309-11 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Solano, 605 F.2d 1141, 1144 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); United States v. Rone, 598 F.2d 564, 571 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); United States v. Smith, 574 F.2d 308, 310-11 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); United States v. Meinster, 475 F. Supp. 1093, 1095 (S.D. Fla. 1979), *aff'd sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); United States v. Pray, 452 F. Supp. 788, 801 (M.D. Pa. 1978); United States v. Hansen, 422 F. Supp. 430, 433 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978); United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976); United States v. Amato, 367 F. Supp. 547, 550-51 (S.D.N.Y. 1973).

71. 284 U.S. at 304.

b. Brown

Although the *Blockburger* test originated in a multiplicity context, it now seems applicable to successive prosecution cases as well. In *Brown v. Ohio*,[72] the United States Supreme Court applied the *Blockburger* test to a case where a defendant was first convicted of joyriding and then prosecuted for auto theft. The Court held that the double jeopardy clause barred indictment for a greater offense after conviction for a lesser included offense. The Court reasoned that the *Blockburger* test will not be met with lesser included offenses such as joyriding because no additional proof is needed to prove the lesser offense that is not needed to prove the greater offense.[73]

Brown may foster both a broad and a narrow interpretation. The broad reading finds *Blockburger* applicable to all post-conviction prosecutions.[74] The narrow one views *Blockburger* as applying only to cases where the defendant could not have been tried for the two offenses at the same trial, such as where one offense is a lesser-included offense.[75]

Brown v. Ohio also raised the more important question of *Blockburger*'s status as a constitutional test. In *Brown*, the same evidence test was used as a check upon courts and prosecutors seeking to impose more punishment than the legislature had intended.[76] The Court assumed that applying *Blockburger* would reveal what the legislature had intended. thus, the Court simply noted that *Blockburger* established the test for determining whether two offenses are sufficiently distinguishable to permit imposing cumulative punishment.[77]

What the *Brown* opinion did not discuss was the possibility that legislative intent, as divined from some extraneous source, might con-

72. 432 U.S. 161 (1977).

73. *Id.* at 168-70.

74. *See* Illinois v. Vitale, 447 U.S. 410, 416 (1980) (*Blockburger* is the "principal test for determining whether two offenses are the same for purposes of barring successive prosecutions").

75. At least one lower court has questioned whether *Brown* means that the *Blockburger* test is to be applied to all post-conviction prosecutions. In United States v. Brooklier, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), the Ninth Circuit pointed out that the *Brown* holding is a narrow one following directly from *Blockburger* and applying only to cases where the defendant could not have been tried for the two offenses at the same trial. *Id.* at 623. Indeed, Illinois v. Vitale is a lesser-included-offense case and does not really extend *Brown*'s narrow holding.

76. Because it was designed originally to embody the protection of the common-law pleas of former jeopardy . . ., the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors. The legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments; but once the legislature has acted courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.

432 U.S. at 165 (citations omitted).

77. *Id.* at 166.

flict with the *Blockburger* test. In its two most recent double jeopardy cases, however, the Court has considered just that possibility.

c. Whalen, *Legislative Intent and* Blockburger

In *Whalen v. United States*,[78] a defendant in the District of Columbia was sentenced to consecutive prison terms for rape and for killing the victim in the perpetration of the rape. The Court concluded that Congress had intended, in the District of Columbia Code, to merge the two offenses; hence, there could not be multiple punishment. The principal evidence of this intent was that Congress had written a version of the *Blockburger* test into the District of Columbia Code.[79] Thus, legislative intent perfectly accorded with *Blockburger* in this case. For the first time, the Court referred to *Blockburger* as a "rule of statutory construction,"[80] a means of determining whether the legislature intended separate punishments for what is claimed to be the same offense. If the test is not met, and thus the same evidence is required to prove both offenses, then the legislature did not intend separate punishments. However, if there is some other expression of legislative intent, the *Blockburger* test can be overriden.[81] In other words, the question of whether there is a constitutional violation hinges on legislative intent. Given legislatures have the power to make laws, define crimes, and prescribe punishments, if the legislature chooses to define the same act as two crimes with two punishments, it is free to do so.[82]

Whalen, however, left open the possibility that there remained a judicial check on the legislature's power to define crimes and prescribe multiple punishment. The *Whalen* Court held that the "Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so."[83] This implied that the clause might nonetheless allow courts to review the constitutionality of Congress' authorization. In a footnote, the Court cited constitutional limitations on Congress' power to define crimes and prescribe punishments.[84] Other opinions had also recognized that the

78. 445 U.S. 684 (1980).

79. D.C. CODE ANN. § 23-112 (1981). *See* Whalen v. United States, 445 U.S. at 691.

80. 445 U.S. at 691.

81. *Id.* at 693. The Court suggested that *Blockburger* is used when there is no other indication of legislative intent: "where two statutory provisions proscribe the 'same offense,' they are construed not to authorize comulative punishments in the absence of a clear indication of contrary legislative intent." *Id.* at 692.

82. *See id.* at 689: "[W]ithin our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress."

83. *Id.* at 689 (emphasis added).

84. *Id.* at n.3. The cases cited as examples of such limitations are Coker v. Georgia, 433 U.S. 584 (1977) (eighth amendment bars cruel and unusual punishment); Roe v. Wade, 410 U.S. 113

Court could override even a clear expression of legislative intent to impose separate punishments. At least one opinion had assumed that the *Blockburger* test was a constitutional one, so that if it is not met, there is a violation of the double jeopardy clause.[85]

Moreover, the Court had recognized the limits of legislative authority to allow separate prosecutions even when the *Blockburger* test is met. In *Ashe v. Swenson*,[86] the Court held that the double jeopardy clause includes the principle of collateral estoppel, so that even in a case where the *Blockburger* test was met there could not be two prosecutions when the second required relitigation of factual issues already resolved by the first.[87] As the Court noted in *Brown v. Ohio*, *Ashe* demonstrated that "[t]he *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense."[88] Thus, even after *Whalen*, the Court had not given up its power to find a double jeopardy violation where there was some indication of legislative intent to impose multiple punishment.[89]

(1973) (right to privacy limits criminal abortion laws); Stanley v. Georgia, 394 U.S. 557 (1969) (first amendment limits laws punishing possession of obscene material); Loving v. Virginia, 388 U.S. 1 (1967) (fourteenth amendment bars miscegenation laws); and Robinson v. California, 370 U.S. 660 (1962) (eighth amendment bars laws punishing status as cruel and unusual punishment). It is true that none of these is a double jeopardy case. But by citing them, the Court appeared to imply its unwillingness to abrogate its power to review laws made by the legislature, whatever the context.

In a post-*Whalen* RICO case, the Fifth Circuit interpreted *Whalen* as making Congressional intent dispositive on the issue of whether multiple punishment can be imposed. United States v. Hawkins, 658 F.2d 279, 286 (5th Cir. 1981). But *Hawkins* also called attention to footnote 3 in *Whalen*, recognizing constitutional limitations upon Congress' power to define criminal offenses and prescribe punishment. *Id.* at 286 n.11.

85. Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary, following our practice of avoiding constitutional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged.

Simpson v. United States, 435 U.S. 6, 11-12 (1978). Chief Justice Burger appeared to agree with this view of the *Blockburger* test in his dissent in Ashe v. Swenson: "This Court, like most American jurisdictions, has expanded that part [double jeopardy concept] of the Coustitution into a 'same evidence' test." Ashe v. Swenson, 397 U.S. 436, 463 (1970) (Burger, C.J., dissenting). *See also* Albernaz v. United States, 450 U.S. 333, 345 (1981) (Stewart, J., concurring in the judgment).

86. 397 U.S. 436 (1970).

87. *Id.* at 445.

88. 432 U.S. 161, 166 n.6 (1977).

89. One notewriter has argued that *Whalen* "implicitly rejected the proposition that the double jeopardy clause imposes a substantive limit on Congress's power to define and punish crimes." Note, *Cumulative Sentences for One Criminal Transaction Under the Double Jeopardy Clause*: Whalen v. United States, 66 CORNELL L. REV. 819, 831 (1981). In other words, *Whalen* is said to limit only the courts' power to impose cumulative sentences not sanctioned by the legislature. The Note concedes, however, that "the Court did not explicitly state that the double jeopardy clause cannot substantively restrict Congress's power to define and punish crimes. . . ." *Id.* at 831 n.43. It is suggested that "the Court may have reserved explicit judgment on substantive effect to preserve the notion that in some instances the double jeopardy clause might act as a substantive check on Congress." *Id.* Support for this hypothesis comes from the majority's failure

d. Albernaz

The Supreme Court's most recent pronouncement, in *Albernaz v. United States*,[90] is a bold extension of the position it took in *Whalen* during the preceding term. In *Albernaz*, the defendants had been convicted of a conspiracy to distribute and a conspiracy to import marijuana. Thus, two different conspiracy statutes were involved.[91] When they received consecutive sentences for the convictions, the defendants challenged their convictions on the grounds that this multiple punishment was unintended by Congress and violative of the double jeopardy clause.

The Court held that Congress did intend to impose separate punishment for violations of the two different conspiracy statutes. To reach this conclusion, it applied the *Blockburger* test. The test was clearly met in this case, since conviction of conspiracy to import marijuana required proof of intent to import, while conviction of conspiracy to distribute required proof of intent to distribute. In short, each conspiracy statute required proof of a fact which the other did not.

Justice Rehnquist, writing the majority opinion, went on to state the limits of the *Blockburger* test. *Blockburger* is a rule of statutory construction and is limited to that purpose. Where *Blockburger* reveals that two crimes require different elements of proof, legislative intent for multiple punishment is inferred. However, where *Blockburger* indicates that the same evidence is required, legislative intent cannot be inferred. Instead, the court must look to specific Congressional authorization of multiple punishment. *Albernaz* concluded by stating that "the question of what punishments are constitutionally permissible is

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to adopt Justice Blackmun's position, namely that the clause's only role in multiplicity cases is to incorporate legislative intent, 445 U.S. at 697-98 (Blackmun, J., concurring), and also from the concurrence in United States v. Albernaz, 450 U.S. 333, 344-45 (1981) (Stewart, J., concurring), in which three members of the *Whalen* majority refused to support Justice Rehnquist's view that the clause does not restrict Congress' power to define and punish crimes. For further discussion of *Albernaz*, see *infra* notes 90-92 and accompanying text.

Westen, *supra* note 68, has interpreted *Whalen* as according with his analysis of the role of the double jeopardy clause in multiplicity cases. *Id.* at 1030-32. According to Professor Westen, *Whalen* holds that "while the double jeopardy clause prohibits the courts from imposing multiple punishment where the legislature does not intend it, and while it permits the courts to impose multiple punishment where the legislature 'clearly' intends it, it operates in all middle areas as a presumption against multiple punishment." *Id.* at 1031 (quoting *Whalen*, 445 U.S. at 695).

The notewriter cited above is in substantial agreement with Professor Westen's analysis, for he concludes that *Whalen* "give[s] the double jeopardy clause substantive content as a presumption against cumulative sentences for a single criminal transaction when legislative intent is ambiguous." Note, *supra*, at 840.

90. Albernaz v. United States, 450 U.S. 333 (1981).

91. The two statutes were 21 U.S.C. § 963 (1976) and 21 U.S.C. § 846 (1977), both part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1976 & Supp. III 1979).

not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended, as it did here, to impose multiple punishment, imposition of such sentences does not violate the Constitution."[92]

e. Blockburger *as a Constitutional Test: Allowing Judicial Review of Multiple Punishments*

As the *Albernaz* concurrence[93] pointed out, the majority opinion misstated *Whalen* and introduced into double jeopardy law the notion that Congress could do whatever it pleased in the way of multiple punishment, with absolutely no constitutional check. Justice Stewart characterized the Court's concluding statements as "supported by neither precedent nor reasoning and . . . unnecessary to reach the Court's conclusion."[94] The concurrence went on to insist, firmly and clearly, that *Blockburger* was a *constitutional* test: "No matter how clearly it spoke, Congress could not constitutionally provide for cumulative punishments unless each statutory offense required proof of a fact that the other did not, under the criterion of *Blockburger*."[95]

Since in the *Albernaz* case the *Blockburger* test was satisfied, the Court's holding was correct. But as the concurrence maintained, all that was required to settle the case was the application of *Blockburger*. The conclusion that Congress has complete freedom to impose multiple punishment is therefore dicta. Nonetheless, it is likely to carry great weight in the interpretation—or nullification—of the double jeopardy clause. It is long-settled doctrine that the double jeopardy clause protects "against multiple punishments for the same offense."[96] If Congress can impose multiple punishments at will, with no constitutional test of what constitutes the same offense and essentially no court review, then there is no real fifth amendment guarantee against multiple punishment for the same offense.

It is true that courts should inquire into legislative intent to make sure that multiple punishments were authorized, but double jeopardy analysis should not end here. Rather, the court should go on to inquire, via *Blockburger*, whether multiple punishments have been prescribed for what is in fact the same offense. In a case where the *Blockburger* test would result in only one prosecution while the legislature had clearly stated that it intended multiple prosecutions, the *Block-*

92. 450 U.S. at 344.
93. *Id.* at 344-45.
94. *Id.* at 345.
95. *Id.*
96. North Carolina v. Pearce, 395 U.S. 711, 717 (1969). Justice Rehnquist quoted this statement in the *Albernaz* opinion, 450 U.S. at 343.

burger standard should prevail. Thus, if it were clear that in RICO Congress intended double punishment, a properly applied *Blockburger* test could forestall multiplicitous prosecutions.

3. Blockburger *and RICO Cases*

A strict application of the *Blockburger* test in RICO cases will always block multiple prosecutions, because RICO, like felony murder, is essentially a greater-offense statute. A RICO violation is the greater offense that includes the two predicate crimes, or lesser included offenses. This becomes apparent if one tries to apply the *Blockburger* test to a RICO case in the abstract. The second prong of the test, that the RICO count must require proof of a fact not required for the separately charged predicate offense, is easily satisfied. As numerous opinions have pointed out,[97] conviction under RICO requires proof of several elements not necessary in a prosecution for the predicate offense. For instance, there must be at least two related racketeering acts;[98] there must be an enterprise affecting interstate commerce; and there must be investment in, control over, or conduct of the enterprise through a pattern of racketeering.[99]

The first prong of the *Blockburger* test, however, is not met unless the separately charged predicate offenses require proof of a fact that the RICO count does not require. To prove violation of section 1962, the government must prove beyond a reasonable doubt each element of each predicate offense.[100] Therefore, the RICO count requires the very same proof of each underlying crime as would be required to prove that crime in a separate prosecution. At least one commentator has concluded that the predicate offenses must be seen as lesser included

97. *See, e.g.*, United States v. Solano, 605 F.2d 1141, 1145 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980); United States v. Smith, 574 F.2d 308, 311 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978); United States v. Hansen, 422 F. Supp. 430, 433 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978); United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

98. It remains an open question whether or not the raeketeering acts that constitute the pattern of racketeering have to be related. At least two courts assumed that there does have to be such a relationship and that that relationship is the additional fact which has to be proved in a RICO prosecution. United States v. White, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). Apparently, the government conceded in *Stofsky* that such a connection had to exist. *Id.* at 617.

99. 18 U.S.C. § 1962 (1976).

100. United States v. Stofsky, 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (concurring with the District Court's opinion in United States v. Parness, No. 73 Cr. 157 (S.D.N.Y. May 17, 1973)), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). *See also* United States v. Pray, 452 F. Supp. 788, 801 (M.D. Pa. 1978) ("The Court does not believe that the Government can charge someone . . . only with eugaging in racketeering activity without being able to convict with respect to the underlying crimes.").

offenses within section 1962(c) and that "[t]herefore, separate punishment of the predicate offenses and the RICO offense is not permissible" in the absence of clear congressional intent to impose consecutive sentences.[101] However, it should be noted that this author concedes that clear legislative intent is dispositive.

Strict application of the *Blockburger* test leads to the conclusion that punishment for a RICO violation and its two predicate offenses amounts to punishment for the same offense. This in turn suggests that Congress did not intend that RICO be used to procure multiple punishments. This conclusion is at odds with findings of a number of circuit courts that Congress clearly authorized separate punishments, and such authorization allows prosecutors to bring predicate offense and RICO charges without violating the double jeopardy clause. *Blockburger* aside, Congress' intent to punish all defendants within the ambit of RICO is in doubt. Moreover, the assertions of the circuit courts are assailable, and do not justify the conclusion that the legislature intended to impose multiple punishment. Even a bold statement of legislative purpose does not circumvent the statutory review or the *Blockburger* scrutiny that courts must undertake. This is particularly important in the RICO context. Such review will serve as a check

101. Tarlow, *supra* note 18, at 264. *See also* United States v. Scotto, 641 F.2d 47, 56 (2d Cir. 1980) (RICO and the Taft-Hartley Act violations are " 'separate crimes separately punishable,' because they 'do not proscribe the same act or transaction, and they implement different Congressional purposes.' ", quoting United States v. Boylan, 620 F.2d 359, 361 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980)), *cert. denied*, 101 S. Ct. 3109 (1981); United States v. Meinster, 475 F. Supp. 1093, 1095 (S.D. Fla. 1979) (claim that aiding and abetting was a lesser included offense under RICO is dismissed for that offense is not among those state or federal offenses defined in § 1961(1)). For a criticism of the *Boylan* argument see *infra* text accompanying notes 122-24.

Courts often avoid having to reach a lesser included offense conclusion on their own by applying only the second prong of the *Blockburger* test. That is, the court will mention what additional proof will be needed to convict under RICO but will not specify the additional proof needed to convict for the predicate offense. For instance, in United States v. Hansen, 422 F. Supp. 430 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978), the court noted that "[w]hile the substantive mail fraud counts are the same as the offenses incorporated in the racketeering charge [i.e., RICO] alleged in Count II, a conviction on Count II requires proof of additional facts which the mail fraud Counts do not—that a pattern of racketcering activity existed and that the defendant was a member of such an enterprise." *Id.* at 433. The court thereupon concluded that the indictment was not multiplicitous. *Id.* at 433-34. *See also* United States v. White, 386 F. Supp. 882, 884 (E.D. Wis. 1974); United States v. Stofsky, 409 F. Supp. 609, 617 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

Courts may also overlook the necessity of proving the elements of the underlying offenses in order to convict under RICO. The court can then easily find different proof required for the predicate offense and the RICO counts, since the one requires proof of a crime and the other of the conduct of an enterprise through racketeering. For instance, United States v. Pray, 452 F. Supp. 788 (M.D. Pa. 1978), dismissed a multiplicity claim on the grounds that "[e]ach particular count of the indictment requires proof of some element special to that count which is not required to prove a general pattern of racketeering activity." *Id.* at 801. But to prove the general pattern of racketeering activity, the government must prove that the predicate offenses were committed. Hence all the elements of each count must also be proved for a RICO conviction.

against unbridled prosecution, and in so doing, better serve Congress' cxpress purpose in enacting RICO, and afford defendants the constitutional protection of the double jeopardy clause.

4. Statutory Analysis of Legislative Intent

The ambiguity inherent in RICO lies in the great disparity between the statute's express purpose and the breadth of its coverage. Tlie purpose of RICO, as stated in Congress' Statement of Findings and Purpose, is to eradicate organized crime.[102] The statute, however, casts its net well beyond that class of persons involved in such activity. While section 1962 of RICO, constructed as it is, avoids the problem of vaguely defining a social phenomenon, it characterizes as organized criminals many multiple offenders who are not, and subjccts this class to the multiple punishment intended for hard-core organized crime members. Of course, Congress has the power to define and punish crimes, but where a statutory definition does not seem to carry out the avowed legislative purpose, the validity of that definition must be questioned.

A number of courts have maintained that RICO's legislative intent as to multiple punishment is clear. They have held that Congress intended multiple punishment, and have enlisted statutory support for this assertion. That each of these arguments is assailable suggests that there was no clear intent in RICO to prescribe multiple punishment.

a. Enhanced Sanctions

The most pervasive argument is that the Congressional Statement of Findings and Purpose calls for enhanced sanctions. This argument was accepted by the Ninth Circuit in *United States v. Rone*,[103] and has since been relied upon by the Second Circuit in *United States v. Boylan*,[104] and the Fifth Circuit in *United States v. Hawkins*.[105] These courts have reasoned that without cumulative sentences, the penalties would be insufficient.[106]

This is not necessarily the case, however. Many of the predicate offenses set out in section 1961 do indeed carry lengthy prison terms. Others do not, such as: sports bribery (five years);[107] transmission of gambling information (two years);[108] obstruction of justice (five

102. *See supra* note 2.
103. 598 F.2d 564, 571-72 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).
104. 620 F.2d 359, 361 (2d Cir. 1980), *cert. denied*, 449 U.S. 833 (1981).
105. 658 F.2d 279 (5th Cir. 1981).
106. *See id.* at 287; United States v. Rone, 598 F.2d at 572.
107. 18 U.S.C. § 224(a) (1976).
108. *Id.* § 1084(a).

years);[109] obstruction of criminal investigations (five years);[110] obstruction of State or local law enforcement (five years);[111] interstate transportation of wagering paraphernalia (five years);[112] trafficking in contraband cigarettes (three or five years).[113] The result is that a prosecutor could obtain a considerably longer prison sentence by using RICO than by charging all the predicate crimes separately, provided the RICO count is based on two predicate offenses that together carry a prison term of less than twenty years. Thus, if there are twenty-five potential counts to an indictment, a prosecutor could substract two, make them the basis of a RICO count, charge the other twenty-three separately, and subject the defendant to a longer total prison term than if he had charged the twenty-five offenses separately.

More importantly, there are reasons for using RICO which are quite unrelated to the prison term to be imposed. The punitive heart of the Act is not really the long prison term or large fine; it is the criminal forfeiture provisions of section 1963,[114] which make it possible for the government to detach RICO defendants from the criminal enterprises or legitimate businesses with which they have been associated. The Senate Report emphasizes that it was on the criminal forfeiture provisions that Congress pinned its greatest hope of destroying organized crime.[115] Thus, it is not the case that RICO would never be used if cumulative sentences could not be imposed.

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109. *Id.* § 1503.

110. *Id.* § 1510(a).

111. *Id.* § 1511(d).

112. *Id.* § 1953(a).

113. *Id.* § 2344(a), (b) (Supp. III 1979).

114. Section 1963(a) provides that a defendant who is convicted under section 1962 shall forfeit to the United States "any interest he has acquired or maintained in violation of section 1962," and "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962." *Id.* § 1963(a) (1976).

115. The Senate Report stresses that traditional penalties have been ineffective to accomplish this purpose, and that new remedies are therefore needed:

> Title IX recognizes that present efforts to dislodge the forces of organized crime from legitimate fields of endeavor have proven unsuccessful. To remedy this failure, the proposed statute adopts the most direct route open to accomplish the desired objective. Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity. . . .
>
> Fine and imprisonment as criminal sanctions are not new. The use of criminal forfeiture, however, represents an innovative attempt to call on our common law heritage to meet an essentially modern problem.
>
> . . . .
>
> . . . Through this new approach, it should be possible to remove the leaders of organized crime from their sources of economic powers.

SENATE REPORT, *supra* note 2, at 79, 80.

b. Separately Punishable Crimes

The Second Circuit in *United States v. Boylan* offered a second argument. The court concluded that Congress intended to define "separate crimes, separately punishable."[116] *Boylan* involved convictions under RICO and the Taft-Hartley Act, statutes that "do not proscribe the same act or transaction, and . . . implement different congressional purposes."[117] This begs the question of how to determine congressional intent, and the *Boylan* court's citation of *Whalen* does not advance the analysis. The *Whalen* Court could find no congressional authorization of separate punishments.

The District of Columbia Code did, however, incorporate a version of the *Blockburger* test, and the *Whalen* Court accordingly held that multiple punishments were not intended.[118] While the court's analysis suggested that the language of the statute and legislative history might be relevant, it did not state that the pronouncement of separate congressional purposes by itself established that Congress intended to sanction consecutive sentences. Nor did the court consider which theory should prevail if the statutory and *Blockburger* tests pointed to different conclusions. Thus, *Boylan*'s different purposes test is not compelled by authority, and leads to relinquishing the court's power to review potentially unconstitutional prosecutions. *Boylan* leaves open the possibility that a legislature could simply set forth two different policy reasons for punishing the same crime and thereby avoid a double jeopardy violation.

c. Prison Time Exclusion

In *United States v. Aleman*,[119] a third argument was advanced that Congress intended consecutive sentences. This argument was based on the language of section 1961(5), which requires that the two predicate offenses must occur within ten years, excluding from the ten years any period of imprisoument. The court reasoned that "[i]t is implicit in that provision that even though a defendant has already served time for the first predicate offense that first offense may still be used as an element in establishing a RICO 'pattern.' "[120] This argument assumes the defendant will be in jail as a result of the first predicate offense. No such

116. 620 F.2d at 361.

117. *Id.* Taft-Hartley "proscribes the receipt of illegal payments by union officials and stems from congressional concern with the integrity of labor organizations." RICO "proscribes a 'pattern' of illegal activities, and arises from congressional concern over the influence of organized crime." *Id.*

118. 445 U.S. at 691-93.

119. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); *accord* United States v. Hawkins, 658 F.2d 279, 288 (5th Cir. 1981).

120. 609 F.2d at 306.

assumption is warranted. The defendant could be in jail for any offense whatever, including one unrelated to the RICO prosecution. As RICO was aimed at defendants who tend to commit crimes regularly, Congress adopted a prison time extension. There is no evidence to suggest that Congress intended the exclusion only for the imprisonment for the first predicate offense.

d. Supersedure and Liberal Construction Clauses

A fourth argument was put forth in *United States v. Hawkins*,[121] and was based on RICO's supersedure[122] and liberal construction[123] clauses. The supersedure clause provides that "[n]othing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title."[124] The court said that this clause, section 904(b), was to be interpreted liberally in accord with section 904(a), which provides that "[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes."[125] Thus, the *Hawkins* court determined that it was Congress' intent to punish RICO violations and their predicate offenses separately.

Such an argument is premised on a strained reading of a standard preemption clause, a version of which was incorporated into RICO in section 904(b). The purpose of such a clause is to allow state and federal authorities to continue prosecuting the crimes listed in section 1961 by making it clear that Congress has not preempted the field of criminal prosecution of these crimes.[126] There is no evidence in the legislative history that section 904(b) was meant to ensure double punishment. Moreover, the liberal construction clause is generally con-

121. 658 F.2d 279 (5th Cir. 1981).

122. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947.

123. *Id.* § 904(a).

124. *Id.* § 904(b).

125. United States v. Hawkins, 658 F.2d at 287. The argument that § 904(b) proves that Congress intended multiple punishment was also suggested in United States v. Alemian, 609 F.2d 298, 306 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

126. For other examples of supersedure clauses, see Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 811, 84 Stat. 922, 940, providing that "[n]o provision of this title [enacting this section and section 1955 of this title, amending section 2516 of this title and enacting provisions set out as notes under this section and section 1955 of this title] indicates an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of a State or possession, or a political subdivision of a State or possession, on the same subject matter, or to relieve any person of any obligation imposed by any law of any State or possession, or political subdivision of a State or possession"; 18 U.S.C. § 2345(a) (Supp. III 1979), providing that "[n]othing in this chapter shall be construed to affect the concurrent jurisdiction of a State to enact and enforce cigarette tax laws, to provide for the confiscation of cigarettes and other property seized for violation of such laws, and to provide for penalties for the violation of such laws."

trary to the interpretation of criminal statutes.[127] Specifically, courts have refused to honor it where liberal construction would threaten RICO's constitutionality.[128]

5. *Resort to* Blockburger

It is worth noting that in *Boylan*, *Rone*, *Aleman*, and *Hawkins* the courts applied the *Blockburger* test,[129] despite the courts' apparent assurance that Congress intended separate punishment. Resort to *Blockburger* suggests that courts are looking for a further test to determine whether Congress intended that RICO allow multiple punishment.

Several RICO courts have indeed suggested that a double jeopardy claim is ultimately resolved by applying a *Blockburger* test. The suggestion implies that the legislative intent of RICO is not clear as to multiple punishment, and that it is the judiciary that must determine whether the defendant has been placed in double jeopardy. These courts have seemed to assume that Congress intended separate punish-

127. United States v. Enmons, 410 U.S. 396, 411 (1972); *accord* United States v. Rubin, 559 F.2d 975, 991 (5th Cir 1977) (identifying this conflict in the RICO context), *vacated and remandcd on other grounds*, 439 U.S. 810 (1978).

128. *See, e.g.*, United States v. Thevis, 474 F. Supp. 134, 142 (N.D. Ga. 1979) (§ 1963(a)(1) must be interpreted narrowly to allow forfeiture only of proprietary interests in an enterprise and not of profits from the enterprise; to allow a "broad, expansive construction" of this subsection would "invite serious due process problems under the Fifth Amendment."), *aff'd on othcr grounds*, 665 F.2d 616 (5th Cir. 1982).

129. *See* United States v. Hawkins, 658 F.2d at 288; United States v. Boylan, 620 F.2d at 361; United States v. Aleman, 609 F.2d at 310; United States v. Rone, 598 F.2d at 571. *Boylan* merely quoted *Blockburger* without really applying it, announcing that the test was not violated. *Aleman* misapplied the test, noting only that the proof required for a RICO conviction was "in contrast" to the proof required to sustain a conviction for the interstate transportation of stolen property. *See supra* note 101 on application of the *Blockburger* test. The *Rone* court did apply the test properly, acknowledging the existence of a potential *Blockburger* problem but finding that none had occurred because, in addition to the allegedly multiplicitous extortions, three murders were also charged as RICO predicate offenses but not charged separately in the indictment. Hence there was sufficient evidence for a RICO conviction without the extortions. The court did not specify how it would have ruled had the three murders not been present. But in a later Ninth Circuit case, *Rone* was cited for the proposition that "a defendant can be convicted and separately punished both for the predicate acts which form the basis of a RICO charge, and for a substantive violation of RICO, without violating the Double Jeopardy Clause." United States v. Solano, 605 F.2d 1141, 1143 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).

In United States v. Hawkins, 658 F.2d 279 (5th Cir. 1981), the court questioned whether the *Blockburger* test applied to RICO cases. The court's reasoning was as follows: In the case of traditional greater and lesser included offenses, the offenses arise from the same act or transaction. But a RICO conviction arises from at least two different acts (the two or more predicate offenses). Therefore, the *Blockburger* test, which is invoked when the same act or transaction violates two distinct statutory provisions, is inappropriate to RICO cases. *Id.* at 288. The court seemed to recognize that this analysis is debatable, because it conceded that it "might be argued that the 'same act or transaction' requirement of *Blockburger* should . . . simply be interpreted as coextensive with the scope of the predicate offense." *Id.* But the court declined to decide this question, on the ground that it was "enough" to conclude that *Blockburger* did not compel it to uphold the defendant's double jeopardy claim. *Id.*

ment only where, under the *Blockburger* test, the offenses are not the same.

In *United States v. Solano*,[130] the Ninth Circuit declined to block the trial of a defendant who had been convicted of conspiracy to manufacture drugs and then faced a RICO conspiracy charge. The defendant claimed it was the same conspiracy, but the court noted the difficulty of applying in advance the *Blockburger* test to complex conspiracy cases and left open the possibility that the defendant could appeal his conviction if the trial revealed that there was only one conspiracy.[131] A similar course was suggested in *United States v. Stofsky*.[132] In this case, the defendants claimed that the racketeering acts forming their RICO charge were the same as the individual violations of the Taft-Hartley Act with which they were separately charged in the same indictment.[133] As in *Solano*, the court declined to block the prosecution; but it suggested that if it became obvious at trial that the evidence with respect to the contested counts was the same, the court might be required to "strike certain counts, or require the government to elect, or use other remedies available."[134] The willingness of the *Solano* and *Stofsky* courts to entertain the possibility that they eventually might have to strike counts or even reverse a conviction on double jeopardy grounds suggests that the *Blockburger* test sets the limits for

130. 605 F.2d 1141 (9th Cir. 1979), *cert. denied*, 444 U.S. 1020 (1980).

131. *Id.* at 1144-45. In Abney v. United States, 431 U.S. 651 (1977), defendants were allowed to raise double jeopardy challenges before the second prosecution. Hence the court should perhaps have decided in advance whether the conspiracies were the same. In Illinois v. Vitale, 447 U.S. 410 (1980), however, the Supreme Court appeared willing to review a double jeopardy decision reached after trial. In *Vitale*, the defendant was convicted of failing to reduce speed to avoid an accident and was then charged with involuntary manslaughter. He claimed the first offense was a lesser included offense of the second. The state claimed that it did not have to prove failure to reduce speed in order to prove involuntary manslaughter and that the *Blockburger* test was therefore not violated. The Court remanded the case to the Illinois Supreme Court "[b]ecause of our doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State will rely on to prove manslaughter are still unknown . . . ." 447 U.S. at 421. The Court left uncertain whether the state would be required to reveal its case before the second trial. Presumably, if it were not, the trial could go forward and if it developed that the state *did* rely on failure to reduce speed then the defendant could challenge his conviction on double jeopardy grounds. The dissent characterized the majority opinion as implying that the state could proceed to trial before a determination was made on the defendant's double jeopardy claim and insisted that such a procedure would violate *Abney*. *Id.* at 426-27 (Stevens, J., dissenting). It is not entirely clear, however, that the majority opinion did sanction a trial before the Illinois Supreme Court passed on the double jeopardy claim.

132. 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

133. *Id.* at 617.

134. *Id.* at 617-18. Since this is a multiplicity situation, *Abney* probably would not apply, so the problem raised *supra* in note 103 would not occur here. The *Abney* decision rests on the policy barring successive prosecutions, as opposed to multiple punishments. *See Abney*, 431 U.S. at 661-62.

applying enhanced sanctions to RICO defendants.[135]

6. Policy Considerations

In addition to considering the conclusions reached by the *Blockburger* and legislative purpose approaches, one must examine the underlying policies that the double jeopardy clause seeks to effect. The magnified difficulties of defendants facing RICO and predicate offense charges are identical to those that compelled the framers to afford constitutional protection against double jeopardy.

All bars against double jeopardy stem from the same deep-rooted belief that it is unfair to punish a person twice for a single act.[136] If that belief is analyzed more closely, different reasons are revealed as underlying the policies against successive prosecutions on the one hand and multiplicity on the other. Multiplicity raises the possibility of double punishment for the same offense in the form of cumulative or consecutive sentences. A RICO defendant, under the *Albernaz* test, indeed faces double punishment for what the *Blockburger* test reveals to be the same offense. There are also the concerns that multiplicitous counts might confuse and lengthen a trial or prejudice the jury by suggesting that the defendant has committed a large number of crimes.[137] In RICO cases, it has been argued that dropping multiplicitous counts will not necessarily shorten a trial or avoid jury prejudice.[138] Nonetheless, charging the predicate offenses separately as well as under RICO produces a longer indictment, a repetition of the crimes charged, and a greater number of counts for the jury to deliberate. This increases the likelihood of jury confusion and prejudice.

The policy against successive prosecutions derives from the belief that people should not be put to the anxiety, trouble, and expense of defending themselves twice against the same charge. Fairness to the accused is at stake; if the state can prosecute an individual again and again until it secures a conviction, the individual is at a tremendous disadvantage.[139] There is some feeling that the policy against succes-

135. Many other courts have applied the *Blockburger* test to RICO cases. *See supra* note 70. But only *Solano* and *Stofsky* appeared to take the test seriously enough to contemplate reversal.

136. *See* J. SIGLER, DOUBLE JEOPARDY 35 (1969).

137. United States v. Stofsky, 409 F. Supp. 609, 618 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976).

138. The government could drop all the multiplicitous counts and still try to prove all the predicate offenses under the RICO count. Conversely, the government could drop the RICO count and still prove all the separately charged offeuses. *Id.*

139. An additional consideration is presented in Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 129-32: that is, the rule that a defendant may not be retried following acquittal by a jury has as its rationale that "the acquittal may be a product of the jury's legitimate authority to acquit against the evidence." *Id.* at 129. Thus, the double jeopardy clause "allows the jury to exercise its constitutional function as the conscience of the community

sive prosecutions is more basic to our system, and hence should be more zealously guarded than the policy against multiplicity. Advocates of this view would bar *all* successive prosecutions within the same jurisdiction, with the government required to join at one trial all charges arising out of the same transaction.[140]

Justice Brennan has been major proponent of this same transaction test.[141] Brennan contends that the double jeopardy clause is not concerned with the justification for or policy behind the statutes violated by the accused. Rather, the clause is concerned with the harassment inherent in successive prosecutions:

> [T]o permit the Government statutorily to multiply the number of offenses resulting from the same acts, and to allow successive prosecutions of the several offenses, rather than merely the imposition of consecutive sentences after one trial of those offenses, would enable the Government to "wear the accused out by a multitude of cases with accumulated trials." Repetitive harassment in such a manner goes to the heart of the Fifth Amendment protection.[142]

In RICO cases, a violation arises when the defendant has invested in, acquired, or operated an enterprise through a pattern of racketeering. This involves a patently different act or transaction than that involved in the predicate offenses. Thus, the same transaction test seems not to compel a finding of a double jeopardy violation. However, RICO is so broad that it might be applied to punish twice for the same predicate acts, the proof of enterprising activity being but a mask for government harassment. This could occur when routine operation of or investment in a business exists but is entirely separate from any wrongdoing. Courts should review cases to check overzealous prosecution.

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in applying the law: to soften, and in the extreme case, to nullify the application of the law in order to avoid unjust judgments." *Id.* at 130.

140. *See* United States v. Brooklier, 637 F.2d 620, 622-23 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), and commentaries and model statutes cited therein.

141. Although he wrote the majority opinion in *Abbate*, Justice Brennan was concerned lest that opinion be interpreted too broadly. The government had wanted *Abbate* to be decided on the rationale that successive prosecutions never violate the double jeopardy clause when they are based on statutes designed to vindicate different governmental interests. But Justice Brennan most emphatically did not want to sanction successive federal prosecutions for the same act and hence wrote a separate opinion. Abbate v. United States, 359 U.S. 187, 196-201 (1959) (Brennan, J., concurring). In his dissent to the denial of certiorari in Thompson v. Oklahoma, 429 U.S. 1053, 1054 (1977) (Breunan, J., dissenting), Justice Brennan listed all the concurrences and dissents in which he has espoused the same transaction test.

142. *Abbate*, 359 U.S. at 199-200 (footnote omitted).

II
ACHIEVING RICO'S PURPOSE WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE: SELECTIVE PROSECUTION

This Comment has argued that the double jeopardy clause bars prosecutors from bringing, and courts from entertaining, RICO charges where the predicate offenses supporting such charges have been tried. Without violating the double jeopardy clause, Congress' goal in enacting RICO—to eradicate racketeering—can be served by prosecutors and courts observing a strictly applied *Blockburger* test. Applying *Blockburger* will serve as a check against prosecutorial abuse, the potential for which is arguably RICO's greatest defect,[143] and, as a practical matter, will narrow the class of prospective RICO defendants to those likely to be engaged in organized crime. The goal of eradicating organized crime can be met within constitutional boundaries by virtue of selective prosecution.

The double jeopardy problems associated with RICO arise from its broad reach. To narrow RICO's snare, prosecutors and courts should follow the *Blockburger* guideline. This entails striking from the indictment the predicate offenses on which a RICO charge is based, or alternatively, basing a RICO charge on offenses yet to be tried. Prosecutors would still be allowed to proceed against those who are indictable under many counts and are likely to be members of organized crime. Defendants who are chargeable on only two counts and are less likely to be members of organized crime would be protected from multiple punishment.

A. Prosecuting the Appropriate Defendants

If prosecutors and courts were to strike predicate offenses or even whole counts, most RICO prosecutions would not be significantly impaired. The indictments are usually so long and the crimes charged so numerous that deleting a few will make no difference to the case's outcome.[144] This is especially true in cases such as *United States v. Brooklier*, where the defendants were the type of people at whom the Act was

143. *See* Tarlow, *supra* note 18 at 171.

144. The recent case of United States v. Peacock, 654 F.2d 339 (5th Cir. 1981), is an excellent example. The defendants were charged with conducting an arson ring: they set fires and collected insurance proceeds. There were 24 counts to the indictment: a substantive RICO count, 22 counts of mail fraud, and an obstruction of justice count. *Id.* at 340. The RICO count listed as predicate offenses 10 acts of arson, a murder, all of the mail frauds charged in counts 2-23, and the obstruction of justice charged in count 24. *Id.* at 341. The government also sought forfeiture, under 18 U.S.C. § 1963(a), of the proceeds derived from defrauding the insurance companies. *Id.* at 340. Pursuant to FED. R. CRIM. P. 31(e), the jury returned a special verdict requiring the defendants to forfeit these proceeds. *Id.* at 348. (FED. R. CRIM. P. 31(e) provides that "If the indictment or

aimed.[145] In *Brooklier*, the defendants had pleaded guilty in 1975 to one count of violating section 1962(d). The specific charge was that they had conspired to extort money from a bookmaker. In 1979, the defendants were again indicted under RICO. Count II of the second indictment alleged numerous crimes, most of which occurred after 1975. One charge, however, was an incident of extortion of the bookmakers and the defendants claimed double jeopardy.[146] Even if this extortion charge were thrown out of the 1979 indictment, there remained threats, other extortions, and murder—more than enough for a conviction and a lengthy prison term. In such cases, RICO can justifiably be used to increase a defendant's prison term by predicating a

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information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned as to the extent of the interest or property subject to forfeiture, if any").

The *Peacock* defendants claimed that it violated the double jeopardy clause for them to have been charged with the substantive mail fraud counts, since these were included in the RICO count as well. The court brushed aside this claim with a standard misapplication of *Blockburger*, reasoning that "a RICO conviction requires proof of a fact which a single mail fraud conviction does not." *Id.* at 349. (*See supra* note 129 for similar misreading of *Blockburger* as it applies to RICO cases.) But given the number of predicate offenses listed in the indictment, there was no reason why the government had to include the mail frauds as well. The defendants could have been convicted under RICO if the jury had found them guilty of only two predicate offenses. Leaving out the multiplicitous mail frauds and obstruction of justice, the jury in fact still had 10 arsons and a murder to choose from. As the court pointed out, since the jury returned a special verdict requiring forfeiture, it must have found the defendants guilty of arson. Otherwise, there would have been no basis for the forfeiture, since all the other crimes mentioned in the indictment, including the mail frauds, grew out of the arson scheme. *Id.* at 348. Therefore, the multiplicitous mail frauds were not needed to convict the defendants of the RICO violation.

In short, the outcome of this case would have been no different had the government been forced to predicate the RICO count upon "only" the 10 arsons and the murder. The sentences would hardly have been shorter. Had the mail frauds been dropped from the RICO count, the one defendant charged under all counts *could* have received a maximum sentence of 135 years: 20 years for RICO, 18 U.S.C. § 1963(a) (1976), 110 years for 22 counts of mail fraud at five years per count, 18 U.S.C. § 1341 (1976), and five years for obstruction of justice, 18 U.S.C. § 1510(a) (1976). In fact, he received a sentence of 55 years. 654 F.2d at 340. Therefore, the addition of the mail fraud charges to the RICO count served no purpose.

For other cases with long indictments in which double jeopardy challenges have been raised, see United States v. Barton, 647 F.2d 224, 227 (2d Cir. 1981) (14 counts); United States v. Hawkins, 658 F.2d 279, 281 (5th Cir. 1981) (at least 23 counts); United States v. Boylan, 620 F.2d 359, 360 (2d Cir. 1980) (12 counts), *cert. denied*, 449 U.S. 833 (1981); United States v. Scotto, 641 F.2d 47, 50 (2d Cir. 1980) (60 counts), *cert. denied*, 101 S. Ct. 3109 (1981); United States v. Meinster, 475 F. Supp. 1093, 1094 (S.D. Fla. 1979) (36 counts), *aff'd sub nom.* United States v. Phillips, 664 F.2d 971 (5th Cir. 1981); United States v. Pray, 452 F. Supp. 788, 792 (M.D. Pa. 1978) (14 counts); United States v. Hansen, 422 F. Supp. 430, 432 (E.D. Wis. 1976), *aff'd*, 583 F.2d 325 (7th Cir. 1978) (25 counts); United States v. White, 386 F. Supp. 882, 883 (E.D. Wis. 1974) (11 counts); United States v. Stofsky, 409 F. Supp. 609, 611-12 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975) (30 counts), *cert. denied*, 429 U.S. 819 (1976).

145. The *Brooklier* defendants are characterized as "the local Mafia hierarchy" in O. DEMARIS, THE LAST MAFIOSO: THE TREACHEROUS WORLD OF JIMMY FRATIANNO 432 (1981). Dominic Brooklier was elected boss of the Los Angeles family of La Cosa Nostra in 1974. *See id.* at 265, 440.

146. United States v. Brooklier, 637 F.2d at 621.

RICO count on two section 1961 offenses which together would not produce a twenty-year prison sentence.

Even if prosecutors cannot charge organized crime defendants with many crimes because of lack of proof, the prosecutor can still obtain a long prison term for the defendant by charging him under section 1962(d), RICO conspiracy, where conviction can be obtained on a showing of an agreement between the defendant and the principal actors. Courts have determined that it is possible to charge a RICO conspiracy and the predicate crimes separately without technically violating the *Blockburger* test.[147] For instance, a prosecutor might lack

147. In Iannelli v. United States, 420 U.S. 770 (1975), the United States Supreme Court held that under *Blockburger* a defendant could be charged in a single indictment with conspiracy and with the underlying substantive offense. *Id.* at 785 n.17. Therefore, there is no bar to charging defendants with both substantive RICO offenses and RICO conspiracies.

The circuits are divided as to whether there can be separate punishment for RICO and non-RICO conspiracies based on the same agreement. *Compare* United States v. Barton, 647 F.2d 224 (2d Cir. 1981) *and* United States v. Smith, 574 F.2d 308 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978) *with* United States v. Solano, 605 F.2d 1141 (9th Cir. 1979) (declining to hold that separate conspiracy prosecutions and convictions are always permissible where two different conspiracy statutes have been violated), *cert. denied*, 444 U.S. 1020 (1980).

It is possible that Albernaz v. United States, 450 U.S. 333 (1981), the Supreme Court's most recent multiplicity case, will affect how RICO courts treat situations in which RICO and non-RICO conspiracies have been charged. *Albernaz* held that where defendants were convicted under two different conspiracy statutes, the *Blockburger* test had to be used to determine whether the two conspiracies were the same. The Second Circuit followed this course in United States v. Barton, 647 F.2d 224 (2d Cir. 1981). The defendants there were characterized by the court as an underworld faction struggling to gain control of gambling and other unlawful enterprises in Rochester from a rival faction. They allegedly killed a rival gang leader by placing a bomb under his car and bombed two buildings housing gambling operations run by the dead leader's associates.

Count One of the indictment charged the defendants under the general federal conspiracy statute, 18 U.S.C. § 371 (1976), with conspiracy to make, receive, and possess destructive devices and to maliciously damage buildings. Count Thirteen charged them with conspiracy to violate § 1962(c) (i.e., RICO conspiracy). The defendants claimed the two conspiracies were the same because they involved a single agreement, namely, to attempt to take over illegal gambling in Rochester. Applying *Blockburger*, the court concluded that the conspiracies were not the same because while the general conspiracy statute required proof of an overt act, the RICO conspiracy section did not. Therefore, each conspiracy statute required proof of an element the other did not: § 371 required proof of an overt act, while the RICO conspiracy section required proof of intent to violate a substantive RICO provision, which in turn requires proof of the special RICO elements.

If the *Barton* interpretation is accepted, then any indictment charging one conspiracy under the general conspiracy section and another under RICO will pass the *Blockburger* test. But the *Barton* decision may have been influenced by several special factors. First, the defendants were clearly underworld figures for whom RICO was designed. Second, although § 371, which proscribes conspiracy to violate any federal statute, is broad enough to include a conspiracy to violate RICO, in this case the defendants were charged with conspiracy to violate federal statutes that are not included in § 1961. That is, the defendants were charged with conspiring to inflict malicious damage on a building with destructive devices and to possess such devices. Neither of these crimes is a RICO predicate offense. So although a § 371 conspiracy could conceivably be the same as a RICO conspiracy—i.e. conspiracy to violate § 1962(c) in either case—here, the § 371 conspiracy did seem to involve crimes separate from those punishable under RICO. It should be noted, though, that the predicate crimes in the RICO conspiracy charge included arson. Arson, although differently named, clearly refers to the same offense as does malicious damage to a build-

evidence that a defendant committed twenty-five predicate crimes but be able to prove the defendant conspired with others to violate RICO and perhaps also personally committed a predicate crime. In such a case, the defendant would be eligible for the special twenty-year prison term plus additional terms for the provable predicate crimes.

B. Inappropriate RICO Defendants

In contrast to dropping one charge among many, striking even one predicate offense will make a big difference when a defendant is charged with only a few crimes. In such cases, the defendants are not likely to be the organized criminals who were RICO's targets. *United States v. Aleman*[148] is a case in point. There, the defendants had committed three home robberies in two states, and one defendant had already been convicted in state court of one of the robberies.[149] Had the previously tried robbery been dropped from the RICO indictment, that defendant still could have been convicted under RICO if the jury found him guilty of the other two robberies. But each robbery was crucial, because a jury might not have convicted him of the other robberies.

In short, the fewer crimes that are involved, the less likely it is that the defendant is a member of organized crime.[150] Thus, there is less reason to use RICO,[151] and more reason to protect the defendant's

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ing—or at least to the same result, a burned building. So in *Barton*, there was a real overlap between one element of the § 371 count and one element of the RICO count.

It remains to be seen whether other courts will follow *Barton*'s adherence to *Blockburger* in dual conspiracy cases and *Barton*'s strained interpretation of the RICO conspiracy section as different from the general federal conspiracy statute in not requiring proof of an overt act. If they do, then prosecutors can easily survive double jeopardy challenges by making use of § 371, which is broad enough to include just about any federal conspiracy.

148. 609 F.2d 298 (7th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

149. *Id.* at 309.

150. It can be argued that the *Aleman*-type case, one in which only a few crimes are charged, is actually the more compelling case for using RICO to the fullest extent possible. This argument runs as follows: It is often difficult to prosecute a successful case against highly placed underworld figures. They act through underlings and are rarely guilty themselves of direct participation in a crime. Hence, indictments in their cases will not list numerous crimes. If the prosecutor has enough evidence to prove two crimes, he is doing well. Hence, where only a few crimes can be charged, Congress' intent will be thwarted unless multiple punishment is allowed for both the RICO violation and the predicate offenses.

While plausible, this argument is not unassailable. First, it rarely happens that defendants who appear to have underworld connections are either charged with or convicted of only a few crimes. That is, the *Brooklier*-style case, with a very long indictment, is quite typical of RICO prosecutions. *See* United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978). Moreover, it seems unlikely that prosecutors have much trouble proving all the counts charged; most of these defendants are appealing convictions on numerous counts. If prosecutors really had to rely on RICO to secure long prison terms for defendants in organized crime prosecutions, then there should be more reported cases involving defendants charged with many crimes but convicted of only a few.

151. Ironically, the *Aleman* court, while affirming all the convictions of this small-time rob-

rights under the double jeopardy clause. On the other hand, the more crimes that are involved, the more likely it is that the defendant will be convicted of some of them. Thus, society's interest will be vindicated, and there is little reason to deny the defendant any of the protection to which he is entitled under the Constitution.

C. Manipulating the Indictment

An indictment can be manipulated to comport with *Blockburger*, as was illustrated by *United States v. Meinster*.[152] There, the defendants had been indicted by a federal grand jury in North Carolina for conspiring to import and possess marijuana with intent to distribute it, and with aiding and abetting this importation. By the time of trial, however, a Florida investigation that would have resulted in subsequent RICO charges was nearing completion. The North Carolina prosecutors dismissed the conspiracy count, and the defendants were convicted only of aiding and abetting. The defendants subsequently were charged in Florida with RICO substantive and conspiracy counts. The court dismissed their double jeopardy claim because they had been tried only on the substantive aiding and abetting count, and proof of aiding and abetting was not necessary to secure a RICO conviction.[153] The court stated that there was no double jeopardy problem even if the proof of the aiding and abetting charge offered by the government in the North Carolina trial were exactly the same as that which would have been offered to prove the dismissed conspiracy charge.[154] All that was required, then, was for the government to choose two statutes with different elements so that *Blockburger* would be satisfied.

As *Meinster* illustrates, because the Act is complex and because federal statutes have proliferated,[155] indictments can easily be structured to satisfy *Blockburger* technically. Courts have tended to settle for form rather than substance, even where, as in *Meinster*, the same offense would lead to a double jeopardy violation if given one label but would not if given another. In another double jeopardy context, collateral estoppel, the Supreme Court warned against applying the collateral estoppel rule "with the hypertechnical and archaic approach of a nineteenth century pleading book."[156] In light of the important policies underlying the double jeopardy clause, RICO cases also call for an approach that is not merely technical. Thus, indictments structured to

bery ring, observed that "we would expect . . . that government prosecutorial policy will reserve use of this statute for racketeers, leaving local crimes to local authorities." *Id.* at 306.

152. 475 F. Supp. 1093 (S.D. Fla. 1979).

153. *Id.* at 1095.

154. *Id.*

155. *See supra* note 65.

156. Ashe v. Swenson, 397 U.S. 436, 444 (1970).

meet the letter of the *Blockburger* test may not always meet the spirit of the double jeopardy clause.

PART ONE CONCLUSION

Although recent Supreme Court decisions may have narrowed the scope of double jeopardy protection for criminal defendants, courts and prosecutors can still guard the constitutional rights of RICO defendants. Because RICO allows so much prosecutorial discretion, these rights can be disregarded where prosecutors try to achieve the maximum number of prosecutions or the longest prison sentences possible under the Act. Courts should take care to control abuse of RICO by dismissing counts in RICO indictments if prosecution on those counts would violate the policies of the double jeopardy clause. In cases of successive state and federal prosecutions, some due process check should be used, prohibiting multiple punishment under the government's own *Petite* policy. In cases of multiplicity or successive federal proseeutions, the *Blockburger* test should be applied strictly to ensure that a defendant is not punished or prosecuted twice for the same offense, especially since it is by no means clear that Congress intended RICO to allow multiple punishment.

If the defendants are organized crime members, the people at whom the Act was aimed, the indictments will probably contain so many counts that dismissing the multiplicitous ones will not damage the government's case. Where such dismissal would make it impossible to secure long prison terms for defendants who are arguably within the class which Congress intended RICO to reach, indictments can be manipulated so as to achieve technical compliance with the *Blockburger* test. If all else fails, RICO's conspiracy section can be used; but such manipulation should seldom be necessary, because when RICO is properly applied, nothing is lost by strict observance of the double jeopardy clause. What is gained, the assurance that ordinary criminal defendants who fall within RICO's net do not receive punishment exceeding what Congress intended, justifies giving careful attention to the double jeopardy claims of all RICO defendants.

PART TWO: THE RICO CIVIL ACTION AND CONSTITUTIONAL SAFEGUARDS

PREFACE

The RICO civil action, set forth in section 1964, offers a novel alternative to criminal and antitrust proceedings[157] as a means of combating the infiltration of organized crime into the American economy. It does so by combining, in effect, the elements of the RICO criminal offense with the traditional sanctions of antitrust, including divestiture, dissolution, injunctive relief, and private treble damages.[158] Section 1964 arguably provides a better vehicle for ridding legitimate organization from the influence of organized crime than either the criminal or antitrust approaches. Its advantage over the RICO criminal action lies in the fewer procedural barriers associated with civil actions. Its advantage over antitrust is obviating the necessity to prove an antitrust violation in order to enjoin, divest, or dissolve a business activity. This is especially significant because the conduct of the racketeer influenced business may not be a traditional antitrust offense, but nonetheless injures competitors by doing business through violence and intimidation,[159] and injures the public by perpetuating organized crime.

Part Two of this Comment considers the necessity for procedural

157. Prosecutors have resorted to antitrust to reach organized crime. *See* R. Blakey & R. Goldstock, *Antitrust & Organized Crime*, in Cornell Microfiche Materials, *supra* note 25, at 836 n.79.

158. Indeed, RICO was patterned after antitrust law. *See* Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for Criminal Activity*, 124 U. PA. L. REV. 192 (1975). In fact, two bills, S. 2048 and S. 2049, 90th Cong., 1st Sess. (1969), predecessors to Title IX, tried to utilize the machinery of antitrust laws "to combat and penalize organized crime, particularly in its attempt to infiltrate and take over legitimate businesses by means of money illegally obtained." Report of the Antitrust Section of the American Bar Association on S. 2043 and S. 2049 in *Hearings on Measures Relating to Organized Crime Before the Sen. Subcomm. on the Judiciary*, 91st Cong., 1st Sess. 556 (1969) [hereinafter cited as *Senate Hearings*]. S. 2048 was framed as an amendment to replace § 8 of the Sherman Act. S. 2049 was drafted as an independent piece of legislation but included in its provisions the discovery and enforcement procedures of the antitrust laws.

The Antitrust Section of the ABA favored the principles of both bills but recommended that separate legislation be enacted to avoid the commingling of "criminal enforcement goals with the goals of regulating competition" in the commercial context. *Id.* at 557. Another concern expressed by the ABA was that if S. 2048 were passed as an amendment to the antitrust laws, private parties would be subject to the strict requirements of standing and proximate cause developed in the antitrust area. *Id.*

At least one commentator disapproves of antitrust-type remedies in the war against organized crime. "[A]n . . . area for exploration would be the *reverse* of all the recent manipulations of antitrust concepts; if businesses and industries really are infiltrated by visible contingents from the underworld, let their simon-pure competitors gang up on the invaders with tactics otherwise outlawed as unfair trade practices." King, *Wild Shots in the War on Crime*, 20 J. PUB. L. 85, 114 (1971) (emphasis in original).

159. *Senate Hearings*, *supra* note 158, at 556-57.

safeguards in this hybrid action. Section I of this Part argues that the punitive intent and effect of a section 1964 remedy, which effectively bars an individual from engaging in a business, requires that courts fashion appropriate due process safeguards for RICO civil proceedings. Section II argues that a burden of proof standard of clear and convincing force is one such protection. Section III considers another constitutionl safeguard—the exclusionary rule—and argues that it should apply to section 1964 proceedings so as to deter police misconduct and abuse of the civil setting by prosecutors.

I
RICO SANCTIONS: CIVIL OR CRIMINAL?

A. Section 1964—A Hybrid

Section 1964 seeks to protect the channels of commerce from the activities of organized crime by stringent civil remedies and procedural advantages given to the enforcing parties, whether private or governmental. These advantages include a lighter burden of proof than the "beyond a reasonable doubt" standard required in criminal prosecutions, extensive pretrial discovery, and the right to appeal an unfavorable determination. By characterizing an action under section 1964 as civil, Congress sought to circumvent stringent safeguards, but in so doing has threatened the constitutional protections of defendants in proceedings that parallel the RICO criminal action.[160]

The change of labels from criminal to civil raises a number of questions regarding what protections should be given to defendants in these "civil" cases. The courts have struggled with the civil/criminal distinction; no definite answer has emerged, but it is clear that the civil label does not determine the protections afforded in an action. Courts must look instead to the nature of the proceeding.[161] In *Helvering v. Mitchell*,[162] the Supreme Court stated that the difference between a criminal and a civil case was whether the sanction imposed was remedial or punitive.[163] In subsequent cases the Supreme Court has taken

160. A criminal defendant is entitled to be represented by counsel; to have a case tried by a jury, Argersinger v. Hamlin, 407 U.S. 25, 28-40 (1972); to have the government prove its case beyond a reasonable donbt, *In re* Winship, 397 U.S. 358, 363 (1970); and to be free from unreasonable searches and seizures, *e.g.*, Katz v. United States, 389 U.S. 347 (1967).

161. Boyd v. United States, 116 U.S. 616, 634 (1886).

162. 303 U.S. 391 (1938).

163. *Id.* at 398-99. The issue in *Mitchell* was whether the assessment of a tax deficiency under the Revenue Act of 1928 for fraud with intent to evade a tax was barred by the defendant's acquittal on the criminal charge of willfully attempting to defeat the tax. The Court concluded that the tax deficiency assessment was remedial and thus the double jeopardy claim was inapplicable.

two approaches to determine whether a sanction is civil or criminal: the punitive intent test and a due process analysis.

B. The Punitive Intent Test

To determine whether Congress intended a statute to be punitive the United States Supreme Court has developed the punitive intent test. In *Kennedy v. Mendoza-Martinez*,[164] the Court examined the purpose of a statute and its prior judicial applications and found clear evidence of punitive intent. The Court went on to list several factors to guide the determination of punitive intent when the statute is unclear:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence—whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, *and these factors may often point in different directions*.[165]

An analysis of the legislative history of section 1964 suggests that its purpose is both remedial and punitive. The Senate Report emphasized that "there is no intent to visit punishment on any individual: the purpose is civil,"[166] and "title IX seeks essentially an economic, not a punitive goal."[167] However, for over thirty years, Congress had investigated and attempted to regulate organized crime.[168] Traditional law enforcement had been inadequate to control the influence of organized

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164. 372 U.S. 144 (1963). *Mendoza-Martinez* involved the revocation of citizenship of an individual who left the country during wartime in order to avoid the draft.

The Supreme Court has come to regard the punitive intent test as one of statutory construction. One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237 (1972). Professor Charney vigorously disagrees with this interpretation:

> This deference to legislative history in determining whether a sanction or a statute is criminal or civil is a gross abdication of the judicial role. Although such an approach appears to be an enlightened attempt to carry out congressional purpose through statutory interpretation, it avoids the substantive question of whether Congress has exceeded its constitutional authority. No amount of congressional labelling should determine that question.

Charney, *The Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 494 (1974).

165. 372 U.S. at 168-69 (footnotes omitted) (emphasis added).

166. SENATE REPORT, *supra* note 2.

167. *Id.* The Department of Justice also stated that the result of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965), would not apply to a RICO civil proceeding because the action is remedial, not punitive. SENATE REPORT, *supra* note 2, at 160. For a discussion suggesting a contrary result, see *infra* notes 253-59 and accompanying text.

168. *See In re* Persico, 522 F.2d 41, 46-49 (2d Cir. 1975) (collecting many legislative reports and other authorities). *See gencrally White-Collar Crime, Symposium*, 17 AM. CRIM. L. REV. 271 (1980).

crime in the nation's economic and political life.[169] It was against this background that the Organized Crime Control Act of 1970 was enacted and its main purpose described as "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."[170] The background of the Act and the foregoing language make it clear that the primary Congressional intent was to deter and punish organized crime by all available methods and on all fronts.[171]

To date, the only court to rule on the constitutionality of section 1964 rejected the defendant's argument that since an action under the section was punitive in nature, he was entitled to rights guaranteed by the Constitution to criminal defendants.[172] In that case, *United States v. Cappetto*, the Seventh Circuit concluded that Congress, pursuant to its power under the commerce clause, may make prohibited activities subject to both criminal and civil sanctions.[173] In enacting RICO, Congress was concerned with protecting interstate commerce from the predatory activities of organized crime, and section 1964 has a rational

169. The Senate Report illustrates this concern:

> Obviously, the time has come for a frontal attack on the subversion of our economic system by organized criminal activities. That attack must begin, however, with the frank recognition that our present laws are inadequate to remove criminal influences from legitimate endeavor organizations. The traditional approach has been to seek through fine and imprisonment to deter or prevent the perpetration of criminal behavior. As the efforts of the Federal Government have increased, many of the Nation's most notorious racketeers have indeed been imprisoned, and many local organized crime endeavors have been substantially curtailed. Nevertheless, the stark fact remains: Not a single one of the "families" of La Cosa Nostra has been destroyed through criminal prosecutions. . . . What is needed here, the committee believes, are new approaches that will 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. In short, an attack must be made on the source of economic power itself, and the attack must take place on all available fronts.

SENATE REPORT, *supra* note 2, at 78-79.

170. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (Statement of Findings and Purpose).

171. As one commentator has aptly indicated:

> Could Congress' patently penal purposes, displayed throughout the Act, have been "turned off" when they considered section 1964? Perhaps, but the legislative history tends to show that the civil remedies were not adopted as a means of regulating conduct that Congress felt *should not* be punished. On the contrary, they were designed to enable the government to reach statutory violations that could not be punished criminally because of the problems posed by the constitutional protection afforded criminal defendants.

Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 211 (1975) (emphasis in original).

172. United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). The case involved a civil action for injunction and divestiture brought by the government under § 1964(a).

173. *Id.*

connection with this important goal. Thus, an action under section 1964 is not entirely punitive in nature.

However, in addition to its goal of protecting interstate commerce, section 1964 also has a punitive purpose.[174] It promotes retribution and deterrence, which are the traditional aims of punishment and among the factors listed in *Mendoza-Martinez*[175] as evidence of the punitive character of the proceeding. A section 1964 defendant must be found to have committed at least two offenses which have always been subjected to criminal penalties and clearly require a finding of scienter.[176] Moreover, in a criminal proceeding the accused is stigmatized by the finding that he committed a crime. The same stigma attaches to being enjoined from racketeering.[177] In fact, it is difficult to envision a civil proceeding that surpasses a section 1964 action in approximating a criminal proceeding.[178]

Thus, as *Mendoza-Martinez* predicted,[179] the punitive-intent test's factors "point in opposite directions." The application of the punitive intent test shows that RICO's purpose is partly remedial and partly punitive. Since a RICO civil action has dual purposes it can therefore be characterized as quasi-criminal.[180]

Although the courts have not explicitly defined the term quasi-criminal,[181] several decisions have identified factors that might characterize a civil action as criminal in nature. These factors are: the civil

174. *See* Comment, *supra* note 171, at 210-12.

175. 372 U.S. 144, 168 (1963).

176. *See, e.g.*, United States v. Boylan, 620 F.2d 359 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977). *See also* 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, 246-47 (1981).

177. *See infra* note 192 and accompanying text.

178. The *Cappetto* court's analysis was rejected by Judge Marovits in an unreported memorandum opinion attached to the petitioner's brief for certiorari. The opinion noted:

> We fail to understand how a civil proceeding could be any more in substance a criminal one than the one herein. . . . *Boyd* compels that any proceedings of a quasi-criminal nature, *like this one*, [are] subject, *inter alia*, to the strictures of the Fourth Amendment and that portion of the Fifth Amendment dealing with self-incrimination. . . . The stigma which attaches at a delinquency proceeding is bottomed to some extent, on a finding that the accused committed a crime. . . . The exact same stigma attaches to the enjoining of racketeering.

Appendix to Petitioner's Brief for Certiorari, United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). *See also* United States v. Finn, No. 74-C-2925 (N.D. Ill. 1975), *cited in* Essay, *The Characterization of Treble Damages: Conflict Between A Hybrid Mode of Recovery and a Jurisprudence of Labels*, in CORNELL MATERIALS, *supra* note 18, 428, 506-07 (1980).

179. 372 U.S. at 169.

180. 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, 1063 (1980).

181. *Boyd* and its progeny point out that some proceedings are not clearly either civil or criminal, but the cases do not define the term quasi-criminal.

proceeding involves a violation of the criminal law;[182] there is a parallel criminal statute;[183] the suit involves an offense against the state and the government is the plaintiff;[184] penalizing the defendant is for the protection of the public;[185] and the defendant would suffer injury to his name and undue stigmatization.[186]

Each of these factors describes the nature of a RICO section 1964 civil action. A RICO action is predicated on at least two criminal offenses; section 1964 has a parallel criminal statute in section 1963; it can involve the government as a plaintiff, and it is certainly meant to protect the public. Moreover, there can be no doubt that a RICO charge is a stigma. These qualities do not undermine the utility or the necessity of a 1964 action. Rather, they highlight the importance of the procedures by which such an action should be conducted.

C. Procedural Protections in Quasi-Criminal Actions

Once a proceeding is defined as quasi-criminal, courts use a due process analysis to determine what procedural safeguards should be granted to the defendant.[187] To determine what procedures are required, courts use a balancing test composed of three factors: the governmental interest involved, the private interest affected by the governmental action, and the risk of an erroneous outcome.[188] The test is flexible; the more important the private interest at stake, the more important it is to avoid incorrect results.[189]

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182. *See, e.g.*, One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Troeder v. Lorsch, 150 F. 710 (1st Cir. 1906); City of Madison v. Geier, 27 Wis. 2d 687, 135 N.W.2d 761 (1965); Ziegler v. Hustisford Farmers Mut. Ins. Co., 238 Wis. 238, 298 N.W. 610 (1941).

183. United States v. Shapleigh, 54 F. 126 (8th Cir. 1893); United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

184. United States v. Shapleigh, 54 F. 126 (8th Cir. 1893). *Cf.* Huntington v. Attrill, 146 U.S. 657, 667 (1892) (whether a state statute is penal and thus unenforceable by the courts of another state depends on whether its purpose is to punish an offense against the state or to afford a private remedy to a person injured by the wrongful act).

185. *In re* Ruffalo, 390 U.S. 544 (1968).

186. *In re* Gault, 387 U.S. 1 (1967).

187. *See, e.g., id.* at 13-14, 27-31 (1967); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-67 (1963).

188. Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)).

189. For instance, in *In re* Gault, 387 U.S. 1 (1967), the Court rejected the "civil label of convenience" and instead balanced the rights of the defendant against the governmental interest to determine the necessity of granting criminal protections. While the Court did not doubt the benevolent intentions of the juvenile system, it found that a juvenile defendant should not suffer undue stigmatization and loss of liberty without the protections afforded to adult defendants. *Id.* at 27-31. Thus, a juvenile defendant is entitled to adequate notice, right to connsel, opportunity for confrontation and cross-examination of witnesses, and freedom from self-incrimination. *Id.* at 33-34, 41, 55. *See also In re* Winship, 397 U.S. 358, 367-68 (1970) (a juvenile is to be tried under the beyond the reasonable doubt standard); *cf.* McKeiver v. Pennsylvania, 403 U.S 528, 550-51 (1971) (no right to jury trial extended to juvenile proceedings, based on a balancing of the benevo-

A section 1964 action demands due process protections because it implicates an aggregation of important private interests. They are the interests in pursuing a livelihood in the business to be divested, the property interest in the assets of the business, and the business reputation of the individual. As a practical matter, a defendant who loses a RICO civil action will be branded in the business community as a racketeer. Hence, it will be extremely difficult for that person to continue a career in any business field connected to the divested enterprise.

The significance of the right to pursue a livelihood is recognized in procedural due process cases. The Supreme Court has required procedural safeguards when a person's position or professional license is threatened by government action.[190] An injury to business reputation and business goodwill may also trigger due process protections.[191] Such injury is clearly possible for a person linked to organized crime.[192]

Of course, it is important to control organized crime and to protect interstate commerce from unfair and illegal competition, and civil remedies could well be effective tools in achieving these goals. On the other hand, the shortcut to prosecution afforded by section 1964 should not be an end run around procedural due process. Section 1964 is unique because it not only deters racketeers from engaging in illegal activities, it also subjects them to punishment by effectively barring them from engaging in a career in a given business. The courts should balance the competing interests and extend procedural safeguards that will protect the defendant from prosecutorial abuse but will not prevent the government from removing undesirable elements from the channels of commerce.

One commentator has recommended that when the "[g]overnment

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lent purposes of the juvenile court system against "the traditional delay, the formality, and the clamor of the adversary system and, possibly the public trial").

190. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03 (1976); Arnett v. Kennedy, 416 U.S. 134, 151-55 (1974); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103 (1963); State *ex rel.* Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973) (fifth amendment right to remain silent applies to proceedings that are penal in nature in that they can result in revocation of a professional license, thereby affecting reputation and livelihood); Margoles v. Wisconsin State Bd. of Medical Examiners, 47 Wis. 2d 499, 509, 177 N.W.2d 353, 358 (1970) (when revoking a medical license, "procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood").

191. Paul v. Davis, 424 U.S. 693, 701 (1976); *see* Marrero v. City of Hialeah, 625 F.2d 499, 516-19 (5th Cir. 1980) (defamatory statement causing damage to the plaintiff's business goodwill and business reputation satisfied the "stigma plus" rule of *Paul v. Davis*), *cert. denied*, 450 U.S. 913 (1981).

192. *See* Morris v. National Fed'n of the Blind, 192 Cal. App. 2d 162, 164, 13 Cal. Rptr. 336, 337 (1st Dist. 1961) (labeling someone a racketeer is libel per se: "It is extremely difficult to place an innocent meaning upon the word 'racketeer' as used here. By dictionary definition, the word imports extortion or other unlawful practice.").

seeks quasi-punitive sanctions such as divestiture, dissolution, or reorganization, the court may require substantial procedural safeguards such as trial by jury and freedom from self-incrimination."[193] This Comment further proposes that the government should be required to prove its case by clear and convincing evidence.[194]

II
BURDEN OF PROOF

The most important advantage of a RICO civil action is probably its less rigorous burden of proof.[195] In criminal proceedings the government must prove each element of its case "beyond a reasonable doubt."[196] But in civil actions the case usually must be proved by only a "preponderance of the evidence."[197] Given the severity and nature of RICO civil remedies and the fact that the defendant must be shown to have violated the criminal law, it is unconstitutional as well as unfair to allow the government to prove its case by the same standard of proof that applies in negligence cases.[198] Both the punitive intent test and the due process balancing analysis argue in favor of a stricter evidentiary standard. While the "beyond a reasonable doubt" standard would be

193. Note, *supra* note 180, at 1064. Freedom from self-incrimination is especially important in cases such as United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), where the government requested an order directing the defendants to supply sworn quarterly reports for a period of ten years. The information requested included the address and business sources of income. *Id.* at 1355. Neither the district court nor the court of appeals ruled on the question, but both expressed doubts regarding the propriety of the remedy. *Id.* at 1359. These doubts are warranted because as one commentator noted:

> [F]iling the reports could be required constitutionally only if the defendants were granted immunity from use of the reports in a separate criminal prosecution, a criminal contempt prosecution, or a civil contempt action leading to imprisonment or 'fine.' This restriction would render the reports virtually useless and make it unlikely that the government would continue to ask for such orders.

Comment, *supra* note 158, at 221. In regard to the right to jury trial, a better approach was followed by Florida in its recently enacted RICO statute. FLA. STAT. §§ 895.01-.06 (1981). Trial by jury is left to the option of the defendant or to the request of an injured party. "The defendant or any injured person may demand a trial by jury in any civil action pursuant to this section." *Id.* § 845.05(7)(a) (1981). The Florida RICO statute is almost identical to the federal RICO Act.

194. *See infra* text accompanying notes 195-239.

195. *See, e.g.*, Gettings, *Materials on RICO: Civil Overview, Techniques in the Investigation and Prosecution of Organized Crime*, in CORNELL MATERIALS, *supra* note 18, at 35, 45; Comment, *Equitable Devices for Controlling Organized Vice*, 48 J. CRIM. L.C. & P.S. 623, 627-29 (1958); Essay, *RICO Civil Remedies and Public Corruption*, in CORNELL MATERIALS, *supra* note 18, at 272, 281.

196. *E.g.*, Jackson v. Virginia, 443 U.S. 307 (1979).

197. *E.g.*, United States v. Regan, 232 U.S. 37, 48 (1914) (in "civil actions it is the duty of the jury to resolve the issues of fact according to a reasonable preponderance of the evidence, and this although they may involve a penalized or criminal act"); C. MCCORMICK, EVIDENCE § 340 (1972) and cases cited therein.

198. Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 285 (1966).

inappropriate in the RICO civil context, the government should be required to prove its case with clear and convincing evidence.

A. The Government's Case Under RICO

If the government brings a RICO civil action, it must prove a violation of section 1962.[199] A violation of section 1962[200] requires proof of the following elements:[201] (a) that a person;[202] (b) through a pattern of racketeering activity,[203] or collection of an unlawful debt;[204] (c) directly or indirectly, invests in, or maintains an interest in,[205] or

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199. *See supra* text accompanying note 189.

200. 18 U.S.C. § 1962(a)-(c) (1976). Section 1964(d) contains the conspiracy provision which overlaps with the substantive provisions. That section requires that "an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*." United States v. Elliott, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (emphasis in original).

201. *See generally* Long, *supra* note 176, at 211.

202. A person includes "any individual or entity capable of holding a legal or beneficial interest in property. . . ." 18 U.S.C. § 1961(3) (1976).

203. Racketeering activity is defined as:

> (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare (funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal 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 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving 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 any law of the United States. . . .

18 U.S.C. § 1961(1)(A) (Supp. III 1979).

A "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of the act and the last of which occurred within 10 years after the commission of a prior racketeering activity. 18 U.S.C. 1961(5) (1976).

204. "Unlawful debt" means a debt (1) incurred or contracted in gambling activity which was in violation of the law of the United States, a state or a political subdivision, or which is unenforceable under State or Federal law relating to usury, and (2) which was incurred in connection with the business of gambling in violation of the law of the United States where the usurious rate is at least twice the enforceable rate. 18 U.S.C. § 1961(6) (1976).

205. "An 'interest' is akin to a continuing proprietary right in the nature of a partnership or stock ownership (or holding a debt or claim, as distinguished from 'equity' investment) rather than

participates in; (d) an enterprise;[206] (e) the activities of which affect interstate commerce. Note that these elements are identical to elements required in a RICO criminal action, and that in order to establish a pattern of racketeering, the plaintiff, whether it is the government or a private party, must prove two criminal offenses. Given these elements, what standard of proof should apply? The first step toward answering this question is to examine legislative intent. If that is unclear, the court must determine the proper standard.

B. Congressional Intent

The RICO statute does not specify what standard of proof is required in a civil action.[207] RICO's legislative history, however, reveals an intent to allow a lower burden of proof than the one used in criminal proceedings. In 1967, after having studied the methods used by organized crime in acquiring control of legitimate businesses, the President's Commission on Law Enforcement and Administration of Justice recommended the use of regulatory measures to control infiltration of business, noting that civil actions were especially valuable because they employed a lower standard of proof.[208] When RICO was drafted, Congress incorporated those recommendations,[209] an intention confirmed by the Seventh Circuit in *United States v. Cappetto*.[210]

The fact that RICO civil actions call for a lower burden of proof than do criminal actions does not reveal precisely what that lower bur-

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mere dividends or distributed profits." United States v. Meyers, 432 F. Supp. 456, 461 (W.D. Pa. 1977).

206. "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. 18 U.S.C. § 1961(4) (1976). The term enterprise encompasses both legitimate and illegitimate enterprises. United States v. Turkette, 101 S. Ct. 2524 (1981).

207. *See* Long, *supra* note 176, at 244.

208. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 190 (1967) (*quoted in* Essay, *Legislative History of R.I.C.O.*, in CORNELL MATERIALS, *supra* note 18, at 58, 71-72) [hereinafter cited as *Legislative History*].

209. Two bills incorporating the Commission's recommendations were introduced in the 90th Congress but were not enacted. In the 91st Congress, Senator McClellan introduced S. 1861 which incorporated some of the Commission's recommendations, but this bill did not contain antitrust-type provisions. *Legislative History*, *supra* note 208, at 79. Senator Hruska then introduced S. 1623 combining the bills that had not been enacted in the 90th Congress. After hearings on the two bills, RICO was drafted as Title IX of the Organized Control Act of 1970, SENATE REPORT, *supra* note 2, at 83, and was subsequently enacted.

During the legislative hearings and floor debates in the House and Senate, the burden of proof applicable to RICO civil proceedings was not specifically discussed. The Deputy Attorney General, however, expressed his support for the antitrust-type remedies, stating that the time-tested antitrust remedies would enable the government to intervene in many situations not susceptible to proof of a criminal violation. Letter of Deputy Attorney General Richard G. Kleindienst (August 11, 1969, *reprinted in* SENATE REPORT, *supra* note 2, at 126.

210. 502 F.2d at 1357.

den is. Congress' use of the antitrust model might indicate that the standard of proof is preponderance of the evidence. Indeed, section 1964 and the Sherman Act are statutes that appear to be in pari materia.[211] Antitrust laws were designed to protect trade and commerce against unlawful restraints and monopolies,[212] and RICO's purpose is to limit the influence of organized crime in commercial enterprises. The burden of proof in antitrust is usually a preponderance of the evidence.[213] Thus, it could be argued that since both statutes seek to protect commerce, and RICO was modeled to some extent on antitrust laws, the preponderance standard should be applied in RICO civil actions.

On the other hand, it is unrealistic to assume that Congress had in mind *all* of the specific antitrust concepts when enacting RICO.[214] For instance, the Antitrust Section of the American Bar Association suggested that one reason to enact RICO as a separate statute rather than as an amendment to the antitrust laws was to avoid the stringent standing and proximate cause requirements developed in the antitrust area.[215] Congress, however, did not include a provision limiting section 1964 in the manner recommended by the American Bar Association. Although it is unlikely that Congress intended to incorporate the

211. Statutes in pari materia generally deal with the same subject matter or have the same purpose or object. "[S]tatutes in pari materia are relevant to decisions in terms of either legislative intent or meaning to others as the criterion of decision." 2A C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION, § 51.01 (4th ed. 1972). "A statute is not in pari materia if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rule or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

Caution must be exercised in applying the rule that one statute will be interpreted to correspond to analogous but unrelated statutes. An inclusion or exclusion may show an intent or convey a meaning exactly contrary to that expressed by the analogous legislation. Therefore, the rule tends to be of greater value where analogy is made to several statutes or to a general course of legislation. Consequently, the chief value of the in pari materia rule is simply that it serves as a criterion for showing the general course of legislative policy.

212. Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1976).

213. Ramsey v. UMW, 401 U.S. 302, 307 (1971); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767, 773-74 (6th Cir. 1970).

214. *See supra* note 211. *See also* Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950):

> [L]egislation means at different times, different, often contradictory things. Until each problem arises, a statute has no full meaning . . . . [T]he trial court, must ask itself . . . what it ought to mean in terms of the needs and goals of our present day society. This approach is required by the insuperable difficulties of readjusting old legislation by the legislative process and by the fact that it is obviously impossible to secure an omniscient legislature.

Id. at 469.

215. *See supra* note 158. *But see* Landmark Sav. & Loan v. Rhoades, 527 F. Supp. 206, 208 (E.D. Mich. 1981) (In order to recover treble damages the plaintiff has to allege that he has suffered a "racketeering enterprise injury." A racketeering enterprise injury might occur if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise.).

hurdles of standing and proximate cause in a statute designed to eliminate organized crime from the economy, this example shows how difficult it is to determine exactly what antitrust standards were incorporated in section 1964.

Congress did expressly provide that RICO be "liberally construed."[216] This could also suggest resort to the usual burden of proof in civil actions, the preponderance standard. Congress, however, was presumably aware that in certain civil proceedings, an intermediate standard of proof had been developed by the federal courts.[217] It might well have intended for the courts to decide which of the lower standards should apply.

C. Judicial Determinations of the Burden

When Congress does not express what evidentiary standard is required in a civil proceeding, it is up to the judiciary to determine the appropriate burden of proof.[218] In civil cases where substantial interests are at stake, courts look to substance rather than form, and set the burden in an equitable manner by applying a due process balancing approach.[219] An example of this approach is *Woodby v. Immigration & Naturalization Service*,[220] in which the Supreme Court held that since deportation proceedings involve considerable hardship to the individual, no person can be deported unless the government proves the grounds for deportation with "clear, unequivocal, and convincing evidence."[221] A RICO civil action is a unique equitable proceeding[222] in which the government often seeks to remove a defendant not from the country but from his chosen business. Since this involves an infringement of an individual's right to earn a livelihood,[223] courts should not apply the most lenient burden of proof.

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216. "The provisions of this Title shall be liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (codified at 18 U.S.C. § 1961 (1976 & Supp. III 1979)) "[W]hen liberally construing a statute, a court gives an expansive, rather than restrictive, interpretation to the language in question." Comment, *RICO and The Liberal Construction Clause*, 66 CORNELL L. REV. 167, 170 (1980).

217. The rule denying the existence of a federal common law does not apply to federal procedural law, and so the treatment of statutes on procedure should be with reference to the previous common law in the federal courts. 2A C. SANDS, SUTHERLAND'S STATUTORY CONSTRUCTION § 50.04 (4th ed. 1972) and cases cited therein. Furthermore, FED. R. EVID. 102 mandates that "[t]hese rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and *proceedings justly determined*." (emphasis added).

218. *E.g.*, Woodby v. Immigration & Naturalization Serv., 385 U.S. 277 (1966).

219. *See supra* notes 188-89 and accompanying text.

220. 385 U.S. 277 (1966).

221. *Id.* at 286.

222. United States v. Cappetto, 502 F.2d at 1357.

223. *See supra* note 190.

1. Preliminary Judicial Response: Preponderance of the Evidence

Despite the quasi-criminal nature of a RICO civil action, three district courts have held that a plaintiff must only prove the elements of his case by a preponderance of the evidence.[224] The brief opinion in *Farmers Bank v. Bell Mortgage Corp.*,[225] however, did not analyze the statute to determine its nature, nor did it engage in the required due process analysis. Instead, the court conclusorily held that a plaintiff seeking damages in a civil action need only "prove the elements of the Act by a preponderance of the evidence."[226] The only support for the court's holding was a citation to *United States v. Cappetto*.[227]

Cappetto, however, is a weak foundation for these decisions. After noting that the section 1964 action was equitable in nature,[228] the court concluded that such actions are customarily subject to a preponderance of the evidence test.[229] Thus, it merely followed traditional form to reach its decision rather than engaging in the due process balancing called for in a quasi-criminal action.

Moreover, *Cappetto* may have been that rare case where due process balancing would lead to the same result as the one reached by following traditional form. In *Cappetto*, the government sought an injunction against gambling.[230] Of the civil remedies a plaintiff might seek—divestiture, dissolution, treble damages, and injunctive relief—the injunction is the least likely to be characterized as punitive. An injunction grants only prospective relief and no retribution. Under the *Mendoza-Martinez* punitive intent test, it is reasonable to conclude that an injunction serves a remedial, not a punitive, purpose. In contrast, the remedy sought in *Farmers Bank* was damages,[231] presumably treble damages. Treble damages are awarded for the purpose of deterrence.[232] Given that such a remedy requires proof of a criminal viola-

224. Heinold Commodities v. McCarthy, 513 F. Supp. 311 (N.D. Ill. 1979); Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978). These cases were private actions. The only case that notes that a preponderance burden is sufficient in cases where the government is the plaintiff is United States v. Ladmer, 429 F. Supp. 1231 (E.D.N.Y. 1977), where relief was denied because the government failed to prove its case by a preponderance of the evidence.

225. 452 F. Supp. at 1280.

226. *Id.* at 1280. *Heinold*'s treatment of the issue was even more perfunctory. In answer to plaintiff's contention that no civil action could be maintained under section 1964 absent a criminal conviction, the court limited its discussion to a direct quote of *Farmers* and to the statement that it "declined to depart from the authority of *Farmers Bank*." *Herinald*, 513 F. Supp. at 314.

227. 452 F. Supp. at 1280 (citing United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975)).

228. 502 F.2d at 1357.

229. *Id.* at 1358.

230. *Id.* at 1355.

231. Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278 (D. Del. 1978).

232. *See generally* 2 P. AREEDA & D. TURNER, ANTITRUST ANALYSIS §§ 311a, 331, 343 (1978).

tion, a court deciding a case like *Farmers Bank* could conclude under the *Mendoza-Martinez* test that this remedy, in this action, has a punitive quality.

While the preponderance of the evidence standard may have been appropriate in *Cappetto*, it should not be applied in all section 1964 proceedings. Courts should not blindly apply precedent that appears to control. Instead they should examine the nature of the remedy, and consider the interests at stake in a due process balancing. Especially in the divestiture situation, the RICO civil remedies can be quite severe. They may inflict considerable financial loss and even deprive an individual of his livelihood.[233] And the stigma resulting from conviction may stifle a defendant's attempted recovery. Courts must consider this aggregation of interests when determining what procedural safeguards should apply.

2. *Due Process Requires Clear and Convincing Evidence*

Analysis of the interests at stake leads to the conclusion that more than the usual civil preponderance burden is required. This conclusion has been reached by several federal and state courts in civil cases where the defendant has been accused of fraud or other quasi-criminal wrongdoings.[234] In a recent case, the Supreme Court stated that "the interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risks to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[235] The same due process anal-

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233. *See supra* notes 190-91.

234. Rogers v. Commissioner, 111 F.2d 987, 989 (6th Cir. 1940); Wittenberg v. United States, 304 F. Supp. 744, 748 (C.D. Minn. 1969); Bukowski v. United States, 136 F. Supp. 91, 95 (S.D. Tex. 1955) (fraud in this type of case must be established by clear and convincing evidence); Owens v. United States, 98 F. Supp. 621, 627 (W.D. Ark. 1951), *aff'd*, 197 F.2d 450 (8th Cir. 1952); Witt v. Panek, 408 Ill. 328, 333, 97 N.E.2d 283, 285 (1951) (in determining whether a party has adduced proof sufficient to establish that the signature on a deed was forged, the record of conveyance and the certificate of acknowledgment can be overcome only by proof which is clear, convincing and satisfactory); State v. Bartz, 224 N.W.2d 632 (Iowa 1974) (a charge that a county supervisor has accepted bribes must be supported by clear, satisfactory, and convincing evidence); City of Madison v. Geier, 27 Wis. 2d 687, 691-92, 135 N.W.2d 761, 763 (1965) (applying a "clear, satisfactory and convincing evidence rule" to a defendant convicted of racing automobile in violation of city ordinance, which also constituted a crime); Ziegler v. Hustiford Farmers Mut. Ins. Co., 238 Wis. 238, 241, 298 N.W. 610, 611 (1941) ("In civil actions, where fraud, crime, criminal conduct or conspiracy is alleged, the burden rests upon him who so charges, to establish the proof of such allegations by clear and satisfactory evidence . . . .", quoting Estate of Hatten, 233 Wis. 199, 208, 288 N.W. 278, 282 (1939)).

235. Addington v. Texas, 441 U.S. 418 (1979). The Court described the three standards as follows:

> At one end of the spectrum is the typical civil case involving a momentary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion. In a criminal case. . . .

ysis is followed in civil proceedings where the defendant could be deprived of his livelihood.[236]

Considering the various interests at stake in the context of a RICO civil action, it becomes apparent that the due process balance tips in favor of an intermediate evidentiary standard. The defendant stands to lose both his business and his reputation in the business community. Both of these interests are considerably stronger than those of the typical civil defendant. The government, however, does have a strong interest in eradicating organized crime. But the risk of an erroneous outcome is increased when the government is required to prove its case by only a preponderance of the evidence. To guard against this possibility, and to protect both the government's and defendants' interests, the evidentiary standard in a RICO civil action should be clear and convincing evidence.

In addition to complying with the mandates of due process, this conclusion flows from considerations of fairness. RICO's civil remedies provide distinct advantages to the prosecutor, notably the lesser burden of proof and the right of appeal after trial. Moreover, the government has broad discovery rights that do not exist in the criminal area.[237] While the defendant could invoke the privilege against self-incrimination, the government can give him use immunity to compel his testimony.[238] If the defendant does not answer truthfully he may be prosecuted for perjury. He can also be tried for contempt if an injunc-

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> the interests of the defendant are of such magnitude. . . . that the Due Process Clause [requires] that the state prove the guilt of an accused beyond a reasonable doubt. The intermediate standard . . . is less commonly used, but nonetheless is 'no stranger to the civil law'. . . . One typical use of the standard is in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant.

Id. at 423-24 (footnotes omitted).

236. McComb v. Commission on Judicial Performance, 19 Cal. 3d Spec. Trib. Supp. 1, 6, 138 Cal. Rptr. 459, 464, 546 P.2d 1, 6 (1977) (clear and convincing evidence needed to remove a judge from the bench); State *ex rel.* Vining v. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973) (revocation of a professional license affects the individual's livelihood and reputation, subjecting such proceedings to a higher scrutiny); Florida Bar v. Schonbrun, 257 So. 2d 6 (Fla. 1971) (the bar must prove misconduct of an attorney by clear and convincing evidence); *In re* Chappel, 33 N.E.2d 393, 397, 12 Ohio Op. 499, 502 (Ct. App. 1938) ("[The Ohio statute regulating suspension] is penal in nature, and should be strictly construed. The evidence must be clear and convincing, that is to say, that degree of proof which will produce in the mind of the court a firm belief or conviction of the truth of the charges and specifications sought to be established.").

A clear and convincing standard is also used in mental commitments. Addington v. Texas, 441 U.S. 418 (1979); *In re* Matter of Salem, 31 N.C. App. 57, 228 S.E.2d 649 (1976); in perjury cases, Barr Rubber Prods. Co. v. Sun Rubber Co., 425 F.2d 1114 (2d Cir. 1970); and in cases where substantial interests are at stake. For examples of the latter, see Woodby v. Immigration & Naturalization Serv., 385 U.S. 277 (1966) (deportation); Chaunt v. United States, 364 U.S. 350 (1960) (denaturalization); Klapprott v. United States, 335 U.S. 601 (1949) (denaturalization); Schneiderman v. United States, 320 U.S. 118 (1943) (denaturalization).

237. Gettings, *supra* note 195, at 46-47.

238. *Id.* at 43.

tion is disobeyed.[239] With the deck stacked in favor of the government, fairness requires, at a minimum, that the government prove its case with clear and convincing evidence.

III
EXCLUSIONARY RULE

Evidence obtained in a manner that transgresses constitutional standards is admissible to prove a RICO civil violation. This is particularly true with regard to proof of predicate offenses that will constitute a pattern of racketeering. The objective of the exclusionary rule, which was developed in criminal cases, is to deter unlawful government conduct. This deterrence is undermined if the exclusionary rule is not applicable in quasi-criminal actions.

A. The Rule and Government Actions

The exclusionary rule is a judicially created remedy whose primary objective is to deter unlawful government conduct,[240] by not allowing the prosecution to present unconstitutionally gathered evidence to the trier of fact. While the Supreme Court has not extended the exclusionary rule to strictly civil actions,[241] the Court has held that the

239. *Id.* at 47.

240. The exclusionary rule is used in state and federal criminal and quasi-criminal proceedings to exclude from trial evidence obtained through: (1) unconstitutional searches and seizures; (2) wiretapping and electronic surveillance that violate the fourth amendment or federal statutory law; (3) confessions and identifications obtained in violation of the fifth and sixth amendments; and (4) evidence obtained by methods so shocking that its use would violate due process. *See* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

The rule's deterrent effect has been the subject of considerable debate, and the Supreme Court in recent years has expressed its lack of enthusiasm for, if not hostility towards, the rule. For instance, Chief Justice Burger, in this dissent in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), stated that the history of the exclusionary rule "demonstrates that it is both conceptually sterile and practically ineffective in accomplishing the stated objective. . . . Some clear demonstration of the benefits and effectiveness of [the rule] is required to justify it in view of the high price it exacts from society—the release of countless guilty criminals." *Id.* at 415-16 (Burger, C.J., dissenting). In Coolidge v. New Hampshire, 403 U.S. 443 (1971), Justice Harlan observed that there was a need to overhaul the law of search and seizure, and indicated he would "begin this process of re-evaluation by overruling *Mapp v. Ohio*." *Id.* at 490-91 (Harlan, J., concurring).

Nonetheless, the exclusionary rule remains the law of the land. In Stone v. Powell, 428 U.S. 465 (1976), the Court expressed considerable dissatisfaction with the excusionary rule but was unwilling to discontinue its use. The Court indicated that despite the absence of empirical evidence of the rule's deterrent effect, it was working under the assumption that the "immediate effect of the exclusion will be to discourage law enforcement officials from violating the Fourth Amendment." *Id.* at 492. The rule's symbolic value was stressed as the conduit for inculcating fourth amendment considerations in law enforcemeut policies. *Id.* This Comment assumes that until a meaningful replacement is found for the protection of fourth amendment rights, the exclusionary rule will continue in operation, as the least harmful way to deter police misconduct.

241. *See generally* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.5 (1978).

rule is to be applied in proceedings of a quasi-criminal character.[242] Exclusion has been warranted in cases where the civil action (1) is a correlative to criminal sanction;[243] (2) serves as an adjunct to the enforcement of the criminal law;[244] and (3) involves an intrasovereign relationship—that is, the governmental unit bringing the suit was also involved in gathering the illegal evidence.[245] As section B will demonstrate, a RICO civil action brought by the government contains all of these elements, and therefore, one of the procedural safeguards that should be accorded the defendant is the exclusion of evidence obtained by unlawful means.

It should be noted, however, that this Comment's analysis is limited to RICO civil actions where the government is the plaintiff. The exclusionary rule is not available in suits brought by a private party, even though the private action supplements government enforcement of the RICO Act. The use of the exclusionary rule in private litigation will not further the purpose of the rule as defined in *United States v. Calandra*,[246] which emphasized that the *sole* purpose of the rule was to deter illegal *governmental* or *official* conduct. On public policy grounds, it could be argued that society has a lesser interest in the outcome of a lawsuit between private parties[247] than it does in a suit where the government is the plaintiff and where there is a strong possibility of governmental misconduct.[248]

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242. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965). *See supra* notes 182-86 and accompanying text.

243. United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

244. *Id.*; United States v. Janis, 428 U.S. 433, 463 (1976) (Stewart, J., dissenting).

245. *See, e.g.*, Pizzarello v. United States, 408 F.2d 579 (2d Cir.) (civil assessment of wagering taxes), *cert. denied*, 396 U.S. 986 (1969); Knoll Associates, Inc. v. Federal Trade Comm'n, 397 F.2d 530 (7th Cir. 1968) (use of stolen documents by Federal Trade Commission barred in civil action); Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966) (review of plaintiff's discharge from the Air Force); Rogers v. United States, 97 F.2d 691 (1st Cir. 1938) (civil action to recover customs duties on imported liquors); Laprease v. Raymours Furniture Co., 315 F. Supp. 716 (N.D.N.Y. 1970) (action to enjoin a replevin); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391 (S.D. Iowa 1968) (treble damages antitrust action), *aff'd sub nom.* Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969); Lord v. Kelloy, 223 F. Supp. 684 (D. Mass. 1963) (action to enjoin evidentiary use of illegally seized records); Lassof v. Gray, 207 F. Supp. 843 (W.D. Ky. 1962) (civil liability for wagering taxes and assessment).

Several state courts have also excluded evidence in civil proceedings. *See, e.g.*, State v. Barclay, 398 A.2d 794, 796 (Me. 1979) (exclusionary rule applicable in adjudication that defendant committed civil violation by possessing a usable amount of marijuana); State v. Spoke Committee, 270 N.W.2d 339, 344 (N.D. 1978) (a civil proceeding to enjoin the showing of an allegedly obscene film was quasi-criminal because the same evidence might be used to establish scienter in a subsequent criminal prosecution and the civil proceeding was initiated by an official of the government); City of Milwaukee v. Cohen, 57 Wis. 2d 38, 46, 203 N.W.2d 633, 638 (1973) (the constitutional provisions of the fourth amendment are not limited to criminal cases).

246. 414 U.S. 338, 347 (1974).

247. Addington v. Texas, 441 U.S. 418, 423-24 (1979).

248. *See generally* 1 W. LAFAVE, *supra* note 241, § 1.5.

The argument that private lawsuits do not merit the exclusionary rule is weakened, however, if the private plaintiff in a RICO civil action is characterized as a "private attorney general." Under this view, the plaintiff is seeking both to recover damages and to protect society's interest in controlling organized crime. Society's interests would be harmed if the private attorney general resorted to lawless self-help to gather evidence.[249] Nonetheless, the Supreme Court has held that the fourth and fourteenth amendments apply only to state action.[250] Since evidence obtained by a private plaintiff during the course of a RICO action would not involve state action, the fourth amendment remedy of the exclusionary rule would not be available. Moreover, even if the private plaintiff wished to introduce evidence illegally obtained during an earlier police investigation, the exclusionary rule should not apply. The purpose of the exclusionary rule is to eliminate any police motive to gather evidence illegally. This purpose is adequately served by excluding illegally obtained evidence in a criminal prosecution. Police have little incentive to gather evidence illegally merely in order to aid a plaintiff in a private action that may or may not be filed in the future, particularly when their misconduct may jeopardize the success of a criminal prosecution. Furthermore, penalizing the private plaintiff who had nothing to do with the police misconduct would do little to discourage police misconduct.

B. Applying the Exclusionary Rule in Section 1964 Actions

A quasi-criminal action brought by the government under section 1964 shares the traits of actions that have required application of the exclusionary rule in the civil context. It is a correlative to a criminal sanction; it serves as an adjunct to a section 1963 criminal proceeding; and most importantly, it involves an intrasovereign relationship that creates the potential for governmental abuse.

1. *Correlative to Criminal Sanction*

As to the first characteristic, while the section 1964 remedies of divestiture and treble damages are not themselves criminal sanctions, they amount to correlatives of criminal sanctions. This is particularly true in situations where the government seeks "to penalize for the commission of an offense against the law"[251] by a proceeding with less stringent procedures than those normally required in a criminal prose-

249. *See* Baade, *Illegally Obtained Evidence in Criminal and Civil Cases: A Comparative Study of a Classic Mismatch* (pt. 2), 52 TEX. L. REV. 621, 700 (1974).

250. *See* Burdeau v. McDowell, 256 U.S. 465 (1921); The Civil Rights Cases, 109 U.S. 3 (1883).

251. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

cution. The government brings a civil action only if the defendant has allegedly violated one of the sections of the RICO Act by a pattern of racketeering activity. Hence, a section 1964 remedy is at least in part a penalty for the violation of the law, notwithstanding Congress' disclaimer of any punitive purpose.[252]

In *One 1958 Plymouth Sedan v. Pennsylvania*,[253] the Supreme Court held that the exclusionary rule applies to quasi-criminal proceedings. The Court noted the anomaly of excluding illegally seized evidence from a criminal proceeding while admitting it in a civil forfeiture proceeding that required a determination of a violation of the criminal law. It decided that under these circumstances, the exclusionary rule must apply to both proceedings.

Although *Plymouth Sedan* differs from a section 1964 action with respect to the remedy sought, both involve punitive sanctions. In *Plymouth Sedan*, the sanction of forfeiture was sought. A RICO action may result in divestiture, which unlike forfeiture, entitles the defendant to the proceeds of the forced sale. Divestiture, in the antitrust setting, has been held to be remedial and not punitive.[254] However, divestiture in antitrust cases and divestiture under section 1964 are not synonymous. In antitrust, divestiture removes the anticompetitive evil. It directly remedies the harm the antitrust laws seek to reach. In RICO cases, on the other hand, divestiture does not remove the evil but rather, something that the evil—the racketeer—owns. To this extent, the remedy is punitive. Moreover, in antitrust, many civil cases are brought where criminal prosecution would not have been justified, and the government does not have to show that the violation constituted a criminal act.[255] RICO actions, on the other hand, must include findings of criminal violations and are thus colorably punitive.

Plymouth Sedan itself sets forth a consideration that reflects punitive effect, and this standard—comparative economic loss—applies to RICO. The State of Pennsylvania in *Plymouth Sedan* sought to cause the forfeiture of an automobile worth $1000, but if the defendant had been convicted of one offense, he would have been subject to a maximum penalty of $500. Under these circumstances, the Court in *Plym-*

252. The civil remedies contained in the RICO statute are designed to free the channels of commerce from predatory activities and not to punish the violator, which remains within the province of the criminal provisions. SENATE REPORT, *supra* note 2, at 81.

253. 380 U.S. 693 (1965).

254. United States v. Dupont de Nemours & Co., 366 U.S. 316 (1961).

255. Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. PA. L. REV. 192, 208 (1975). *See also* 2 P. AREEDA & D. TURNER, *supra* note 232, § 310a ("We must thus recognize that the courts would reconcile—if they have not already implicitly done so—the Sherman Act's purpose as a charter of freedom with its criminal sanctions by divorcing the latter from the statute's civil sweep.")

outh Sedan decided that the forfeiture was a penalty, found the action quasi-criminal, and held that illegally seized evidence was excludable.[256] The economic loss attributed to forced RICO divestiture is likely to be substantial, and like forfeiture, it may be greater than that allowed under the parallel criminal sanction. If a defendant is ordered to divest or dissolve his enterprise, his economic loss could easily exceed $25,000, which is the maximum fine in the criminal proceeding. In this respect, the divestiture looks like a penalty, and it follows that illegally seized evidence should be excluded from such a quasi-criminal proceeding.

A RICO civil action resembles *Plymouth Sedan* in one more important aspect. Both involve the government forcing the defendant to give up a possession or interest that is not, of itself, illegal. In *Plymouth Sedan* Justice Goldberg noted that possession of an automobile is not inherently criminal. It was only the illegal use of the automobile that subjected defendant to its possible loss.[257] Likewise, an ownership interest in a legitimate business is not criminal, and it is only investing in a business in the prohibited manner that is a crime under RICO. Thus, in both contexts, proof of a crime is a required predicate to the loss of an otherwise legal interest. In RICO actions, as in *Plymouth Sedan*, the government should not be permitted to prove the underlying crime with evidence obtained in violation of the defendant's constitutional rights.

2. *Adjunct to the Criminal Law*

It is also clear that, just as in *Plymouth Sedan*, the civil sanction under RICO serves as an adjunct to the enforcement of the criminal law.[258] It not only frees the channels of commerce from unfair competition, but also has a snowballing effect in controlling organized crime. The government civil suit will not only put a racketeer out of business, it will also shake the economic foundation of the corrupt organization. That the economic sanction aids the criminal penalty to such an extent supports the notion that the government should not be excused from constitutional mandates when prosecuting its action in a civil forum.[259]

3. *Intrasovereign Misconduct*

Perhaps the most compelling reason to apply the exclusionary rule in RICO cases is the great possibility for intrasovereign misconduct. The Justice Department is in charge of investigating violations of

256. 380 U.S. at 701-02.
257. *Id.* at 699-700.
258. *See supra* note 244. *See also infra* notes 270-74 and accompanying text.
259. *See* United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966).

RICO. Routinely, civil and criminal investigations are performed concurrently.[260] Under RICO, the government has the option of bringing a criminal action, a civil action, or both. A criminal action is not a prerequisite to the institution of a civil suit.[261] But if the government is successful in a preceding a criminal action, commission of the predicate offense is res judicata.[262] Moreover, if the criminal case results in an acquittal, there is no bar to a later civil suit.[263]

Thus, evidence gathered by the Justice Department's investigators can be used against a section 1964 defendant in several ways. The government might bring the criminal action first to dispel the contention that the civil suit was punitive rather than remedial,[264] or to take advantage of section 1964(d) collateral estoppel.[265] The United States Attorney might decide to bring a civil action if the imprisonment, fine, and criminal forfeiture under a seetion 1962[266] conviction has not had a substantial economic impact on the defendant's illegal activities. Moreover, if the criminal prosecution is unsuccessful, the government can resort to a civil action to penalize the defendant. Finally, the decision to institute a criminal or civil action might depend on the quality of the evidence available to the prosecution.[267]

If a RICO investigator conducts an illegal search or seizure, he knows the evidence gathered in such a way will probably be excluded

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260. For instance, in antitrust law:

> The Antitrust Division of the Department of Justice or the appropriate United States Attorney, under the direction of the Attorney General initiates both the criminal and civil investigations [and it can be assumed that the same procedure will be followed by the Organized Crime Division of the Department of Justice in the RICO context.] The practice of the Department of Justice, [however] has been to limit criminal proceedings to situations where the offense is clearly unlawful (like 'price-fixing'), where defendant has acted with 'specifie intent to restrain trade or monopolize' or has engaged in 'predatory practices (boycotts, for example)' . . . . Thus, criminal prosecution in general and imprisonment in particular, have been confined to instances of outrageous conduct and undoubted illegality.

2 P. AREEDA & D. TURNER, *supra* note 232, § 309b.

261. Farmers v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D.C. Del. 1978).

262. "A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceedings brought by the United States." 18 U.S.C. § 1964(d) (1976).

263. Helvering v. Mitchell, 303 U.S. 391, 397 (1938); *see also* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); United States v. Gypsum Co., 51 F. Supp. 613 (D.D.C. 1943).

264. *See supra* text accompanying notes 160-80 and accompanying text.

265. *See supra* note 262.

266. 18 U.S.C. § 1962 (1976).

267. In United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), defendants unsuccessfully argued that unlike civil antitrust and pure food statutes, § 1964 was designed to serve as an alternative to criminal prosecutions when the requisite proofs are lacking. *Id.* at 1357. It remains to be seen, however, whether other federal courts will follow this rationale.

from any subsequent criminal prosecution.[268] He also knows, however, that the Supreme Court has not extended the exclusionary rule to strictly civil proceedings. Furthermore, he might believe that a civil action may well be a more effective tool to achieve one of the purposes of the RICO Act, setting "free the channels of commerce from predatory activities."[269] This hypothetical investigator is not deterred from gathering evidence in an unlawful way, with an eye toward a civil proceeding unless the exclusionary rule applies in the civil action.

An overzealous investigator or prosecutor might be encouraged to disregard constitutional constraints if he knows "that there is available an alternative to criminal prosecution which involves no exclusion for . . . misconduct but which permits the imposition of substantial sanctions upon those so prosecuted."[270] The prosecutor may believe that injunctions,[271] divestiture,[272] reorganization, and dissolution[273] will disengage organized crime from commercial enterprises more effectively than putting individual defendants behind bars. Moreover, because the government has the advantage of a less onerous burden of proof in a civil suit than in a criminal action,[274] the prosecutor may find a civil action to be an ideal method of punishing defendants while avoiding the constitutional limitations on criminal investigations. These considerations have moved several federal courts to exclude evidence from civil proceedings[275] in cases of intrasovereign violations.

Because a RICO action must be predicated on at least two criminal offenses, the federal government may sometimes rely on evidence

268. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Elkins v. United States, 364 U.S. 206 (1960); Weeks v. United States, 232 U.S. 383 (1914). Tainted evidence could still be admitted if the government can show the police obtained the evidence by means sufficiently distinguishable from the illegality. Wong Sun v. United States, 371 U.S. 471, 488 (1963); *accord* United States v. Ceccolini. 435 U.S. 268 (1978).

269. SENATE REPORT, *supra* note 2, at 81.

270. Quiek, *Constitutional Rights in the Juvenile Court*, 12 How. L.J. 76, 97 (1966).

271. RICO injunctions parallel antitrust injunctive relief, which prohibits engaging in certain types of activity. This antitrust remedy was approved in United States v. Grinnel Corp., 384 U.S. 563 (1966). Grinnel manufactured plumbing supplies and fire sprinkler systems and its affiliates supplied subscribers with fire and burglar alarm services. One affiliated company controlled 73% of the national market of automatic alarm systems monitored through central stations. The court enjoined all four affiliated companies from restraining trade or monopolizing the market and further required the company to divest itself of its affiliates. *Id.* at 579-80.

272. Divestiture may be the "most important of antitrust remedies. It is simple, relatively easy to administer, and sure." United States v. DuPont de Nemours & Co., 366 U.S. 316, 331 (1961) (footnote omitted). The term divestiture refers to those situations in which individuals or organizations are required to strip themselves of property, securities, or other interests.

273. Dissolution involves the destruction of an allegedly illegal organization or association. *See, e.g.*, International Boxing Club v. United States, 358 U.S. 242 (1959).

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

275. *See supra* note 264.

of a state crime illegally obtained by state police officers. Such a situation involves an *inter*sovereignty rather than an *intra*sovereignty relationship—that is, the governmental unit involved in gathering the illegal evidence is not the unit bringing the suit. The issue in such a case is whether evidence illegally seized by state criminal law enforcement officials is admissible to establish a predicate offense in a section 1964 action brought by the federal government.

The United States Supreme Court addressed a similar issue in *United States v. Janis*,[276] where the Court held that evidence illegally seized by state law enforcement officers is admissible in civil tax proceedings brought by the United States. *Janis*, however, is readily distinguishable from a section 1964 action and provides little support for admitting illegally obtained evidence in government instituted RICO civil actions. First, *Janis* did not involve a quasi-criminal penalty. Rather, the federal government sought to compel payment of federal wagering taxes due on the defendant's bookmaking operation. The Court pointed out that while it had previously applied the exclusionary rule in the civil context where the remedy was "clearly a penalty for the criminal offense,"[277] the rule had never been applied to ordinary civil actions. Unlike *Janis*, a section 1964 action does involve quasi-criminal penalties. Second, *Janis* did not require proof of a state crime as a predicate to recovery. All that was needed in *Janis* was proof that the defendant had not paid taxes that were legally due. In contrast, the government must prove at least two predicate crimes in a RICO action. If illegally obtained evidence is admitted in a federal RICO proceeding, the effect will be that the state crime may be proved with evidence that could not be used to prove the crime in a state prosecution. Permitting its introduction will provide an incentive to state law enforcement officials to conduct illegal investigations in cases where the state is willing to forego state prosecution in favor of federal RICO sanctions.[278] In short, since RICO proceedings provide an alternate method of sanctioning conduct that violates state law, allowing introduction of tainted evidence may well encourage illegal searches and seizures. *Janis* relied on the fact that exclusion would have little deterrent effect because there was no interaction between the federal civil proceeding

276. 428 U.S. 433 (1976). The Court noted that "seminal" lower court decisions have applied the exclusionary rule to civil proceedings involving intrasovereign fourth amendment violations, but it expressly did not consider that situation. *Id.* at 456. *See also* Guzzetta v. Commissioner [1982] TAX CT. REP. (CCH) No. 38,758 (Feb. 2, 1982) (following *Janis*).

277. 428 U.S. at 447 & n.17.

278. In Terry v. Ohio, 392 U.S. 1, 14 (1968), the Supreme Court observed that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving *some other goal*." (emphasis added). This observation has particular force in the RICO civil context.

and the state criminal action.[279] By contrast, applying the exclusionary rule to RICO proceedings will be more likely to deter violations by state officials because it will eliminate the availability of an alternate penalty for conduct that violates state law.

C. *A Pragmatic Analysis*

In determining whether to apply the exclusionary rule to RICO civil actions courts must, instead, balance the benefit of exclusion against the costs.[280] In a RICO action, the interests that are at stake when the court undergoes the necessary "pragmatic analysis"[281] include the purposes underlying the rule, the possible official misconduct, the government's alternatives if tainted evidence is excluded, and the protection of the rights of the defendant.

The purpose of the exclusionary rule is the protection of society from unconstitutional governmental intrusion. It serves to effectuate the fourth amendment rights of people to the security of their persons, homes, and property. The exclusionary rule discourages the unlawful use of the power of search and seizure by penalizing the violator. Abuses of governmental power should not be tolerated in either the criminal or quasi-criminal setting.

This is especially the case where governmental abuse may be encouraged by the availability of the two genres of RICO actions. Given the availability of a civil forum that may not apply the exclusionary rule, law enforcement agencies may engage in the type of investigation that the exclusionary rule seeks to deter. Moreover, officials may seek to circumvent application of the exclusionary rule by bringing a civil action after critical evidence has been excluded from a criminal case. If they are permitted to so circumvent the rule, the constitutional violation is not penalized.

Finally, application of the exclusionary rule is necessary to protect the defendant's interests. It would do a defendant little good to claim that his constitutional rights had been violated if the illegally seized evidence could still be used by the government in a quasi-criminal RICO action. The exclusionary rule is the remedy currently provided for violations of the defendant's fourth amendment rights. Moreover, as this Comment has argued, the defendant faces substantial incursions on his reputation, property-related interests, and his interest in earning

279. Professor LaFave criticizes the result and states that "the majority's deterrence theory points in precisely the opposite direction. . . ." 1 W. LAFAVE, *supra* note 241, § 1.5(d). *See also* Justice Stewart's dissent in *Janis*, 428 U.S. at 463-64.

280. *See* Stone v. Powell, 428 U.S. 465, 488 (1979); United States v. Janis, 428 U.S. 443, 447-60 (1976); United States v. Calandra, 414 U.S. 338, 347 (1974).

281. Stone v. Powell, 428 U.S. at 488.

a livelihood.[282] While none of these interests, at least as are likely to arise in a RICO case, are of constitutional proportions, taken together they suggest that there should be constitutional procedural protections.

PART TWO CONCLUSION

The involvement of organized crime in the nation's commerce is well-documented. Organized crime's corrosive influence should be stopped by any lawful means within the government's control. RICO gives the government a powerful tool to achieve this end. By using antitrust-type remedies to remove tainted funds from legitimate enterprises, the government can make the activities of organized crime less profitable.

Although the Justice Department has used RICO with considerable restraint in the past ten years, RICO's civil remedies present great opportunities for abuse. It is possible that overzealous prosecutors might engage in activities which would violate a defendant's constitutional rights. While defendants in civil trials are not given the same constitutional protections as are accorded criminal defendants, RICO's civil label should not be determinative. No label should take precedence over justice and fairness. The trial courts should balance the competing interests involved and grant RICO defendants procedural safeguards appropriate to the circumstances of each case.

This Comment suggests that as a minimum, RICO civil defendants should be tried under the clear and convincing standard rather than the preponderance of the evidence standard used in most civil cases. In addition, it is recommended that in order to deter government misconduct, the exclusionary rule should be applied in RICO civil actions. These procedural safeguards will protect the defendant from undue government intrusion without denying the government the ability to reach organized crime's financial interests through the unusual remedy of a RICO civil action.

CONCLUSION

While RICO's main objective is to eradicate racketeering influence from the American economy, its language and scope are very broad and its provisions are applicable to individuals who have no ties to organized crime. The primary aim of this Comment is to examine RICO's major flaw: the opportunity for prosecutorial misconduct. The Comment suggests that there are at least two areas where the possibility for abuse are great. First, any criminal defendant who has committed two crimes is vulnerable to a RICO prosecution and in many instances

282. *See supra* notes 190-91 and accompanying text.

would face double punishment for the same offense. Second, a civil defendant faces the prospect of being found guilty of at least two criminal acts by a mere preponderance of the evidence, and this evidence does not have to conform with the requirements of the fourth amendment. In order to limit RICO's scope for abuse, this Comment recommends that criminal defendants receive as much protection from multiple prosecution as is consistent with current double jeopardy law and that civil defendants be given certain procedural safeguards, to wit, that the government be required to prove its case by clear and convincing evidence and that all evidence gathered and presented conform with the requirements of the exclusionary rule. These safeguards would protect defendants from undue government intrusion, and are consistent with RICO's legislative intent to provide for enhanced criminal sanctions and innovative civil remedies that allow the government to reach the activities of organized crime.

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