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Title IX - Racketeer Influenced and Corrupt Organizations

Richard Levy
University of Michigan Law School

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

I. THE PROBLEM: ORGANIZED CRIME'S PENETRATION OF LEGITIMATE BUSINESS

Organized crime's penetration of legitimate business has long been a major congressional concern. Although the means employed to effect such penetration may vary,[1] the result remains constant; organized crime is provided with additional economic power and a facade of legitimacy behind which it can more easily spread its influence and pursue its goals. At the same time, organized crime's monopolistic tendencies, furthered by its use of various forms of coercion, pose a serious threat to free trade and lawful ownership.[2]

Prior law proved inadequate in curtailing these abuses. Federal law was piecemeal and not designed to meet the challenge of organized crime, and, consequently, much reliance had to be placed upon ineffectual state laws. Moreover, difficulties of proof made the successful prosecution of members of criminal syndicates, especially those in the higher and more isolated echelons of the organized crime structure, extremely difficult. More importantly, however, conviction of any one member of a criminal syndicate did not loosen organized crime's hold on legitimate business. Rather, it resulted only in the adoption of a "compulsory retirement and promotion system"[3] in which other syndicate members were promoted to take the place of the convicted few.

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[1] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 190 (1967), cites four principal methods by which organized crime gains control of legitimate business: (1) extortion; (2) investment of profits acquired from gambling and other illegal activities; (3) acceptance of interests in business as payment for the owner's gambling debts; (4) foreclosure on usurious loans.

[2] *Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122, and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 556 (1969) [hereinafter cited as *Senate Hearings*] (report of Antitrust Section of the American Bar Association):

> Organized crime . . . is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest in economic superiority.

[3] S. REP. NO. 91-617, 91st Cong., 1st Sess. 78 (1969) [hereinafter cited as SENATE REPORT].

II. PROHIBITED ACTIVITIES

In an effort to ameliorate these problems, title IX adopts a three-fold approach. First, it attempts to prevent organized crime from gaining control of legitimate businesses. Second, it seeks to prevent organized crime from using legitimate businesses in which it has an interest as a basis from which to spread its influence. Finally, title IX attempts to facilitate the prosecution of organized criminals by lowering the standard of proof traditionally required by American law.

Section 1962 of title IX sets forth three major prohibited activities. It prohibits any person who has received any income from either a pattern of racketeering activity, or the collection of an unlawful debt, from using any part of that income to acquire an interest in or to maintain any enterprise which affects interstate commerce.[4] Title IX defines a "pattern of racketeering activity" as at least two acts of racketeering activity.[5] The term "racketeering activity" is defined as: (1) any act or threat involving certain crimes (including murder, arson, and extortion) which are chargeable under state law; (2) any act indictable under certain provisions of title 18 (including bribery, extortionate credit transactions, mail fraud) and title 29 (including restrictions on payments and loans to labor organizations, and embezzlement from union funds); or (3) any offense involving bankruptcy fraud, securities fraud, or dealing in narcotic drugs which is punishable under any law of the United States.[6] The term "unlawful debt" means a debt received from either gambling activity or usurious loans in violation of the laws of the United States.[7] The purpose of this provision is to prohibit organized crime from gaining a foothold in legitimate business by using the proceeds of its illegal activities for investment purposes.

Section 1962(b) prohibits anyone from acquiring or maintaining any interest in a business through a pattern of racketeering activity or the collection of an unlawful debt. This provision differs from section 1962(a) in that it does not require the use of *income* from racketeering activity in the acquisition or maintenance of a business. For example, foreclosing on a usurious loan is a means

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[4] 18 U.S.C.A. § 1962(a) (Supp. 1971) expressly exempts from its proscription a purchase of securities on the open market for purposes of investment if the purchaser lacks intent to control or participate in the control of the issues and if the aggregate purchases do not exceed one percent of the outstanding securities of any one class and do not confer upon the purchaser the power to elect one or more directors.

[5] 18 U.S.C.A. § 1961(5) (Supp. 1971).

[6] *Id.* § 1961(1).

[7] *Id.* § 1961(6).

frequently used by organized crime to acquire an interest in a legitimate business.[8] Although this would not entail use of the *income* from unlawful debt and would not therefore fall within the prohibitions of section 1962(a),[9] it would fall within 1962(b).[10]

Finally, section 1962(c)[11] prohibits a person employed or associated with an interstate business from conducting that business through means of racketeering activity or the collection of unlawful debt. The purpose of this provision is to prevent organized crime from using a legitimate business as a basis for conducting racketeering activity.[12]

III. Criminal Penalties and Civil Remedies

A. Criminal Penalties

The substantive provisions of title IX are enforced, in part, by criminal penalties. Section 1963(a) imposes a fine of up to twenty-five thousand dollars and/or imprisonment for not more than twenty years for a violation of any of the substantive provisions of title IX. Most importantly, however, section 1963(c) provides that following the "conviction of a person under Title IX," the Attorney General may seize property or other interests declared "forfeited" by the court.

The traditional forfeiture proceeding, frequently found in federal statutes,[13] is a proceeding in rem against the goods or other property used by the defendant to pursue his illegal ends. The origin of criminal forfeiture in English law is explained by Blackstone as follows:

> [W]hatever personal chattel is the immediate occasion of the death of any reasonable creature [is forfeited to the King]. . . . It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death.[14]

In *J.W. Goldsmith-Grant Co. v. United States*,[15] the Supreme

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[8] *See* note 1 *supra*.

[9] 18 U.S.C.A. § 1962(a) (Supp. 1971).

[10] *Id.* § 1962(b).

[11] *Id.* § 1962(c).

[12] 18 U.S.C.A. § 1962(d) (Supp. 1971) prohibits any person from conspiring to violate any of the provisions of subsections (a), (b) or (c).

[13] *See e.g.*, 18 U.S.C. § 1082 (1964) (relating to gambling ships), 18 U.S.C. § 492 (1964) (counterfeiting), 49 U.S.C. §§ 781-83 (1964) (relating to narcotics violation). The *Internal Revenue Code* has been a fruitful source of criminal forfeiture proceedings. In United States v. One Ford Coupe, 272 U.S. 321 (1926), the claimant's automobile, used in the distribution of illegal spirits, was declared forfeited by the lower court because of his failure to purchase a liquor tax stamp.

[14] 1 Blackstone Commentaries 300 (16th ed. 1825).

[15] 254 U.S. 505 (1921).

Court acquiesced in the incorporation of this remedy into American law and held that criminal forfeiture "is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced."[16]

B. Civil Remedies

Although the criminal penalties should have a deterrent effect on organized crime's infiltration of legitimate business, title IX's civil remedies should have the greatest impact.[17] Under section 1964(a) the federal district courts are authorized to order any person to divest himself of any interest in any enterprise, to enjoin any person from engaging or investing in a business, or to dissolve or reorganize any business. Further, section 1964(c) provides that any person whose business is harmed because of violation of section 1962 may sue the defendant for treble damages.

These civil remedies are patterned after those employed in antitrust legislation[18] and are included in title IX for two primary reasons. The first is to prevent the monopolistic tendencies and the other illegal activities which arise when organized crime enters into legitimate business.[19] There is little doubt that if vigorously enforced these remedies, especially divestiture and treble damages, will have a strong prophylactic effect on the expansion of organized crime's hold on legitimate enterprise. Divestiture is especially important in this respect, for it will ensure that organized crime's hold on a particular business will be completely removed. Second, Congress apparently believed that title IX would be more effective if someone other than the federal government shared the burden of prosecuting organized crime. However, in light of organized crime's notorious use of violence and other more subtle means of coercion, it would not be surprising to find the federal government alone in its prosecution under title IX.

To facilitate further both civil and criminal litigation under title IX, section 1968 permits the use of the civil investigative demand. Under that section, upon reasonable belief that any person or enterprise may be in possession or control of "any documentary evidence relevant to a racketeering investigation," the Attorney General may order the production of such materials.[20]

Delegation of investigatory powers, including the power of production of documents, is not unique to title IX. Numerous federal

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[16] *Id.* at 511.

[17] *See Senate Hearings* 407 (letter from Richard G. Kleindienst, Deputy Attorney General of the United States).

[18] *See, e.g.*, treble damage provision of the antitrust acts, 15 U.S.C. § 15 (1964).

[19] *See* note 2 *supra*.

[20] 18 U.S.C.A. § 1968(a) (Supp. 1971).

officials have similar investigative grants to aid them in the performance of their duties.[21] Indeed, the civil investigative demand in title IX is very similar to that incorporated in the Antitrust Civil Process Act.[22] The only significant difference is that the antitrust civil investigative demand applies to any "corporation, association, partnership, or other legal entity *not a natural person*" (emphasis added).[23] In *Hyster v. United States*[24] the United States Court of Appeals upheld the validity of antitrust civil investigative demands and rejected the petitioner's argument that the demand was an "unreasonable" search and seizure within the meaning of the fourth amendment.[25] The court emphasized, however, that the demand was only enforceable pursuant to a judicial proceeding. In such cases the court is given broad discretion to protect the aggrieved party from any unreasonable demands.[26]

The court in *Hyster* also upheld the delegation of such demand authority to the Attorney General.[27] The court cited various instances of such proper delegation to "quasi-judicial" or administrative bodies,[28] which have the power to refer evidence to the Attorney General to prosecute for the commission of crimes revealed during the course of their investigation. In the absence of any showing that the Attorney General will abuse this power, there is no reason why such power cannot be directly delegated to him.[29]

A possible distinction between antitrust and title IX's civil investigative demand, however, is that title IX's civil remedies are based on a finding of guilt for the underlying "racketeering activity."[30] To prove a civil wrong, criminal liability must also be

[21] 7 U.S.C. §§ 7a, 1373, 1603 (1964) (authorizing the Secretary of Agriculture to examine books and documents upon a finding of reasonable belief); 26 U.S.C. § 7602 (1964) (authorizing Secretary of the Treasury or his delegate to examine books, papers, records and other data to ascertain correctness or completeness of any person's tax returns); 33 U.S.C. §506 (1964) (authorizing the Secretary of the Army to inspect documents pursuant to the establishment of reasonable toll rates for bridges over navigable waters); 15 U.S.C. § 49 (1964) (authorizing the Federal Trade Commission to examine documents and require attendance of witnesses pursuant to his investigatory powers).

[22] 15 U.S.C. §§ 1311-14 (1964).

[23] *Id.* § 1311(f).

[24] 338 F.2d 183 (9th Cir. 1964).

[25] *Id.* at 186.

[26] *See* FTC v. American Tobacco Co., 264 U.S. 298 (1924), affirming the denial of a production demand pursuant to the Federal Trade Commission Act of September 26, 1914, Ch. 311, § 9, on grounds that the demand was too general and extensive and based only on hearsay and suspicion.

[27] 338 F.2d at 186.

[28] *Id.* at 186. *See also* United States v. Morton Salt Co., 338 U.S. 186 (1950); Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946); K. DAVIS, ADMINISTRATIVE LAW, § 303 (1958).

[29] 338 F.2d at 186.

[30] The difference between a civil investigative demand supplementing a primarily civil antitrust statute on the one hand, and a criminal statute on the other may be an important

demonstrated. This in turn gives rise to the problem of to what extent information garnered for purposes of a civil suit may be used in a subsequent or contemporaneous criminal action. This problem has recently been obviated by the Supreme Court's decision in *United States v. Kordel*.[31] That case involved the use of evidence obtained from interrogatories during the course of a civil libel action against a corporation under the Federal Food, Drug, and Cosmetic Act[32] in a subsequent criminal proceeding under the Act against the corporation's officers. The defendants argued that the use of this evidence violated their fifth amendment privilege against self-incrimination. Although the Court found that the defendants had waived this privilege, it did recognize that a timely assertion of the fifth amendment right would be valid.[33]

The rationale of the *Kordel* case should apply to title IX's civil investigative demand. In both instances evidence derived from proceedings attendant to a civil action may be used in a subsequent criminal action. The fifth amendment's privilege against self-incrimination should apply equally to both cases.

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distinction in light of Boyd v. United States, 116 U.S. 616 (1886), in which the Supreme Court held that " any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of a crime or to forfeit his property is contrary to the principle of free government." *Id.* at 631-32.

[31] 397 U.S. 1 (1970).

[32] 21 U.S.C. §§ 301 *et seq.* (1964).

[33] 397 U.S. 1, 7 (1970). The Court did, however, emphasize that there was no constitutional barrier to the Government's pursuing both a civil and criminal action: "It would stultify enforcement of federal law to require a governmental agency . . . invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11 (1970).