The RICO Nexus Requirement: A "Flexible" Linkage

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In 1970, Congress, responding to what was perceived as an alarming increase in the activities of La Cosa Nostra,\(^1\) enacted the Racketeer Influenced and Corrupt Reorganization Act (RICO)\(^2\) as part of the Organized Crime Control Act of 1970.\(^3\) Created during a period marked by national and legislative paranoia over organized crime,\(^4\) RICO was broadly drafted in order to help fill "the gaps" in the enforcement net through which the mob bosses were slipping.\(^5\) For five years after its passage RICO was largely ignored by prosecutors and

1. See McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 55-60 (1970). McClellan describes La Cosa Nostra as a criminal organization of 26 families that is directly descended from and is patterned upon the centuries-old Sicilian terrorists society, the Mafia. This organization, also known as Cosa Nostra, operates vast illegal enterprises that produce an annual income of many billions of dollars. This combine has so much power and influence that it may be described as a private government of organized crime. *Id.* at 59 (quoting the Final Report of the Permanent Subcommittee on Investigations, *infra* note 5). McClellan cites syndicated gambling, the importation and distribution of narcotics, and loan-sharking as the chief activities of this organization.

The threat of organized crime is very real. In 1967, the President's Commission on Law Enforcement estimated that the economic cost of organized crime is twice that of all other crime combined. *President's Commission on Law Enforecement and Administration of Justice, The Challenge of Crime in a Free Society* 31-35 (1967). This same commission estimated that organized crime annually earned an amount approximately equal to the aggregated incomes of America's ten largest companies. *Note, United States v. Sutton: Reining In on a Runaway RICO*, 42 U. PITT. L. REV. 131, 131 (1980).


4. Congress was motivated by extensive evidence leading to the conclusion that organized crime was a "cancer in our cities," which would require strong measures to combat and eradicate. The hearings that preceded the Act, including Joseph Valachi's startling disclosures of the organization and scope of the Mafia, led to a nationwide fear that our society's basic institutions were being eroded by this evil force. The popular reaction was not unlike the "red scares" that swept the nation in the 1920s and again in the 1950s. *Bradley, Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 837 (1980) (footnotes omitted). See generally *Albanese, What Lockheed and La Gosa Nostra Have in Common: The Effect of Ideology on Criminal Justice Policy*, 28 CRIME & DELINQ. 211 (1982) (containing a general discussion of how the Valachi and Lockheed hearings led to the passage of new legislation).

5. "The loopholes through which the leaders of organized crime now escape the processes of our law must be closed. Justice and public safety demand no less, and it is to this end that S.30 was carefully drafted . . . ." *McClellan, supra* note 1, at 60 (footnote omitted). Congressional studies indicated that the members of La Cosa Nostra obtained dismissal or acquittal on charges leveled against them more than twice as often, on a percentage basis, as ordinary criminals. 115 CONG. REC. S14430 (daily ed. Nov. 17, 1969). The Permanent Subcommittee on Investigation found that

The crime leaders are experienced, resourceful, and shrewd in evading and dissipating the effects of established procedures in law enforcement. Their operating methods, carefully and cleverly evolved during several decades of this century, generally are highly effective
the fervor about organized crime subsided; but the past few years have witnessed a dramatic increase in the use of Civil and Criminal RICO as well as in the controversy surrounding the statute.

The potential scope of RICO’s broad substantive provisions combined with its potent civil and criminal penalties has led to a vast body of critical legal scholarship and an equally large mass of confused and often conflicting judicial opinions. Critics argue that as currently applied, “the statute is too broad and constitutes a snare for persons and activities within, as well as outside of, the statute’s intended coverage.” Indeed, a large number of courts have asked pros-

foils against diligent police efforts to obtain firm evidence that would lead to prosecution and conviction.

The crime chieftains, for example, have developed the process of “insulation” to a remarkable degree. The efficient police forces in a particular area may well be aware that a crime leader has ordered a murder, or is an important trafficker in narcotics, or controls an illegal gambling network, or extorts usurious gains from “shy locking” ventures. Convicting him of his crimes, however, is usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the utmost care to insulate himself from any apparent physical connection with the crime or with his hireling who commits it.

PERMANENT SUBCOMMITTEE ON INVESTIGATIONS OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS, ORGANIZED CRIME AND ILlicit TRAFFIC IN NARCOTICS, S. REP. NO. 72, 89th Cong., 1st Sess. 2 (1965) [hereinafter cited as PERMANENT SUBCOMMITTEE].


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

(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.

(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.

(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.


10. See Tarlow, RICO: The New Darling of the Prosecutor’s Nursery, 49 FORDHAM L. REV. 165 (1980); Tarlow, supra note 6. These two articles discuss RICO in its entirety and canvass the wide range of judicial opinions and critical writings.

ecutors to exercise discretion in bringing RICO suits.\textsuperscript{12}

This Note argues that the RICO "nexus" requirement can be interpreted to limit effectively this overbroad use of RICO without emasculating the statute. The "nexus requirement" is generally described as defining the word "through"\textsuperscript{13} in section 1962(c), the provision of RICO that makes it illegal to "conduct or participate, directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity."\textsuperscript{14} This language establishes the necessity of proving a relationship between the enterprise and the racketeering.\textsuperscript{15}

Once evidence of the alleged enterprise\textsuperscript{16} and the predicate racketeering-
ing acts has been submitted, the final element of proof must be that the racketeering and the enterprise are sufficiently related to justify a find-

Note, Racketeer Influenced and Corrupt Organizations: Distinguishing the "Enterprise" Issues, 59 WASH. U. L. Q. 1343 (1982); Comment, Reading the "Enterprise" Element Back into RICO: Sections 1962 and 1964(c), 76 NW. U. L. REV. 100 (1981). While a full discourse on the enterprise issue would not be helpful, the debate does have implications for the nexus requirement. The Supreme Court's decision in United States v. Turkette, 452 U.S. 576 (1981), settled a circuit split by deciding that the term "enterprise" as defined in § 1961(4) encompasses illegitimate as well as legitimate enterprises. The Court left open the issue of whether this illegitimate enterprise must have an existence independent of the pattern of racketeering activity. If it must, a prosecutor cannot define the RICO enterprise as a group organized to commit the racketeering acts. The circuit courts have not clearly resolved this issue, but the decision by the Eighth Circuit in United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981), holding that the enterprise must have some economic existence apart from the racketeering has gained support.

We hold that Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its definition of the term "enterprise" in section 1961(4), to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the "pattern of racketeering activity." See also Bennett v. Berg, 685 F.2d 1053 (8th Cir. 1982), on rehearing en banc, affd. in part, revd. in part, 710 F.2d 1361, cert. denied, 104 S. Ct. 527 (1983); United States v. Bledsoe, 674 F.2d 647 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). The most important source of support has come from the advisory and nonbinding guidelines for prosecutors issued by the Justice Department which adopted the Anderson approach to the enterprise issue. See Justice Department to Shift Emphasis from White Collar Area, Giuliani Says, 30 CRIM. L. REP. (BNA) 2238, 2239 (Dec. 23, 1981). For a criticism of these guidelines as being "somewhat opaque," see Blakey & Gettings, RICO's Problem in the Courts: A Classic Case of Misreading, Natl. L. J., Mar. 9, 1981, at 28 n.3, col. 2.

The Anderson approach is correct in that two unacceptable results follow from defining an enterprise as a group of people joined together solely to commit racketeering acts. First, a broad reading, such as the one adopted in United States v. Elliott, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978), eliminates the enterprise requirement because establishing the pattern of racketeering establishes the enterprise. If the definition of enterprise requires a purpose to engage in racketeering, this in turn eliminates the nexus requirement.

With subsections (b) and (c) [of section 1962], consideration must also be given to the requirement that the defendant operate "through" a pattern of racketeering activity. This element practically vanishes along with the enterprise element whenever the enterprise is defined as the association to commit the racketeering activity, but it can pose substantive limitations on prosecutorial zeal in the setting of infiltration of legitimate business. Anderson, 626 F.2d at 1366 n.13. This would leave only one element, the pattern of racketeering activity, to establish any RICO violation, a result contrary to congressional intent.

We must presume, however, that had Congress desired to use RICO to prohibit all racketeering activity in connection with or through the instrumentality of a legitimate enterprise, it would have done so expressly. In this connection, it is pertinent that RICO's legislative history reveals a congressional intention to eradicate the infiltration of organized crime and racketeering into legitimate organizations, and not, in particular, to reach all racketeering activity which has any connection with a legitimate enterprise.


Secondly, a broad enterprise interpretation amounts to according "the word 'enterprise' . . . parity with the term 'conspiracy.' " Altese, 542 F.2d at 108 (Van Graafeland, J., dissenting). If the racketeering activity can be used to define the enterprise then the prosecution can escape the rigors of common law conspiracy doctrine by invoking RICO. For articles reflecting the concern that RICO can be used to federalize the common law of conspiracy, see Brickey, Conspiracy, Group Danger and the Corporate Defendant, 52 U. CIN. L. REV. 431 (1983); Holderman, Recon-
ing of a RICO violation. Thus, the "nexus" requirement presents the question of whether RICO should apply in any particular case in which the central elements of the offense can be shown. Unfortunately, section 1962(c) defines neither the nature of this relationship nor the degree of involvement necessary for it to exist.

This Note advocates an approach to the "nexus" requirement which focuses on the extent to which the defendant utilized the "organizational structure" of the enterprise. Rather than attempting to provide a rigid definition of utilization of organizational structure, it urges the factfinder to examine a series of factors which are indicative of enterprise exploitation. Part I of this Note analyzes the various judicial approaches to the nexus issue and argues that they are inadequate largely because of a reliance on rigid definitions. Part II provides an alternative approach by examining the language of section 1962(c), the legislative history of RICO and the ordinary conception of organizational crime to establish that the concern of RICO, and particularly the nexus requirement, is with racketeer utilization of organization or enterprise structure. The same material is used to elucidate a nonexhaustive list of indicia of utilization of the enterprise.

I. THE INADEQUACY OF CURRENT JUDICIAL APPROACHES

A. The General Approach

Generally, the courts have required the existence of a "sufficient" or "substantial" nexus or relationship in order to find a RICO violation. Unfortunately, the majority of courts using this approach do


The nexus requirement is directly affected by the interpretation of the enterprise issue. When the enterprise is required to be independent of the racketeering activity, as is the case whenever a legitimate enterprise is alleged or in any case arising in a jurisdiction that follows United States v. Anderson, the necessary degree of the relationship between these two elements becomes critical.

"If the racketeering acts need not be related to each other and there is no requirement of a substantial nexus to the enterprise's affairs, the scope of RICO counts would be virtually unlimited." Tarlow, supra note 6, at 371-72. Given an independent enterprise, the nexus requirement serves as an important limitation on the scope of § 1962(c).

17. The scope of this Note is limited to "criminal" RICO and cases dealing with prosecutions under 18 U.S.C. § 1963 (1982). Since the substantive provision, § 1962, is the same for civil and criminal RICO this analysis, in theory, should have the same application in the civil area. However, there may be statutory and judicially created differences. See Haroco, Inc. v. American Natl. Bank & Trust Co., 747 F.2d 384 (7th Cir. 1984), cert. granted, 105 S. Ct. 902 (1985).

18. See generally United States v. Rubio, 727 F.2d 786 (9th Cir. 1983); United States v. Webster, 639 F.2d 174 (4th Cir. 1981), modified on rehearing, 669 F.2d 185, cert. denied, 454 U.S. 857 (1982); United States v. Barber, 668 F.2d 778 (4th Cir.), cert. denied, 459 U.S. 829 (1982); United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Campanale, 518 F.2d 352 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976). In each of these cases the courts were content to assert that there was a sufficient nexus without introducing a standard to guide their decision.

not define what a "substantial" nexus is, and "substantial" and "sufficient" are not words which are intrinsically helpful. The result of this failure is an "I know it when I see it" approach to RICO which presents the threat of uneven justice.

The spectre of inconsistent application that arises because of vagueness and ambiguity cannot be tolerated in a statute as potent as RICO. First, the stakes involved are high; a person charged under criminal RICO faces the potential of a twenty-year sentence, forfeiture of assets in the alleged enterprise, and collateral estoppel if a civil RICO suit is brought. A guilty verdict in a civil suit can result in treble damages and a variety of remedial injunctions. Second, vague language in court-created "tests" or definitions prevents the defendant from adequately preparing a defense and creates the possibly argued that RICO was unconstitutionally vague since it failed to specify the relationship required between the predicate acts and the enterprise. The court agreed that a relationship was required, see text at note 15 supra, but found that § 1962(c) was not vague; it was just broad.

It is true that the statute does not define this connection by distinguishing between predicate acts which play a major or a minor role, or any role at all, in what might be seen as the usual operations of the enterprise; nor does it require that such acts be in furtherance of the enterprise, as defendants suggest it must.

In this Court's view, the statute fails to state these requirements because Congress did not intend to require them in these terms. The perversion of legitimate business may take many forms. It plainly says that it places criminal responsibility on both those who conduct and those who participate, directly or indirectly, in the conduct of the affairs of the enterprise, without regard to what the enterprise was or was not about at the time in question. 409 F. Supp. at 613. Thus, Stofsky implies that no particular relationship is required. See Tarlow, supra note 6, at 371. The Stofsky approach has only rarely been followed. See, e.g., United States v. Scalzitti, 408 F. Supp. 1014 (W.D. Pa. 1975) and United States v. Field, 432 F. Supp. 55 (S.D.N.Y. 1977), affd., 578 F.2d 1371 (2d Cir.), cert. dismissed, 439 U.S. 801 (1978).

19. See note 18 supra. The approaches of those courts which have attempted to provide a standard are discussed in notes 30-61 infra and accompanying text.


21. The threat of uneven justice arises when a statute is vague because it is difficult to know what acts are in fact prohibited. Thus, the courts have broad discretion as to when they will apply the statute to particular conduct. Indeed, this ambiguity in RICO has precipitated charges that the statute is unconstitutionally vague because "fundamental principles of due process mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited." Dunn v. United States, 442 U.S. 100, 112 (1979). See also Tarlow, supra note 10, at 191 n.138; Tarlow, supra note 6, at 309 n.67.

22. Many of the same equitable considerations that led to the long-standing rule in favor of a narrow construction of criminal statutes should require the elimination of vagueness in RICO's application. See United States v. Branblett, 348 U.S. 503, 509 (1955) ("That criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority."). For a discussion of the genesis of the strict construction rule, see Note, RICO and the Liberal Construction Clause, 66 CORNELL L. REV. 167 (1980).

27. One of the problems of vagueness is that the defendant may be "subjected to . . . com-
ity that a person may unwittingly violate the statute. Third, ambiguity may either exaggerate or diminish the deterrent effect of a criminal statute since it is not clear exactly what type of conduct society is condemning. Thus, the substantial relationship approach is wholly inadequate to implement the RICO prohibitions in a meaningful and effective manner.

B. Attempts at Further Definition

Perhaps in response to the inadequacies of the "substantial relationship" standard described above, the courts have adopted five different identifiable approaches to the nexus requirement in an effort at further definition. Each formulation offers a black-letter rule defining the nexus requirement, but for various reasons, each is inadequate.

1. The "Solely by Virtue of Position" Test

Of those tests defining a "substantial nexus," the Scotto-Provenzano rule is the most commonly cited. In United States v. Scotto the court defines the nexus in two alternative ways:

We think that one conducts the activities of an enterprise through a pattern of racketeering when (1) one is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise, or (2) the predicate offenses are related to the activities of that enterprise. Simply committing predicate acts which are unrelated to the enterprise or one's position within it would be insufficient.

The second test simply restates that the statute requires a relationship without defining the nature of the required nexus. However, there is some value in the first test because it focuses specifically on the nature of the relationship required. Notwithstanding, the first test is inadequate. Additionally, if the statute is extremely ambiguous, there may be a weakening of the intended deterrent effect because an individual does not even contemplate that her conduct comes within the statute.
quate because it would punish acts that are clearly outside of RICO's intended purview.

There are a variety of ways in which one's position within an enterprise can contribute to the commission of criminal acts. Consider three examples: First, a low-level corporate executive embezzles $100 from his firm on two separate occasions. Second, an employee of an enterprise sells narcotics to fellow employees whom he would not have met but for his position with the enterprise. Finally, a union official uses his power to obtain kickbacks from contractors in exchange for allowing construction to take place with nonunion labor. Under the Scotto-Provenzano rule, all three of these acts may result in a finding of a RICO violation because the perpetrator's position enables him to commit the act.

However, these acts do not all deserve the same treatment under RICO. While the union example is a clear RICO violation, the first two examples should not be within the purview of section 1962(c). The drug dealer, although affiliated with the enterprise, made no use of the enterprise. Thus, the situation really does not involve the main impetus for and thrust of RICO. The small-time embezzler, while obviously using the enterprise to commit the acts, poses such a small threat that the use of RICO would amount to unintended overkill.

Literally read, the test requires that the offense was possible

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33. The example of the drug dealer can be analogized to the facts of United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978), aff'd, 625 F.2d 782 (8th Cir. 1980), where a RICO count was dropped against a General Motors employee who had collected an unlawful debt from another employee on General Motors property. The court held that there was no nexus between the activities and conduct of the enterprise. 458 F. Supp. at 199. It arguably is possible to bring this case under RICO on a "solely because of one's position" rationale.

34. See notes 67-81 infra and accompanying text.

35. Congress was well aware that the statute could encompass much more than organized crime and could affect individuals, but felt that because of the complexity of the problem, a broad and sweeping statute was needed. See McClellan, supra note 1. The Justice Department was aware of RICO's breadth and assured Congress that they would concentrate on serious cases. Atkinson, "Racketeer Influenced and Corrupt Organizations." 18 U.S.C. §§ 1961-68: Broadest of the Federal Criminal Statutes, 69 J. CRIM. L. & CRIMINOLOGY 1, 16 (1978). For the view that the Justice Department has ignored its reassurances, see United States v. Ivie, 700 F.2d 51 (2d Cir. 1983); Nagel & Plager, RICO, Past and Future: Some Observations and Conclusions, 52 U. CN. L. REV. 456, 457-58 (1983).

The small-time embezzler should be distinguished from the large-scale embezzler for RICO purposes. Congress was concerned with the criminal element bleeding firms of assets, and saw this as one of La Cosa Nostra's most important tactics. See McClellan, supra note 1, at 141-42 (claiming there are approximately 200 syndicate-inspired bankruptcy schemes annually). The executive who steals from " petty cash" does not pose the same threat to the enterprise and the economy as the large embezzler. Furthermore, RICO is a " remedial" statute as opposed to a "criminal" statute, i.e., it provides only new remedies, and does not create new substantive crimes. See Blakey & Gettings, supra note 1, at 1021 n.71. Therefore, it makes sense to limit the remedies to those crimes which were substantial enough to induce Congress to pass the Act. For a further development of the possible relevance of size of the crime, see notes 100-03 infra and accompanying text.
“solely” because of the defendant’s connection to the enterprise. This would limit the application of RICO by excluding any case in which factors other than “position,” “involvement” or “control” contributed to the defendant’s commission of the racketeering activity. Because neither the Scotto court nor the courts which have followed its approach have elaborated upon the rule, it is not clear if they intended to so limit section 1962(c). Given the problems of proof that would arise if courts were required to determine that the only enabling factor behind the racketeering was the defendant’s position in the enterprise, it is doubtful that “solely” was intended to add anything to the test. The Scotto-Provenzano rule illustrates the difficulty that courts have had in attempting to create a concise and lucid definition of the “nexus requirement”; the concept has proven too elusive to be captured in a small number of words.

2. The “Effect” Test

In United States v. Cauble, the Fifth Circuit added to the Scotto-Provenzano rule a requirement that “the predicate acts had some effect on the legal enterprise.” This approach is another rigid definitional formulation which presents two distinct problems: a failure to define adequately its terms and a lack of attention to nonenterprise effects.

The court does not adequately define the term “effect,” stating that the effect may be direct, such as the deposit of money in the enterprise’s bank account, or indirect, such as the retention of the enterprise’s existing clients. The government need not prove that the racketeering ac-

36. If the “solely by virtue of his position” formulation were read literally, then a defendant would have an incentive to claim that she was enabled to commit the acts for a number of reasons outside of the enterprise. Read literally the test would require a search for causation which would increase the burden of RICO litigation.


38. The test as fully articulated requires that
(1) the defendant has in fact committed the racketeering acts as alleged; (2) the defendant’s position in the enterprise facilitated his commission of the racketeering acts, and (3) the predicate acts had some effect on the legal enterprise. 706 F.2d at 1333 (emphasis added). The first element of the rule adds nothing to the nexus controversy since there is no issue if the defendant did not commit the acts. The second element incorporates the first test of the Scotto-Provenzano rule and thus suffers from the same flaws that plague that approach. See notes 30-36 supra and accompanying text. The third element modifies the Scotto-Provenzano rule itself, asserting that there should be an enterprise-racketeering nexus in addition to the enterprise-defendant nexus.

This division of nexus into two distinct elements is neither helpful nor correct. The language of § 1962(c) does require a relationship between the enterprise and the defendant and the racketeering, but it does not follow that these should be analyzed as two distinct relationships as opposed to one nexus. The same facts that are used to establish that the defendant conducted or participated in the affairs of the enterprise should be used to prove this was done through a pattern of racketeering activity. Essentially the court in Cauble is arguing that Scotto defined the term “conduct or participate” but failed to define the term “through,” which the Fifth Circuit felt required an effect test. Dividing § 1962 into a series of elements just adds to the confusion. Only one issue needs to be addressed: did this defendant participate in the affairs of the alleged enterprise through a pattern of racketeering activity?
tivity "benefitted" or "advanced the affairs of" the enterprise. . . . The prosecution need prove only that the racketeering acts affected the enterprise in some fashion. 39

This standard provides no means of distinguishing among the variety of effects that racketeering may have on an enterprise. If any actual or theoretical effect on an enterprise will satisfy the court, the requirement of effect adds nothing to the Scotto-Provenzano rule. For example, in the case of an employee selling narcotics to other employees, the reputational damage caused by possible negative publicity could qualify as an effect on the enterprise, as could a potential decline in worker productivity due to drug use. Thus, the courts' failure to define the term "effect" renders it of little or no use.

In addition to failing to define "effect," the Fifth Circuit improperly ignored the important effects of criminal activity outside the organization itself. In passing RICO, Congress sought to combat the infiltration of businesses by organized crime not only because of the effects infiltration has on the enterprises themselves but also because of the injuries to specific victims and the economic cost to the general public.40 RICO's civil remedies demonstrate its concern for victims as well as its concern with the enterprise.41 The Fifth Circuit's emphasis on how the enterprise was affected runs the risk of ignoring the equally important issue of how the racketeer utilized the enterprise to injure others, regardless of the consequences to the enterprise.42 Neither the enterprise nor its owners may be benefited or harmed if the enterprise is used as a front for racketeering. However, in such a case the enter-

39. Cauble, 706 F.2d at 1333 n.24 (citations omitted).


(3) [T]his [organized crime's] money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens.


42. A related, albeit short-lived, approach was put forth in United States v. Webster, 639 F.2d 174, 185-86 (4th Cir. 1981), modified on rehearing, 669 F.2d 185, cert. denied, 454 U.S. 857 (1982), which suggested that a nexus is established only when the enterprise is benefited, advanced, or promoted. The Fourth Circuit reversed its holding on rehearing, and rightfully so. Like Cauble, Webster's focus on the effects for the enterprise is misplaced. The benefit requirement is an unwarranted narrowing of RICO because much racketeering activity, such as a union official taking bribes, is detrimental to the enterprise and Congress was aware of this. See McClellan, supra note 1, at 141 (including in the evils of organized crime's infiltration of legitimate enterprises the bleeding of a firm's assets and the selling of labor peace to employers). The Webster approach has been rejected uniformly by all other courts. See, e.g., United States v. Cauble, 706 F.2d 1322, 1333 n.24 (5th Cir. 1983), cert. denied. 104 S. Ct. 996 (1984); United States v. Hartley, 678 F.2d 961, 990-91 (11th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); United States v. Barber, 668 F.2d 778, 785 (4th Cir.), cert. denied, 459 U.S. 829 (1982); United States v. Welch, 656 F.2d 1039, 1060-61 (5th Cir. 1981), cert. denied, 456 U.S. 915 (1982).
prise plays a vital role in enhancing the racketeer's ability to injure her victims. Thus, the "effect" test is both too broad due to its ambiguity and too narrow in that it fails to encompass nonenterprise effects, a significant concern of Congress in passing RICO.

3. The "Dictionary" Test

A third attempt at definition of the substantial relationship approach is found in United States v. Nerone. In Nerone, the Seventh Circuit defined the "nexus" by turning to Black's Law Dictionary for the definition of the word "through." The court asserted that the word's most logical meaning was that supplied by the dictionary, which defined it as "by means of, in consequence of, by reason of." However, given the importance of the "nexus" to the determination of the general scope of RICO, the extensive legislative history of the Organized Crime Control Act, and the confusion that has arisen in its application, resorting to the dictionary is too simplistic to be appropriate. The court is simply restating that section 1962(c) required a nexus without defining the scope of the relationship.

In addition to its oversimplification, this approach was used by the Nerone court to create an unwarranted distinction between conducting the affairs of an enterprise by means of racketeering and conducting the racketeering by means of an enterprise. The flaw with this distinction is that in a given fact situation, it is possible to describe the nexus without defining the scope of the relationship.

43. United States v. Webster, 639 F.2d 174 (4th Cir. 1980), modified on rehearing, 669 F.2d 185 (1982), cert. denied, 454 U.S. 857 (1982), discussed in note 42 supra, provides an example of the type of case where the focus on the "effect" on the enterprise is misplaced. In Webster a nightclub was used as a front for a narcotics racket. On rehearing, the Fourth Circuit reversed its benefit test in favor of a test examining how the enterprise facilitated the drug ring. This was the crux of the case; the role of the enterprise was more important than the effect on the enterprise. One could imagine a fact situation similar to Webster in which there could be no benefit or harm traceable to the enterprise. Given the role the nightclub in Webster played in the commission of the crimes, it seems unconscionable to claim there was no nexus because there was no "effect."

44. 563 F.2d 836 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978).

45. 563 F.2d at 851 (quoting BLACKS LAW DICTIONARY 1652 (rev. 4th ed. 1968)).

46. Relying on the dictionary definition implies that § 1962(c) can be dealt with by giving the words their natural meaning. There is ample support for claiming that the parts of § 1962(c) that constitute the nexus requirement are too vague to justify a plain meaning approach. See generally United States v. Rubin, 559 F.2d 975, 990 (5th Cir. 1977) (acknowledging a conflict over the nexus requirement and describing the language of § 1962(c) as "less than pellucid"), cert. denied, 444 U.S. 864 (1979); Tarlow, supra note 10, at 222-34 (discussing conflicting views on the nexus requirement); Tarlow, supra note 6, at 371 (cases dealing with the nexus requirement "have produced a number of ambiguous and conflicting tests to describe this relationship"). See also Fordham & Leach, Interpretation of Statutes in Derogation of the Common Law, 3 VAND. L. REV. 438, 440 (1950) ("A court is not compelled by what appears to be a clear, literal interpretation to forego taking into account the common law or statutory background, the social matrix, legislative history and the consequences of a literal interpretation ... ").

47. Nerone involved an illegal gambling operation conducted by the owners of a mobile home park. The chief link between the enterprise and the racketeering was that the mobile home park was the situs of the gambling operation. The Seventh Circuit rejected the prosecution's attempt to argue that the mobile home park was operated through a pattern of racketeering activity. The
activity in either fashion. For example, if a union official uses collective bargaining talks to acquire kickbacks in exchange for union concessions, she has conducted her racketeering by means of the activities of the union and she has also conducted the affairs of the union by means of a pattern of racketeering activity. This is a classic RICO violation, and it is ludicrous to confuse and complicate a RICO proceeding by allowing the parties to argue over a semantic distinction that is more imaginary than real. The decisions relying on the Nerone analysis seem to have found a distinction which can be used to dismiss an action when in reality the decisions seem justifiable only on the ground that the relationship really is just too attenuated in the particular case. 48 Thus, the simplified and semantic “dictionary” test is inadequate to capture the complexities of RICO.

The court replied that

[t]he only fair implication of this formulation is that [the defendants] conducted the casino operation through the mechanism of the mobile park corporation. The Government further asserts that the jury could reasonably conclude that [the defendants] "used the mobile home park to house, promote, and conceal their illegal gambling operation." Once again, however, this statement can only be read as suggesting that the casino operation was advanced through the instrumentality of the corporation.

Nerone, 563 F.2d at 851 (emphasis in original).

48. In United States v. Gibson, 486 F. Supp. 1230 (S.D. Ohio 1980), aff'd., 675 F.2d 825 (6th Cir. 1982), a RICO count was dismissed against a union official who had misused union assets for his own personal gain. The court acknowledged that under the Scotto-Provenzano rule, see text at note 31 supra, the defendant would be held to have violated RICO. However, the court did not believe that Congress had gone so far to encompass all embezzlement under RICO:

Admittedly, the racketeering activity at issue here is connected to the operation of the union in the sense that Gibson would not have been able to accomplish the embezzlement of union funds but for his position with the union. We must presume, however, that had Congress desired to use RICO to prohibit all racketeering activity in connection with or through the instrumentality of a legitimate enterprise, it would have done so expressly. In this connection, it is pertinent that RICO's legislative history reveals a congressional intention to eradicate the infiltration of organized crime and racketeering into legitimate organizations, and not, in particular, to reach all racketeering activity which has any connection with a legitimate enterprise.

486 F. Supp. at 1244. The court should have been content to stop at this point, see Part II infra, but went on to cite Nerone and hold that the defendant conducted the racketeering through the enterprise rather than vice versa. 486 F. Supp. at 1244. Throughout the opinion it is clear that the court is really concerned with the fact that the funds were used for personal reasons having nothing to do with the union. See Engl v. Berg, 511 F. Supp. 1146, 1155 (E.D. Pa. 1981) (distinguishing Gibson on the ground that it was a case where the enterprise was merely a setting for the racketeering activity). The court seems to seize on terminology to justify its decision that RICO should not apply. In the reverse situation, Tarlow, supra note 6, at 294, suggests that “some judges who are result oriented have strained to adopt broad constructions of RICO by ignoring logical and theoretical consistency.” LaFave and Scott have described this possibility of “result-oriented” decision making:

There is something of a dispute among those who like to speculate on the workings of the judicial mind as to whether courts first decide how a defective statute ought to be interpreted and then display whatever canons of statutory construction will make this interpretation look inevitable, or whether the courts actually first use the applicable canons and second reach the result. Doubtless the truth lies somewhere in between — some judges are apt to do it one way, some the other; some cases lend themselves to one technique, some to the other.

W. LaFave & A. Scott, HANDBOOK ON CRIMINAL LAW 70 (1972) (footnote omitted).
4. The "Manage or Operate" Test

In United States v. Mandel,\(^49\) the Fourth Circuit sustained the dismissal of a RICO count because the defendant was not involved in "the operation or management of [the] enterprise."\(^50\) The act in question was the transfer of a business interest as a bribe. The court held that this conduct did not amount to participation in the affairs of the enterprise because a passive investment interest in the enterprise cannot satisfy the RICO "nexus" requirement.\(^51\)

Mandel can be criticized both for its textual interpretation and its reading of RICO's legislative history. The court essentially replaces the statutory terms "conduct or participate" with the words "manage or operate." However, the words are not synonymous, and "section 1962(c) makes no requirement that the person charged be entitled to any particular degree of managerial responsibility. The statute provides only that "any person employed by or associated with" the corrupt enterprise shall be criminally liable."\(^52\)

Although the Mandel court purports to rely on legislative history,\(^53\) its reasoning is incomplete. RICO and the Organized Crime Control Act were passed because of the difficulty of convicting organized crime leaders who placed subordinates in control of the day-to-day affairs of an enterprise and passively reaped the profits.\(^54\) However, important figures in organized crime who remain on the fringe of the racketeering will escape prosecution if the defendant must manage or operate the enterprise. While Mandel represents the narrowest limitation of "nexus" yet adopted,\(^55\) the "manage or operate" approach

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49. 591 F.2d 1347 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980).

50. 591 F.2d at 1374. The defendants in Mandel were the former governor of Maryland and his associates. The court believed that its conclusion was mandated by the nexus requirement of § 1962(c):

[T]he word "through" in the statute ... would seem to require proof of some connection between the pattern of racketeering activity and the conducting or operating of the business. Indeed, this connection must be shown if the word "through" is to have any meaning in the statute. Without the word "through", anyone who used income from a legitimate business to participate in racketeering activity would be guilty of a violation of § 1962(c). We do not believe Congress meant to sweep so broadly . . . .

591 F.2d at 1375. Although the court's solution involves the redefinition of "conduct or participate," it is in essence an attempt to determine the scope of the nexus relationship. See note 13 supra.

51. 591 F.2d at 1376.

52. Note, supra note 11, at 781 (emphasis in original). For the text of § 1962(c) see note 7 supra.


54. See PERMANENT SUBCOMMITTEE, supra note 5, at 2 (detailing how effectively "crime chieftains" insulate themselves from the operations they control); McClellan, supra note 1, at 57-60 (describing the difficulty of convicting organized crime leaders).

55. See Tarlow, supra note 6, at 372 (characterizing the Mandel approach as the most stringent standard).
must be rejected because it reopens the hole in the enforcement "net" that RICO was designed to fill.

5. The "Essential Function" Test

Another narrow approach is the "essential function" requirement of *United States v. Ladmer*.\(^5^6\) In *Ladmer*, the district court declined to subject the defendants, who had misused union funds earmarked for union conventions, to RICO because their acts related to activities that were not *essential union functions*.\(^5^7\) The court interpreted RICO's provision for injunctive relief\(^5^8\) as evidence of congressional concern with only the essential operations of an enterprise.\(^5^9\)

Although the *Ladmer* approach is commendable for its attempt to examine the statute in its entirety in order to derive a standard, the test is inadequate. First, the court fails to define the scope of the "essential functions" of an operation. Clearly the attendance of conventions by officials is not a prime function of a labor union. But unions and large corporations engage in a multitude of activities and *Ladmer* provides no standard for determining which are "essential" when the case is less obvious. For example, if the union officials had misused funds intended for the salaries of union officers, the court would be forced to determine if paying salaries is an essential union function. This is obviously a central function from the perspective of the individuals who receive this income, but the answer here is not apparent in the absence of a more concrete definition.

Second, and more importantly, just as *Mandel* allowed fringe but significant parties to escape RICO, *Ladmer* places activity which involves fringe but potentially important functions of an enterprise outside of RICO.\(^6^0\) It would be anomalous to allow racketeers who bankrupt a union by misusing convention funds, an extreme variation of *Ladmer*’s facts, to escape RICO sanctions. Nowhere in the legislative history is there support for the view that Congress was concerned with anything less than the infiltration of enterprises in its broadest sense. There are no qualifiers in the language of the statute or the


\(^{57}\) 429 F. Supp. at 1244.


\(^{59}\) The available remedies suggest that the statute is concerned with that which characterizes the conduct of the enterprise in question in its essential functions rather than irregularities committed in the course of otherwise lawful conduct of an enterprise. There is no question that Congress intended to provide a remedy adequate to the evil visualized and in that sense to enact broadly and inclusively. 429 F. Supp. at 1244.

\(^{60}\) An example of a case that would be difficult to reconcile under the *Ladmer* approach is presented by *United States v. DePalma*, 461 F. Supp. 778 (S.D.N.Y. 1978), where the defendants operated a theater legally but engaged in a number of fraudulent acts surrounding the enterprise’s Chapter XI bankruptcy. The district court held that nothing in RICO requires the activity to be part of the "day-to-day" business operations of an enterprise. 461 F. Supp. at 786.
legislative history to limit the scope of RICO to the infiltration of an enterprise's essential functions.61

While none of the judicial definitions discussed necessarily led to a "wrong" decision in the cases in which they were adopted, their over- or underinclusiveness threatens unacceptable and unintended results unless courts modify or discard the tests in response to differing factual backgrounds. Ambiguity, the central problem running through all these approaches, is the direct result of attempting to capture the nexus requirement in a definitional word or phrase. The inadequacy of the current judicial formulations suggests that the search for a rigid test is futile and that the slipperiness of the nexus concept requires a more flexible approach.

II. AN ALTERNATIVE APPROACH TO THE "NEXUS" REQUIREMENT

A standard approach to eliminating ambiguity and creating predictability is to create a black-letter rule. This might be the preferable approach for the nexus requirement if it were possible. However, as shown in Part I, the intended breadth of RICO62 makes the fashioning of compact, yet comprehensive, definitions unfeasible.63 The statute itself is too ambiguous to guide courts faced with a nexus question,64 yet the attempts at definition have proved to be equally vague or too rigid.

Alternatively, courts could compare the fact situation before them to a set of factors which usually indicate that the affairs of an enterprise are being conducted "through a pattern of racketeering." Factors would then provide courts with solid guidance on the issue of when a defendant's activities are sufficiently related to the enterprise to justify applying RICO, while allowing sufficient elasticity to distinguish fairly the variety of fact situations that arise. The use of factors makes the discretion currently exercised by the courts explicit, yet simultaneously provides principles to inform the decision. Such a flexible approach, with the structured discretion it vests in the courts, is the best alternative that can be designed.65

61. See United States v. DePalma, 461 F. Supp. 778, 786 (S.D.N.Y. 1978) (there are no qualifiers in the statute on what constitutes the affairs of an enterprise).

62. For the view that RICO must be broad to deal with the threat of organized crime, see McClellan, supra note 1. For a general discussion of the breadth of RICO see Atkinson, supra note 35, at 4-15.

63. Indeed, McClellan, supra note 1, at 143, asserts that because of the wide variety of offenses committed by organized crime, "[i]t is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."

64. See note 21 supra for a discussion of the potential constitutional problems this discretion and ambiguity creates.

65. Further support for a flexible approach comes from the nature of the statute itself. RICO is not a criminal statute; it does not make criminal conduct that before its enactment
A. The Definitional Step

In order to determine what factors are relevant in establishing a sufficient "nexus," we should examine the concerns that prompted Congress to enact RICO. The meaning of "conducting or participating" in the affairs of an enterprise "through" a pattern of racketeering cannot adequately be found in the broad language of section 1962(c). A narrower definition does exist, however, in light of the "statutory background, the social matrix, legislative history and the consequences of a literal interpretation." 66

Unquestionably Congress was concerned with the special threat posed by organizational crime. 67 Organizational crime, of which or-

was not already prohibited, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. In addition, its standards of unlawful, i.e., criminal or civil, conduct are sanctioned by both criminal and civil remedies. RICO, in short, is a "remedial" statute.

Blakey & Gettings, supra note 16, at 1021 n. 71 (citations omitted). If RICO is indeed a "civil remedies" statute, then the need for black-letter rules is lessened; remedies have traditionally been subject to judicial discretion. See National Association of Attorneys General, Committee on the Office of Attorney General, The Use of Civil Remedies in Organized Crime Control 6-7 (1977) (discussing the advantages of the greater flexibility of civil remedies).

By allowing for flexibility, the approach presented in this Note is subject to claims of vagueness similar to those made against the current judicial formulae. The crucial difference, however, is that the approach advocated here attempts to make the judicial discretion inherent in the provision explicit and principled. It is an unfortunate fact of the RICO nexus requirement that it is not susceptible to black-letter definitions. The use of a flexible factor approach, while not capable of completely eliminating vagueness, is a preferable "second best" strategy.

66. Fordham & Leach, supra note 46, at 440. See also United Steelworkers v. Weber, 443 U.S. 193, 201 (1979) (It is a "familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.") (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

RICO's liberal interpretation provision, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 941, 947 (1970), is not a bar to seeking a limited approach to RICO since the provision provides that RICO is to be liberally construed in light of its remedial purpose. The point of the approach advocated in this Note is to demonstrate that the remedial purpose of RICO as reflected in the nexus requirement is narrower than the literal language of the statute.

67. Organizational crime can be viewed as the general criminal use of any organization. Organized crime is a specific type of organizational crime where the organization utilized exists only for criminal purposes. It is undisputable that the debates in Congress over Title IX of the Organized Crime Control Act were specifically concerned with the infiltration of legitimate businesses by organized crime, specifically La Cosa Nostra and the effect this was having on society and the economy. See McClellan, supra note 1, at 59. See generally Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-923 (1970):

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized
organized crime is but a subset, can be viewed as any utilization of a

crime continues to grow because of defects in the evidence-gathering process of the law
inhibiting the development of the legally admissible evidence necessary to bring criminal
and other sanctions or remedies to bear on the unlawful activities of those engaged in organ­
ized crime and because the sanctions and remedies available to the Government are unne­
cessarily limited in scope and impact.

It is the purpose of this Act 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.

The legislative history of Title IX of the Organized Crime Control Act (RICO) is not terribly
helpful. Most of it, like the Statement of Purpose, reflects a general congressional concern with
the growing power of organized crime. See notes 1-4 supra and accompanying text. See also
Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482, 492 (2d Cir. 1984) (referring to the “clanging
silence of the legislative history” in discussing private civil remedies), cert. granted, 105 S. Ct.
901 (1985).

RICO was not, however, written in the narrow terms of the congressional debate and some
weight must be given to the decision to draft the statute in general terms. Congress had to avoid
phrasing the statute in terms of organized crime and La Cosa Nostra. First, the use of such
terms would have subjected the statute to attack as unconstitutionally vague because the defini­
tion of organized crime would be so elusive. See Parnes v. Heinold Commodities, Inc., 548 F.
Supp. 20, 22 (N.D. Ill. 1982).

Second, the burden of proving the existence of an organized criminal structure was one of the
problems that RICO was designed to eliminate. Including the term “organized crime” in the
statute would have further invited courts to require a link with organized crime, resulting in
another loophole for crime bosses to slip through.

Despite this policy and overwhelming contrary precedent, a few district courts have dis­
missed civil cases on the ground that no tie to organized crime was alleged. See Noonan v.
(must be involved with “organized crime or activities within the penumbra of that phrase”);
Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 113 (S.D.N.Y. 1975) (must be a member of “a society of
criminals operating outside of the law”). Most circuit (as well as district) court cases have re­
jected this view. See, e.g., Schacht v. Brown, 711 F.2d 1343, 1353 (7th Cir.), cert. denied, 104 S.
Ct. 509 (1983); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982), aff'd in part, reversed in
part on rehearing en banc, 710 F.2d 1361, cert. denied, 104 S. Ct. 527 (1983); Bennett v. Aleman,
609 F.2d 298, 303 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980); United States v.
Gibson, 486 F. Supp. 1230, 1240-41 (S.D. Ohio 1980), aff'd, 675 F.2d 825 (6th Cir. 1982); United
with organized crime has only arisen in civil cases despite the fact that the substantive offenses
outlined in § 1962 are the same for both criminal and civil RICO. Theoretically, the same
standards should apply in either type of suit. See Tarlov, supra note 6, at 302 & n.35. Furthermore,
the organized crime requirement can find no authority within the language of statute, Barr, 66
F. R.D. at 116-17 (cited in the legislative history).

The curious objection has been raised to S.30 as a whole, and to several of its provisions in
particular, that they are not somehow limited to organized crime — as if organized crime were
a precise and operative legal concept, like murder, rape, or robbery. Actually, of course, it is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual crim­
nal offenses committed in diverse circumstances.


Although the terms “organized crime” or “organized criminal activity” were not used, RICO
is designed specifically to combat organized crime. The definition of racketeering activity in
§ 1961 and the substantive provision of § 1962 sufficiently encompassed the “symptoms” of or­
ganized crime’s activities to avoid a severe overinclusivity problem.

It is self-defeating to attempt to exclude from any list of offenses such as that found in title
IX all offenses which commonly are committed by persons not involved in organized crime.
Title IX’s list does all that can be expected . . . it lists offenses committed by organized
crime with substantial frequency, as part of its commercial operations.

McClellan, supra note 1, at 144; Measures Relating to Organized Crime: Hearings on S. 30
bureaucratic or corporate-like structure. It is this exploitation of an infrastructure that increases the threat a racketeer poses to society. Therefore, the required linkage between the racketeering and the enterprise should be viewed as a requirement that the defendant utilize the organizational structure provided by the enterprise.68

There are a number of reasons for this special concern with the utilization of an enterprise or organizational structure to further criminal goals. Legal or illegal behavior is always more effective when car-

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Before the Subcom. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 405 (1969) (letters by the Department of Justice suggesting improvements in § 1961(1)(A) that would still keep the provision "broad enough to include most state statutes customarily invoked against organized crime.").

The definition of what constitutes racketeering activity is contained in 18 U.S.C. § 1961(1) (1976) which provides:

(1) "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 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.

Thus, while RICO's scope extends beyond organized crime, this does not imply that the statute is completely divorced from any limitations arising from its roots or the organized crime concept. The language of § 1962(c) and the legislative history should be read together to establish a general concern with organizational crime, a concept encompassing all the dangers associated with organized crime, see notes 69-77 infra and accompanying text, while flexible enough to eliminate the problems of proof associated with the limiting of the statute's application to criminal syndicates.

68. Requiring a showing that the defendant utilized the enterprise in his racketeering activities is from one point of view a reversal of the language of § 1962(c), which states that it is unlawful "to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." See United States v. Nerone, 563 F.2d 836, 851 (7th Cir. 1977), cert. denied, 435 U.S. 951 (1978). While the criticism may be semantically valid, it lacks true substance. It is possible to describe any fact situation using either semantic formulation. Phrasing the nexus requirement in terms of "utilizing the organizational structure" has no effect on the breadth of RICO. See notes 44-48 supra and accompanying text. Furthermore, the test herein proposed provides an accurate description of the remedial purpose of § 1962(c), whereas blind adherence to the words of the statute would frustrate that purpose. See notes 69-82 infra and accompanying text.
ried out by a group of persons, but a qualitative leap in power and efficiency occurs when a group has the benefit of bureaucratic structure or infrastructure. Certain advantages, such as the ability of the entity to outlive any of its individual members, the replacement of informal personal relations with structured status ties, and the efficiency of centralized impersonal decision making acquired by separation of functions accrue to varying degrees when a group develops or co-opts a structure.

Furthermore, while the individual racketeer attempting to further her goals through the utilization of the enterprise's organization may not benefit directly from the advantages of bureaucratization, she does benefit indirectly. Position within an enterprise resulting from bureaucratization provides one with a status that conveys more power than inherently resides with the individual. The president of a union

69. See Krulewitch v. United States, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring) ("[T]o unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."). See also Brickey, supra note 16, at 442-44 (1983).

70. Wheeler & Rothman, The Organization as Weapon in White-Collar Crime, 80 Mich. L. Rev. 1403 (1982), use statistical and sociological data to prove that the organization is to the white-collar criminal what the gun is to the street — "a tool to obtain money from victims." Id. at 1406. Their data shows a significant increase in the gravity of certain typical white-collar crimes when the defendant utilized a formal organization. See note 99 infra. See generally K. BOULDING, THE ORGANIZATIONAL REVOLUTION: A STUDY IN THE ETHICS OF ECONOMIC ORGANIZATION (1953). There are two important ways for a criminal to obtain an organization. First a criminal syndicate may develop from within as La Cosa Nostra grew out of the "centuries old Sicilian terrorist society, the Mafia." See PERMANENT SUBCOMMITTEE, supra note 5, at 117. Second, a criminal organization, a single racketeer or a group of racketeers may co-opt an existing legitimate enterprise. RICO was in theory designed to deal with the second of these possibilities. See Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23 (1970).

The decision of the Supreme Court in United States v. Turkette, 452 U.S. 576 (1981), brought the first type of organization within RICO's scope. Turkette extended RICO coverage to illegitimate as well as legitimate enterprises on the theory that if Congress had intended to limit the definition of enterprise to legitimate organizations it could have inserted the term legitimate in § 1961(4). 452 U.S. at 580-81. The Turkette decision makes sense in light of the general congressional concern with organized crime. It would seem nonsensical to allow an underworld figure to escape the punishment of RICO by claiming that he was conducting only the affairs of the mob. Turkette left open the issue of whether the enterprise must have an ascertainable structure apart from the racketeering activity. See note 16 supra.

71. The Committee on the Judiciary has found that unlike the criminal gangs of the past, organized crime now functions regardless of individual personnel changes, like a sophisticated corporation. S. REP. No. 617, 91st Cong., 1st Sess. 36 (1969).

72. See K. BOULDING, supra note 70, at 26 (discussing how organizations grow by replacing "informal" communication which characterizes the family with more structured ties).

73. See K. BOULDING, supra note 70, at 34. Boulding also discusses "the power of organization to release new sources of energy" and to increase the productivity of time and energy devoted to organizations. Id. at 32.

74. Not all possible RICO enterprises fall under the classic corporate-bureaucratic model discussed in K. BOULDING, supra note 70. However, it is reasonable to assume that most enterprises do possess some of these unique advantages that distinguish them from a person acting on his own behalf for legitimate or illegitimate goals. Even the Mom and Pop grocery store can be more efficient than the pushcart peddler.

75. See K. BOULDING, supra note 70, at 18-20 (commenting on the need for "status" and
is powerful because she is president, not because she, as an individual, merits that degree of respect. In addition to status, an organization can provide the individual with a complex structure that prevents detection of criminal activity,\(^{76}\) facilities to be exploited for criminal purposes and a potential pool of witting or unwitting compatriots in the form of people who have adopted the organization's value system.\(^{77}\) The racketeer or group of racketeers who create or utilize an enterprise acquire an organizational power that separates their criminality from the ordinary, thus necessitating special statutory treatment through RICO.

Congressional concern for racketeer utilization of organizational structure, and thus organizational power, can be gleaned from the content of RICO itself. First, section 1962(c) subjects racketeering activities to the severe sanctions of RICO only if affiliated in some manner with an enterprise.\(^{78}\) Second, RICO's remedies emphasize separating the criminal element from the enterprise's structure. The injunctions provided for in section 1964\(^{79}\) allow the court, in the process of punishing the defendant, to dissolve the organization that the defendant utilized or to prevent the defendant from gaining access to a similar organization. Likewise, the forfeiture provision of section 1963,\(^{80}\) which provides for the total removal of the racketeer's influ-

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how the organization provides this and can improve it). See also id. at xxxiii (discussing the organization's necessity for hierarchy resulting in a "highly stratified society of status").

76. See note 5 supra (discussing the difficulty of detection with the highly sophisticated structure of organized crime).

77. K. BOULDING, supra note 70, at 8-10 (discussing how an individual's value system is molded by an organization); W. WHYTE, JR., THE ORGANIZATION MAN (1956) (discussing how American society indoctrinates its people to assume their place in an organizational world). Part of the obedience of subordinates comes from what Boulding refers to as the "two-sidedness of organizations."

Many of the dilemmas are created by the fact that organization is on the one hand an expression of solidarity within the organized group, and on the other an expression of a lack of solidarity with those outside the organization. Organization, in other words, may tend to accentuate the division between an "in-group" and an "out-group." Almost every organization, therefore, exhibits two faces — a smiling face which it turns towards its members and a frowning face which it turns to the world outside.

K. BOULDING, supra note 70, at 10. The loyalty to and sense of belonging derived from an organization can be exploited by the racketeer to get subordinates to go along with activity to which they may be morally opposed. Id. at 10-12.


79. 18 U.S.C. § 1964(a) (1982), provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; 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.

80. 18 U.S.C. § 1963(c) (1982), provides:

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such
ence from the enterprise, acknowledges that organized crime is capable of outliving the incarceration of its individual members.\footnote{81}{See note 71 supra.}

The extent to which the defendant {utilizes the organizational structure or infra-structure} of the alleged enterprise to further the racketeering activity is what the nexus requirement involves. Utilization requires that the enterprise be more than a context for criminal activity. To be "utilized" the enterprise must be a "weapon" of the racketeer;\footnote{82}{See generally Wheeler & Rothman, \textit{supra} note 70.} it must enhance the ability to commit the crime. This standard is the first step in developing a "flexible" approach.

\section*{B. The "Characteristics" of Utilization of an Enterprise.}

The standard for establishing a nexus set out above — utilization of organizational structure — is an ambiguous definitional test which cannot be successfully applied without encountering problems similar to those that plague current judicial approaches. The approach advocated here is the same as that used by Congress in the face of the vague concept of organized crime: the best way to identify the utilization of the enterprise is to look for its symptoms.\footnote{83}{See note 67 supra.} The characteristics of exploitation of an organizational structure to which a court should look can be derived from the advantages which an infrastructure offers the criminal, the elements of organized crime that troubled Congress and the policy considerations which underlie RICO. No single characteristic is necessarily sufficient to sustain a determination of a substantial nexus. The importance of any factor will vary depending on the facts of a given case. The factfinder must examine the factors as evidence of utilization of organizational structure in order to determine whether the organization was used "as a weapon" by the racketeer.

First, the court should inquire whether the type of criminal activity in question requires or is generally associated with an enterprise. When an enterprise is a prerequisite for the commission of the crime the inquiry is simplified. For example, the bankruptcy scheme of \textit{United States v. DePalma}\footnote{84}{461 F. Supp. 778 (S.D.N.Y. 1978). In \textit{DePalma} the defendants successfully denied inves-} could not occur without the enterprise. In terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

\begin{itemize}
\item \footnote{81}{See note 71 supra.}
\item \footnote{82}{See generally Wheeler & Rothman, \textit{supra} note 70.}
\item \footnote{83}{See note 67 supra.}
\item \footnote{84}{461 F. Supp. 778 (S.D.N.Y. 1978). In \textit{DePalma} the defendants successfully denied inves-}
\end{itemize}
contrast, many fact situations involve crimes that are not inherently enterprise crimes, such as murder or arson. If the crimes involved are "enterprise" crimes, arguably the inquiry need proceed no further since the nexus is established within the definition of the criminal activity.

Second, a court should consider the defendant's position in the enterprise and the extent to which it furthered the racketeering activity. Of particular relevance here are access to organizational structure and power and the use of status to further criminal purposes. The higher the position within the organization, the more likely it is that the defendant had at her disposal the appurtenances of organizational structure, including the possibility of access to the enterprise's financial resources and/or books, access to inside information, or a degree of control over facilities and subordinates. The factfinder can examine position within the enterprise to determine whether the defendant had the ability to channel the organizational power of the enterprise to illegitimate ends. In addition, position can provide status or recognition which can be used for criminal purpose. This situation arises frequently in cases involving bribery of police officers or union officials, the defendant uses the power the organizational structure confers in the form of status. The factfinder should also determine whether the defendant relied on her organizational status to commit the crimes; position itself is not necessarily determinative. A high-

86. There may still be policy reasons for not considering the nexus established solely by "enterprise" crimes. For example, this Note argues that one of the factors that should be considered is the magnitude of the criminal acts. See notes 99-103 infra and accompanying text.
87. See, e.g., United States v. DePalma, 461 F. Supp. 778 (S.D.N.Y. 1978) (In order to skim off assets to prevent creditors from claiming them in Chapter XI bankruptcy proceedings, the defendants utilized their power as directors of the corporation to alter the books and move assets.).
88. See note 77 supra.
89. See note 75 supra and accompanying text.
91. This factor is related to the approach embodied in the Scotto-Provenzano formulation, see notes 30-36 supra and accompanying text, but differs in the important sense that the defendant's position is a consideration rather than a rigid test. There are cases where the importance of the use of organization status alone calls for the finding of a nexus. In this type of case the Scotto-Provenzano rule yields the same result as the flexible approach. However, in a less obvious case
ranking position provides the racketeer with advantages. While this factor indicates what those advantages are, the factfinder must determine if they were in fact utilized.

Third, the court should determine the extent to which the enterprise served to complicate detection. Even if an enterprise was not used to facilitate the criminal activity, the organizational structure can make a major contribution to the racketeering effort by providing a "cover." Bureaucracy makes law enforcement more difficult; it allows the separation of decision making from implementation, making it much harder to find and convict the leaders of organized crime. When a legitimate enterprise is involved, detection is complicated by the ability to use the enterprise as a cover for racketeering activity and to "launder" funds through the enterprise. Finally, the sheer complexity of the entity that can be achieved through a corporate structure makes detection difficult. This is the case with La Cosa Nostra where determining and then proving who was involved in what activity has proved most intractable.

The extent to which the enterprise provided a front or served to complicate detection is relevant on policy as well as on practical grounds. RICO was passed in part to bolster the existing criminal law in obtaining convictions where detection was difficult. This factor is designed to help effectuate the congressional concern with the use of the enterprise to mask racketeering.

Fourth, the use of physical facilities of the enterprise is an obvious indication of the utilization of the enterprise. However, the use of enterprise facilities is the least reliable symptom of the existence of the

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92. In using someone's position in the enterprise as an indicator of their ability to utilize the organizational structure the nature of the racketeering is important. A financial crime such as securities fraud would require a high level management position. In contrast, while a foreman with authority over employees could be guilty of using organizational structure to run numbers, her position as a foreman only makes it more likely that she utilized the enterprise. She could in fact be utilizing personal or mob ties to get cooperation of the employees. Other factors would have to be considered to determine if she relied in fact on her organizational status.

93. See Permanent Subcommittee, supra note 5 (discussing the ability of "crime chieftains" to insulate themselves from actual implementation).

94. Wheeler and Rothman found that "organizational" offenders are able to break the law more often and for longer durations than individual offenders. See Wheeler & Rothman, supra note 70, at 1410-11.

This is quite consistent with other findings in our general research program which emphasize the ability to "hide" an offense within the interstices of organization and through elusive manipulation of paper, making it easier for relatively sophisticated crimes to continue undetected for a longer period and to occur with greater frequency. Id. at 1412-13.

95. See Permanent Subcommittee, supra note 5.

nexus. Use of facilities does not necessarily mean that the existence of the enterprise in some way enhanced the criminal activity, but extensive use of the facilities can be evidence that the enterprise was merely a front for illegal activity.97 Even if the enterprise is not a front, the use of enterprise facilities could be so vital to the criminal acts that a nexus is established. In this situation the nature of the facilities is as important as the degree of use; to the extent the enterprise provides facilities which are not commonly obtainable, it substantially enhances the racketeering.98

Finally, the scope and gravity of the offenses should be considered by the court. Professors Wheeler and Rothman have studied the effects of utilizing an organization on white-collar crime. Their results reveal that the crimes of “organizational offenders” are of a significantly longer duration, involve a larger geographic scope, are more sophisticated, and net a great deal more money than those of “individual offenders.”99 While statistical studies are not necessarily the best

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97. Compare United States v. Dennis, 458 F. Supp. 197 (E.D. Mo. 1978), affd., 625 F.2d 782 (8th Cir. 1980), with United States v. Webster, 669 F.2d 185 (4th Cir. 1982), modifying on rehearing, 639 F.2d 174 (1981), cert. denied, 454 U.S. 857 (1982). In Dennis a General Motors employee collected unlawful debts on General Motors property. The court held that although the defendant was an employee and utilized the premises of the corporation to carry out his scheme, this was not enough to establish a nexus between the enterprise and the defendant's racketeering activity. In Webster the Fourth Circuit focused on the extensive use of a nightclub's facilities by a narcotics ring in determining that there was a sufficient nexus between the nightclub and the racketeering.

Evidence introduced at the trial tended to show that, by means of the telephone company's call-forwarding service, telephone calls to Webster's and Thompson's home telephone (which was tapped by court order) were frequently forwarded to the telephone at the 1508 Club; that Club facilities and personnel were used to accept and relay narcotics related messages; and that, on at least one occasion, a Club employee was asked by Webster to provide Club-owned drinks to one of Webster's narcotics customers who was waiting for drugs to be brought so that a transaction could take place. The evidence which the government has offered as sustaining the convictions under subsection (c) indicates that the facilities of the 1508 Club were regularly made available to, and put in the service of, the defendants' drug dealing business.

669 F.2d at 187 (citation omitted) (quoting Webster, 639 F.2d at 183, 184).

98. When the enterprise merely provides facilities such as cars, telephones, a place to make deliveries or any other easily obtainable item, the enterprise has not enhanced the threat posed by the racketeers, but has simply provided a convenient source of “supplies.” Extensive use of ordinary facilities can be evidence that the enterprise was a front. See note 97 supra. To establish a nexus, when the enterprise is not a front, the facilities of the enterprise utilized should provide the racketeer with power he would not have if acting completely outside the enterprise. For instance, some enterprises can provide facilities that are unique. See e.g., United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983) (defendants made extensive use of enterprise's boats, plane, cattle ranch and bank account to further a drug smuggling operation), cert. denied, 104 S. Ct. 996 (1984).

99. See Wheeler & Rothman, supra note 70, at 1410-19. For example, the amount netted by “individual offenders” for the crimes studied had a median of $7,623 and a mean of $74,585. For “occupational offenders” the median was $8,018 and the mean $135,011. For “organizational offenders” the median was $387,274 and the mean was $1,077,432. Id. at 144. Wheeler and Rothman also discuss the possibility of using the characteristics of organizational crime as warning signs for this type of crime. Id. at 1425-26.
basis for a judicial rule, there are strong policy reasons for considering the scope of the crime as an indicator of a nexus.

The statistics suggest that the unusually large magnitude of a particular crime may indicate utilization of an organizational structure. For example, the small embezzler who pillers petty cash does not utilize the organization to the same extent as the large-scale embezzler.100 Congress drafted RICO to get at large-scale cases; it was not intended to get at “Mom and Pop” criminal acts.101 Although it is not binding legal precedent, the Justice Department’s promise not to “power rape nickel and dime cases”102 should be used as a guide to the intended scope of RICO. Use of a magnitude factor would incorporate that intent into the law itself, instead of leaving it to the promises of prosecutors.103 The judiciary should keep the crimes allowed to fall under RICO in line with the punishments provided by the statute. One way to effectuate this policy is to treat magnitude of the crime as an indicator of utilization of an organization. It is important to note that severity of the crime should not be determinative of a RICO violation, but only used as one factor to establish a nexus. Likewise, if all other characteristics point to actual utilization of the organizational structure, scope of the crime should not eclipse the evidence of a nexus.

CONCLUSION

This Note has argued against the conventional approaches to RICO’s “nexus requirement” because of their ambiguity and their unwarranted attempts to limit the statutory language with rigid definitions. The “nexus requirement” should be viewed as the final determination of whether section 1962(c) applies. Given the existence of an enterprise and a pattern of racketeering activity, the issue becomes whether the two elements are sufficiently related to warrant a conviction. The best approach to making this determination is a flexible one focusing on the extent to which the parties utilized the organizational or bureaucratic structure of the enterprise. Flexibility is

100. Embezzlement is an “enterprise” crime, so by definition there can be no question of a racketeering-enterprise nexus. However, there are different degrees of embezzlement based on their gravity; the greater the amount embezzled, or, more generally, the greater the magnitude of the crime, the more extensive the use of the organizational structure must be.

101. See McClellan, supra note 1, at 141-45 (answering American Civil Liberties Union objection to RICO’s potential breadth by arguing that the definition of racketeering in § 1961(1) and the concept of a pattern limits RICO’s application to the large-scale crimes characteristic of La Cosa Nostra); cf. United States v. Bledsoe, 674 F.2d 647, 647, 659 (8th Cir.) (“We are satisfied that RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes. The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes.”), cert. denied, 459 U.S. 1040 (1982).

102. Atkinson, supra note 35, at 16 (quoting John Dowd, chief of the Justice Department task force in charge of RICO cases in 1977). The Courts have also cautioned prosecutors against aggressive use of RICO. See note 12 supra.

103. See Tarlow, supra note 10, at 176-77.
maintained by concentrating on certain indicators of the defendant's use of the enterprise rather than on rigid definitions. This approach allows for principled judicial discretion that emphasizes the remedial purposes of the statute, and this can provide a meaningful limitation on RICO.