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The RICO *Enterprise* Controversy: Judicial Legislation Versus Judicial Interpretation

I. Introduction

In 1970, a Congress which had become increasingly concerned about the growth of organized crime and its infiltration of legitimate business¹ enacted the Racketeering Influenced and Corrupt Organizations Act.² This extremely controversial act combined two bills introduced in the Senate in 1969. S. 1623, the "Criminal Activities Profits Act," introduced by Senator Roman Hruska of Nebraska, would have prohibited the investment into any legitimate business enterprise affecting interstate and foreign commerce of income derived from criminal activities.³ S. 1861, the "Corrupt Organizations Act of 1969," introduced by Senator John McClellan, would have proscribed the infiltration of management of legitimate organizations by racketeers.⁴ These two bills produced Title IX, "RICO," of the Organized Crime Control Act of 1970.⁵

Section 1962⁶ sets out the substantive RICO offenses. Section 1962(a)⁷ prohibits the acquisition of an interest in an *enter-*

1. See, e.g., U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967).

2. 18 U.S.C. §§ 1961-68 (1976) [hereinafter referred to as "RICO"].

3. S. 1623, 91st Cong., 2d Sess. (1969).

4. S. 1861, 91st Cong., 2d Sess. (1969).

5. The Organized Crime Control Act of 1970, Pub. L. No. 91-452, §§ 101-1301, 84 Stat. 922.

6. 18 U.S.C. § 1962 (1976).

7. 18 U.S.C. § 1962(a) (1976) provides:

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, 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

prise engaging in or affecting interstate commerce through profits derived from a pattern of racketeering activity or through collection of an unlawful debt. Section 1962(b)⁸ prohibits the acquisition of an interest in an *enterprise* by means of a pattern of racketeering activity or loansharking. Section 1962(c)⁹ proscribes the use of racketeering or loansharking in the conduct of such *enterprise*.¹⁰ The term "enterprise" is the critical element common to these RICO substantive offenses.¹¹

Judicial opinion, however, attempted to vary its scope. Some circuit courts¹² took a broad view of which "enterprises" were covered, finding that combinations for clearly illegal purposes came within the scope of RICO's prohibitions. Other circuit courts took a narrow view,¹³ and found Congress's intent to

be unlawful under the subsection or if the securities of the issuer held by the purchaser, the members of his immediate family, and his or her accomplices many 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 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.

Id.

8. 18 U.S.C. § 1962(b) (1976) provides:

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

Id. (emphasis added).

9. 18 U.S.C. § 1962(c) (1976) provides:

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.

Id. (emphasis added).

10. The final § 1962 offense is § 1962(d) (1976), which provides:

It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Id.

11. 18 U.S.C. § 1961(4) (1976) defines "enterprise" as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

12. Hereinafter referred to as the "broad view courts." See, e.g., *United States v. Elliot*, 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978). The court held that "enterprise" encompasses not only legitimate businesses but also enterprises which are, from their inception, organized for illegal purposes.

13. Hereinafter referred to as the "narrow view courts." See, e.g., *United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979).

The court held that the term "enterprise" encompasses only legitimate associations.

be to proscribe only incursions into otherwise legitimate business.

The RICO "enterprise" controversy warrants a close analysis because of the judicial tendency to legislate rather than to interpret statutes. This analysis will reveal that one view is the product of judicial legislation, while the other is the product of judicial interpretation.

This comment will begin by elucidating judicial reasoning supporting each view. It will then critique each view, closely scrutinizing judicial use of statutory interpretation, legislative history, and intent, concluding that the narrow view is the preferable interpretation of "enterprise."

II. The Cases

A. *The Broad View*

In *United States v. Elliot*,¹⁴ the defendants were charged with agreeing to participate, directly and indirectly, in the conduct of the affairs of an "enterprise" whose purposes were to commit thefts, fence stolen property, illegally traffic in narcotics, obstruct justice, and engage in other criminal activities. Reduced to its bare essentials, the substantive section 1962(c) RICO violation was restated as

[b]eing associated with a group of individuals who were associated in fact, [defendants] each directly and indirectly participated in the group's affairs through the commission of two or more predicate crimes.¹⁵

The defendants maintained that there was no group of individuals associated in fact - no enterprise - in whose affairs they could have participated.¹⁶ The United States Court of Appeals for the Fifth Circuit disagreed, beginning its analysis by citing two of its own opinions, *United States v. Hawes*¹⁷ and *United States v. McLaurin*.¹⁸ It noted that Congress had given the term

14. 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

15. *Id.* at 897.

16. *Id.*

17. 529 F.2d 472 (5th Cir. 1976).

18. 557 F.2d 1064 (5th Cir. 1977).

"enterprise" a very broad meaning,¹⁹ and that the Act clearly encompassed "not only legitimate businesses but also enterprises which are from their inception organized for illicit purposes."²⁰ The court then noted that the "illegitimate business = enterprise" dispute stemmed from dictum in *Iannelli v. United States*,²¹ where the Supreme Court stated:

[RICO] seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pattern of racketeering activity.²²

The *Elliot* court discounted this, saying that there was no indication that the dictum was intended to describe fully the ambit of the Act's coverage, that the Act drew no distinction between legitimate and illegitimate businesses, and that the legislative history²³ supported the broad application inherent in the

19. *United States v. Hawes*, 529 F.2d at 479.

20. *United States v. McLaurin*, 557 F.2d at 1073.

21. 420 U.S. 770 (1975).

22. *Id.* at 787 n.19.

23. 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 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 organized crime and because the sanctions and remedies available to the government are unnecessarily 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 crimes.

Congressional Statement of Findings and Purpose, Pub. L. No. 91-452, § 1, 84 Stat. 922 (1970).

words of the statute.²⁴

The *Elliot* court then stated that Congress had clearly extended the statute to include other than legitimate businesses.

The statute extended beyond conventional business organizations to reach "any . . . group of individuals" whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes. The statute demands only that there be association "in fact" when it cannot be implied in law. There is no distinction, for "enterprise" purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.²⁵

The court concluded that the evidence demonstrated "the existence of an enterprise, a myriopod criminal network, loosely connected but connected nevertheless."²⁶

In *United States v. Altese*,²⁷ the defendants were charged with conducting a large scale gambling business through a pattern of racketeering and collection of unlawful debts, as defined in 18 U.S.C. § 1961(1),²⁸ (5),²⁹ and (6).³⁰ The district court³¹

24. *United States v. Elliot*, 571 F.2d at 897 n.17.

25. *Id.* at 898.

26. *Id.* at 899. See Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980). Professor Bradley summarized the *Elliot* holding:

The *Elliot* court created two new federal crimes - a subsection 1962(c) RICO violation and a subsection 1962(d) RICO conspiracy - from nothing more than a series of simple statutory violations. The element of agreement, necessary to distinguish the conspiracy charge from the substantive offense, is missing. Proof of the substantive offense automatically makes out a conspiracy, according to the court, because one of the elements of the substantive offense, the pattern, satisfies the agreement element of the conspiracy.

Id. at 879 (footnote omitted).

27. 542 F.2d 104 (2d Cir. 1976), cert. denied, 429 U.S. 1039 (1977).

28. 18 U.S.C. § 1961(a) (1976):

(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 pensions and welfare funds), sections 391-94 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1314 (relating to mail fraud), section 1343 (relating to wire fraud), section

agreed with the defendants that section 1962(c)³² applied only to legitimate enterprises financed through patterns of racketeering activity or the collection of unlawful debts, and not to an illegal gambling business.³³

The United States Court of Appeals for the Second Circuit reversed, beginning its statutory analysis by examining the language of the Act. The court noted the frequent use of the word "any" in conjunction with "enterprise", and determined that such repetition precluded the elimination of illegitimate business from the ambit of the Act.³⁴

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 business), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-46 (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.

29. 18 U.S.C. § 1961(5) (1976) provides that "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurs after October 15, 1970, the effective date of this chapter, and the last of which occurs within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

30. 18 U.S.C. § 1961(6) (1976):

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the law relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate

31. *United States v. Altese*, No. 76-1008, No. 902 (E.D.N.Y. 1976) (Mishler, C.J.).

32. 18 U.S.C. § 1962(c) (1976). *See supra* note 9.

33. The district court held that Title IX of the Organized Crime Control Act, of which § 1962(c) is a part, "deals with the problem of infiltration of legitimate business by persons connected with organized crime" and was not designed by Congress "to cover the types of activity charged in the indictment." *United States v. Altese*, 542 F.2d at 106.

34. *Id.*

[W]e find ourselves obliged to say that Title IX in its entirety says in clear, precise, and unambiguous language - the use of the word "any" - that all enterprises that are conducted through a pattern of racketeering activity or collection of unlawful debts fall within the interdiction of the Act.³⁵

The court closed this part of its analysis by noting that Congress could have inserted words of restriction if it intended any other meaning. On the contrary, "it inserted a clause providing that the provisions of Title IX be liberally construed to effectuate [RICO's] remedial purposes."³⁶ Therefore, the court maintained that it could not hold that "Congress did not say what it meant nor mean what it said."³⁷

The *Altese* court, supported by its own holding in *United States v. Parness*,³⁸ noted that it was obliged to construe the Act liberally to include illegitimate business because if the new penal prohibitions did not extend to such business there would be a loophole in the law. Noting, moreover, that three other circuits³⁹ had reached the same result, the *Altese* court held that RICO's "enterprise" included illegitimate business.⁴⁰

35. *Id.* The court looked to Webster's Dictionary for a definition of "any."

"Any" is defined in Webster's New International Dictionary, Second Edition, as follows: "Indicating a person, thing, etc., as one selected without restriction or limitation of choice, with the implication that everyone is open to selection without exception; all, taken distributively; every; used especially in assertions with emphasis on unlimited scope."

Id. at 106 n.4.

36. *Id.* Pub. L. No. 91-452, Title IX § 904(a), 84 Stat. 947 provides:

The provisions of this title shall be liberally construed to effectuate its remedial purposes.

37. *United States v. Altese*, 542 F.2d at 106. For an identical interpretation of the liberal construction clause, see Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167 (1980).

38. 503 F.2d 430 (2d Cir.), *cert. denied*, 419 U.S. 1105 (1974).

39. *United States v. Hawes*, 529 F.2d 472 (5th Cir. 1976); *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Capetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

40. *United States v. Altese*, 542 F.2d at 107.

In a well written dissent, Judge Van Graafeiland strongly criticized the majority's reliance upon "any" to expand the "enterprise" definition. He noted that "[T]he end result of the majority's expansive interpretation of § 1962(c) is to accord the word "enterprise," intended by Congress to be synonymous with commercial business, parity with the term "conspiracy." 542 F.2d at 108.

Without a clear and precise direction from Congress, we have created a statute making it a federal felony for any group, association or conspiracy to violate any

In *United States v. Rone*,⁴¹ the defendants had been convicted of forming an enterprise to commit various acts of extortion, and in association with and in the conduct of that enterprise, conspiring together to commit, and committing, three murders. The defendants claimed that the evidence did not establish a RICO "enterprise."

The United States Court of Appeals for the Ninth Circuit disagreed, beginning its analysis by stating that defendant's contention was without merit.

A reading of § 1962(c) and Title IX in its entirety indicates that any enterprise which is conducted through a pattern of racketeering activity falls within the statute.⁴²

The *Rone* court noted that Congress's broad legislative scheme did not include an intent to limit the Act to "legitimate" or "illegitimate" business. The RICO "enterprise" definition was "all-encompassing," and its "broad and unrestricted use . . . appears throughout Title IX."⁴³

Given the presence of the wholly unencumbered term "any enterprise" throughout the statute, we hold that its use in § 1962(c) manifests an intent to proscribe the conduct of specified activities through a pattern of racketeering activity, regardless of the type of enterprise involved.⁴⁴

The *Rone* court then cited *Elliot*⁴⁵ and *Altese*⁴⁶ to support its view. Further, the court felt that an examination of the legislative history was "inappropriate" since the statute was not ambiguous; examination of the legislative history would reveal

state's murder, kidnapping, gambling, arson, robbery, bribery, extortion, or narcotics statutes in any manner which utilizes or affects interstate commerce. The disruptive effect of our holding on federal-state relationships and on the limited enforcement and judicial resources of the federal government is every bit as great as that of the expansive interpretation of the Travel Act, 18 U.S.C. § 1952, condemned by the Supreme Court. [*Rewis v. United States*, 401 U.S. 808 (1971)].

Id. (citation omitted) (emphasis added).

Note that Judge Van Graafeiland has noted that "we have created a statute." It is the constitutional province of the courts to interpret, not create, legislation.

41. 598 F.2d 564 (9th Cir. 1979).

42. *Id.* at 568.

43. *Id.*

44. *Id.*

45. *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978).

46. *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976).

nothing contrary to the court's position.⁴⁷ The court noted:

[a] significant purpose of the legislation was to address the problems of infiltration of legitimate business by persons connected with organized crime [footnote omitted], [but] [t]he recognition of this particular purpose hardly leads to the conclusion that § 1962 applies only in the case of an actual infiltration of a legitimate business. Rather, acceptance of the broad definition of "enterprise" used by Congress fully comports with the stated congressional goal of arresting the infiltration of regular commerce by organized crime. By prohibiting the functioning of illegitimate enterprises, participants in them are denied the sources of income used to invest in legitimate businesses.⁴⁸

Therefore, including illicit enterprises in RICO's ambit will prevent criminal infiltration into legitimate enterprises "in the first instance by denying racketeers the sources of their investment funds."⁴⁹

B. *The Narrow View*

In *United States v. Sutton*,⁵⁰ the defendants had been convicted under RICO of conducting the affairs of an "enterprise" affecting interstate commerce through a pattern of racketeering primarily involving possession and distribution of heroin, and transporting and receiving stolen property.

The defendants contended that "RICO was intended to proscribe only the infiltration and operation of legitimate enterprises through patterns of racketeering activity, a situation which the government conceded was not involved in the case."⁵¹ The government, relying entirely upon the text of the statute,

47. *United States v. Rone*, 598 F.2d at 569.

48. *Id.*

49. *Id.*

Judge Ely's dissent strongly criticized the majority's reliance upon the word "any" and its reluctance to examine the legislative history:

[W]e must look to the provisions of the whole law so that we give effect to the legislative will "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."

United States v. Rone, 598 F.2d at 574 (citations omitted) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892)).

50. 605 F.2d 260 (6th Cir. 1979).

51. *Id.* at 264. See *supra* notes 6-12.

argued that it did not distinguish between legitimate and illegitimate enterprises; that "enterprise" was defined broadly in section 1961(4); and that the defendants were a "group of individuals associated in fact" and had each committed the required number of racketeering offenses while in that association.

To summarize the government's theory of the case, the evidence showed the existence of a "single enterprise-operated for the purpose of making money from repeated criminal activity."⁵²

The United States Court of Appeals for the Sixth Circuit began its statutory analysis of the section 1961(4) "enterprise" definition by using a dictionary meaning of "enterprise." The court found that individuals and groups do not become "enterprises" except in relation to some acts they perform.⁵³ The statutory definition, the court concluded, did not say what "that something is."⁵⁴ The *Sutton* court disagreed with the government's view that that "something" is provided by the individuals racketeering activity. The *Sutton* court immediately detected a flaw in the government's argument: its "deceptively literal treatment" of the term "enterprise" read the term entirely out of the statute.⁵⁵ RICO then simply proscribes "patterns of racketeering activity." The *Sutton* court stated that "[Congress] would not have opted for so complex a formulation if the legislative purpose had been merely to proscribe racketeering, without more."⁵⁶ The plain meaning indicates that "enterprise" must be "larger than, and conceptually distinct from, any 'pattern of racketeering activity' through which the enterprises 'affairs' might be conducted."⁵⁷ The court attacked the *Elliot*⁵⁸ characterization of "criminal enterprise,"⁵⁹ stating that

greater precision than that is required if the statute is not to violate "the first essential of due process of law" by forbidding "the doing of an act in terms so vague that [persons] of common intel-

52. *United States v. Sutton*, 605 F.2d at 265.

53. *Id.*

54. *Id.*

55. *Id.*

56. *United States v. Sutton*, 605 F.2d at 266.

57. *Id.*

58. *United States v. Elliot*, 571 F.2d 880 (5th Cir. 1978).

59. "An amoeba-like infra-structure that controls a secret criminal network." *United States v. Elliot*, 571 F.2d at 897-98.

ligence [would] necessarily [have to] guess at its meaning and differ as to its application. . . .⁶⁰

The court, therefore, maintained that "definite standards" are required if RICO is to apply to "criminal enterprises." The court started its search for these "standards" by examining the legislative history,⁶¹ concluding that it did not resolve the "criminal enterprise" issue but that it did lend support to defendants' contention that section 1962(c)⁶² was intended to be limited to "legitimate enterprises."⁶³ The *Sutton* court also found that the *Altese* construction⁶⁴ "seriously misconceives this legislative history[;] to argue . . . that limiting RICO to the corruption of legitimate enterprises 'does not make sense since it leaves a loophole for illegitimate businesses to escape its coverage.'"⁶⁵ Illegitimate business is already adequately proscribed elsewhere, and the defendants "quite properly point out that they did not engage in the aggravated form of racketeering activity for which RICO was exclusively designed."⁶⁶

The court then examined the structure of the statute as a whole. Finding that section 1962(a)⁶⁷ was clearly directed at legitimate enterprises, the court determined that subsections (b) and (c) read *in pari materia* should also be so directed.⁶⁸

Proceeding with its analysis, the court felt that it was most important to give content to each element of the RICO § 1962 offenses. The government's interpretation, which reads the "enterprise" element out of the statute, failed in this regard; the defendants' interpretation did not. The court also noted that its "only alternative . . . to accepting [defendants'] position on the scope of § 1962(c) [was] to rewrite the statute completely,"⁶⁹ engrafting upon section 1961(4)⁷⁰ standards to warn specifically of

60. *United States v. Sutton*, 605 F.2d at 266 (citations omitted).

61. *See supra* note 23.

62. 18 U.S.C. § 1962(c) (1976).

63. *United States v. Sutton* 605 F.2d at 267. *See supra* note 23.

64. *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976).

65. *United States v. Sutton*, 605 F.2d at 268.

66. *Id.*

67. 18 U.S.C. § 1962(a) (1976). *See supra* note 7.

68. *United States v. Sutton*, 605 F.2d at 268-69. Statutes *in pari materia* are to be construed together.

69. *Id.* at 269.

70. 18 U.S.C. § 1961(4) (1976). *See supra* note 11.

the proscribed activities. The court concluded:

Although Congress has declared that RICO's provisions should be "liberally construed to effectuate its remedial purpose, "[the court would not] read that directive as authorizing [them] to write a new and substantially different law."⁷¹

The *Sutton* court then used two criminal statutory construction canons to buttress its argument. First, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity . . . unless the legislature has spoken 'plainly and unmistakably' to the contrary. . . ."⁷² Since the legislative history⁷³ spoke "plainly and unmistakably" for the defendants' view, "the maxim applies with special force."⁷⁴ Second, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."⁷⁵ Acceptance of the government's construction would substantially alter the federal-state balance regarding state criminal jurisdiction "by making a federal felon out of 'any individual' or any member of a 'group' who has committed any two of the broad range of state offenses denominated 'racketeering activity' under § 1961(1)."⁷⁶ Since an alternative construction (i.e., the defendants'), supported by the legislative history,⁷⁷ was available, the *Sutton* court refused to take such a step and held for the defendants.⁷⁸

71. *United States v. Sutton*, 605 F.2d at 269. See *supra* note 36.

72. *United States v. Sutton*, 605 F.2d at 269. (citations omitted).

73. See *supra* note 23.

74. *United States v. Sutton*, 605 F.2d at 269.

75. *Id.* at 270 (citations omitted).

76. *Id.*

77. The Senate Report, the House Report, the Justice Department's recommendation, the concurring view of Senator Scott, the views of the House dissenters, and discussions on the floor of the Senate and House of Representatives before passage of OCCA-70, clearly express an intent limited to attacking organized crime's incursions into legal enterprises.

Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies For "Criminal Activity,"* 124 U. PA. L. REV. 192, 204-05 (1975) (footnotes omitted).

78. *United States v. Sutton*, 605 F.2d at 270. The court "held that an 'enterprise' within the meaning of the statute is 'any individual, partnership, corporation, association . . . and any union or group of individuals associated in fact,' that is organized and acting for some ostensibly lawful purpose, whether formally declared or informally recognized. Section 1962(c) is violated whenever any person associated with such an enterprise conducts its affairs, i.e., undertakes any activity on behalf of or relating to the purposes

Another recent case taking a narrow view of the RICO "enterprise" is *United States v. Anderson*.⁷⁹ There defendants, Arkansas county judges Anderson and Mooney, had devised a scheme to defraud and to obtain money from their county treasuries by means of false and fraudulent pretenses, representations, and promises, thereby allegedly violating § 1962(c) and (d).⁸⁰ The United States Court of Appeals for the Eighth Circuit agreed with the defendants' assertion that the district court erred in applying RICO.⁸¹

The *Anderson* court began its "enterprise" analysis with an examination of interpretative case history.⁸² It noted that after *Parness* a broad construction of the term "enterprise" had become entrenched, but not without some criticism.⁸³ Next, the court began examining the statutory language, noting that the

of the enterprise, by committing at least two criminal acts constituting a 'pattern of racketeering' as defined in section 1961(5)." *Id.*

79. 626 F.2d 1358 (8th Cir. 1980).

80. *Id.* at 1362.

Count I of the indictment charges violation of 18 U.S.C. § 1962(c), alleging that Leslie Anderson and Leonard Mooney were persons associated with an enterprise engaged in, and the activities of which affected, interstate commerce, *namely each of the said defendants and Paul A. Baldwin were associated in fact to defraud, and to obtain money by means of false and fraudulent pretenses, representations and promises from Sharp and Fulton Counties, Arkansas, and the people of said counties, and the said defendants, Leslie Anderson and Leonard Mooney, did knowingly and willfully conduct and participate directly and indirectly in the conducting of such enterprise's affairs through a pattern or racketeering activity as defined in Title 18, United States Code, Section 1961.* Count II of the indictment charges violation of 18 U.S.C. § 1962(c) and (d), alleging that Leslie Anderson and Leonard Mooney, defendants herein, being associated with an enterprise engaged in and whose activities affect interstate commerce, as defined in Section 1961 of Title 18, United States Code, that is the association in fact with Paul A. Baldwin, d/b/a The "Lisco" Company, *did knowingly and willfully conspire, confederate and agree together and with each other, to conduct and participate in, directly and indirectly, conduct of subject enterprise's affairs, through a pattern of racketeering activity.*

Id. (emphasis added).

81. Defendants Anderson and Mooney argued that the term "enterprise" does not encompass an illegal association that is proved only by facts which also establish the predicate acts constituting the "pattern or racketeering activity." *United States v. Anderson*, 626 F.2d at 1365.

82. The *Anderson* court cited a long case history tracing the origin of the broad interpretation of "enterprise," beginning with *United States v. Parness*, 503 F.2d 430 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *United States v. Anderson* 626 F.2d at 1363-64.

83. See *supra* notes 40 and 49.

statute "is particularly complicated, and the various elements of the offense intricately interrelate."⁸⁴ The court stated that these "structured relationships control the disposition of [the] case."⁸⁵ The court then focused on "enterprise" and "pattern of racketeering activity."

The term "enterprise" must signify an association that is substantially different from the acts which form the "pattern of racketeering activity." A contrary interpretation would alter the essential elements of the offense as determined by Congress.⁸⁶

The court disposed of the government's argument that the liberal use of the word "any"⁸⁷ required the broadest possible interpretation argument by stating that all of the "anys" prece-
de the word "enterprise" which is defined in section 1961(4). It is this "enterprise," as defined,, which controls the scope of the statute, and not the word "any."⁸⁸

The court, noting the syntactical form of section 1961(4), then applied a traditional maxim of statutory construction and found that the general words were *ejusdem generis*⁸⁹ to the previous words defining types of groups. The "meaning of the general phrase, 'group of individuals associated in fact although not a legal entity,' is controlled by the preceding specifically enumerated examples."⁹⁰ The *Anderson* court then ascertained the common aspects among the enumerated examples of an enterprise by examining section 1962.⁹¹ Noting that an overly broad construction of the term "enterprise" rendered that element of a section 1962(c) offense equal to the "pattern of racketeering" el-

84. *United States v. Anderson*, 626 F.2d at 1365.

85. *Id.*

86. *Id.*

87. See *supra* text accompanying notes 34 and 35.

88. *United States v. Anderson*, 626 F.2d at 1366.

89. Where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be considered in their widest extent, but are to be held as applying to persons or things of the same general class or kind as those specifically mentioned. The court noted that "the *ejusdem generis* rule is not applicable when the context of the statutory provision manifests a contrary intention, the wording and composition of RICO, as well as the legislative history and motivating policies of the Act strongly apply the applicability of the rule." *Id.* at 1366.

90. *Id.* The "enumerated examples" are "individual, partnership, corporation, association or other legal entity. . . ." 18 U.S.C. § 1961(4) (1976).

91. *United States v. Anderson*, 626 F.2d at 1366.

ement, the court followed the "universal rule of construction . . . that courts should give effect to all the words of a statute in order to discover the true intention of the legislature, [and therefore] the government's interpretation of the phrase 'group of individuals associated in fact' appears contrary to legislative intent."⁹²

The court then noted that the "enterprise" element was the focal point of the offense⁹³ and that its elimination "would pose difficult problems relating to the fifth amendment's guarantee against double jeopardy."⁹⁴

The "enterprise" element provides an essential ingredient in the constitutionality of the composition and structure of a section 1962(c) offense. Because a defendant may be separately prosecuted for the two predicate crimes only by requiring proof of an "enterprise" that engages in or has activities affecting interstate or foreign commerce does section 1962(c) require proof of a fact other than facts required to prove the predicate crimes.⁹⁵

92. *Id.* at 1367. The government contended that two individuals committing acts of racketeering activity would constitute a "group of individuals associated in fact."

93. *Id.*

The definition of "pattern of racketeering activity" provided in section 1961(5) merely "requires at least two acts of racketeering activity." Since the term "racketeering activity" is defined simply by listing particular offenses questions have arisen concerning the nature of the relationship between the two predicate crimes. Although the ordinary and natural meaning of the phrase "pattern of racketeering activity" would seem to require that the predicate acts relate in some manner, section 1961(5)'s requirement of the commission of two of the predicate crimes has been held to be clear on its face, and no further evidence has been held necessary to establish a pattern. To ensure that the predicate acts possess some degree of interrelationship, some courts have used the "enterprise" element to establish a coherent crime by holding that the only relationship between the predicate crimes necessary for a section 1962 violation is that they must both relate to the same enterprise. Thus the "enterprise" element stands as the focal point of the offense.

This use of "enterprise" element to provide a relationship between the two predicate crimes aids to contain the prohibitions of RICO rather than expand them to cover purely sporadic criminal activity. This result of the statutory structure does not appear serendipitous, but rather seems to be product of careful planning.

Id. (citations omitted).

94. *Id.*

95. *Id.* (citations omitted).

The double jeopardy clause "protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The *Blockburger* test emphasizes the ele-

Continuing, the court noted that the "racketeering activity" offenses⁹⁶ reflected an economic orientation, "reinforcing the view that Congress intended RICO to aim at the target of organized crime's infiltration of the American economy."⁹⁷ The civil remedial provisions of section 1964,⁹⁸ based upon the antitrust laws, strengthened this view.⁹⁹

ments of the two crimes: "[i]f each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n. 17 (1975). Thus, under RICO, if the "pattern of racketeering activity" can constitute an "enterprise", then it appears that one may be prosecuted and convicted twice for the same crime, once on the federal level, 18 U.S.C. § 1962(c) (1976), and once on the state level (for racketeering proscribed on the state level).

96. See *supra* note 28.

97. *United States v. Anderson*, 626 F.2d 1368 (8th Cir. 1980).

98. 18 U.S.C. § 1964 (1976) provides:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter [18 U.S.C. § 1962] 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.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Id.

99. *United States v. Anderson*, 626 F. 2d at 1368. An analysis of the civil purpose of RICO leads to the conclusion that:

Title IX is designed to maintain the integrity of business enterprises supplying lawful public needs. Congress may decide eventually to extend the use of civil remedies to combat more indirect economic effects of criminal activity, unrelated to particular business enterprises. But it has not yet done so under Title IX.

Id. (citations omitted).

The *Anderson* court then attacked the *Elliot*¹⁰⁰ decision because it "displaced traditional precepts concerning concerted criminal activity, and freed the Government from the strictures of traditional conspiracy doctrine."¹⁰¹ The court found nothing in the statute to suggest that Congress intended to do such a thing.¹⁰² Further, the court refuted the *Altese* "Liberal Construction Clause" argument by citing due process arguments¹⁰³ and the lenity rule which requires resolving ambiguities in penal statutes in favor of lenity.¹⁰⁴ The court ended this part of its discussion by stating:

[a]s the preceding discussion of the language and structure of RICO indicates, the Government simply cannot rely solely on a "plain meaning" interpretation of the term "enterprise." Furthermore, an expansive definition of the term "enterprise" will not necessarily effectuate the remedial purpose of RICO to eliminate

100. *United States v. Elliot*, 511 F.2d 880 (5th Cir. 1978).

101. *United States v. Anderson*, 626 F.2d at 1368.

The enterprise charged in the . . . indictment assumes that organizations formed solely for illicit purposes and having no legitimate business structure or connection fall within RICO's definition of enterprise. This permits proof of the enterprise element by evidence indicating a simple association to commit the pattern of racketeering activity.

Id. See *supra* note 26.

102. *United States v. Anderson*, 626 F.2d at 1369.

Congress's inclusion of subsection (d) implies that it did not intend to create a separate species of conspiracy law by including in its definition of the term "enterprise" a "group of individuals associated in fact." It indicates that Congress intended to establish two distinctly separate offenses in subsections (c) and (d). If a simple criminal conspiracy to commit the predicate crimes were to fulfill the "enterprise" element of a section 1962(c) violation, then a conspiracy to commit a 1962(c) violation would be defined as when a person, associated with a conspiracy to commit criminal acts, conspires to conduct those criminal acts. The awkwardness and duplication inherent in the structure of this articulation of the offense should be sufficient to suggest we search for an alternate interpretation.

Id. (citations omitted).

103. *United States v. Anderson*, 626 F.2d at 1369. "Due process requires that criminal laws be written to give fair notice of the conduct they prohibit." *Id.* (citation omitted). *Altese* used the liberal construction clause to find a broad interpretation. See *supra* text accompanying notes 39-40. A broad interpretation necessarily leads to a certain "vagueness" in giving notice of what RICO prohibits. The *Sutton* court attacked the *Elliot* holding with a due process argument. See *supra* text accompanying notes 58-60.

104. *United States v. Anderson*, 626 F.2d at 1370. "Also, the principle of statutory construction, referred to as the rule of lenity, requires resolving ambiguities in penal statutes in favor of lenity" *Id.* (citations omitted). The *Sutton* court also used this argument. See *supra* text accompanying notes 72-74.

the infiltration of racketeers into our business economy. Instead, it will inject federal prosecutors into the realm of offenses traditionally considered to be of a local character.¹⁰⁵

Next, applying an "established rule" from Broom's *Legal Maxims*,¹⁰⁶ the court found that "Congress's careful solicitude regarding federal-state relations concerning gambling, evident in Title VIII, would effectively be eradicated by an overly broad construction of Title IX, RICO. We cannot assume Congress was this careless."¹⁰⁷ Further, the court thought it "should be wary of any argument that Congress implicitly altered the traditional division of responsibilities between federal and state governments."¹⁰⁸

Finally, finding that the relevant legislative history¹⁰⁹ supported its view, the *Anderson* court held:

Congress intended that the phrase "a group of individuals associated in fact although not a legal entity," as used in its defini-

105. *United States v. Anderson*, 626 F.2d at 1370 (citations omitted).

106. "[I]t is an established rule, in construing a statute, that the intention of the lawgiver and the meaning of the law are to be ascertained by viewing the whole and every part of the Act." *United States v. Anderson*, 626 F.2d at 1370 (citations omitted). (quoting BROOM, *LEGAL MAXIMS* 585 (1882)).

107. In Title VIII of the Organized Crime Control Act, Congress carefully included provisions designed to preclude infringement upon local law enforcement officials unless the gambling activity could be considered of sufficient magnitude to warrant federal intervention. The creation of the RICO offenses does not reflect any awareness of disruption in the balance between federal and state criminal prosecution, yet an expansive definition of the term "enterprise" permits greater and more pervasive intrusion upon state and local law enforcement authority than would federal entry into the isolated area of gambling. The predicate crimes that can establish a pattern of racketeering activity encompass a broad range of criminal acts, and the effective elimination of the "enterprise" element of the offense would permit federal prosecution of any group of individuals associated to commit two or more predicate acts.

United States v. Anderson, 626 F.2d at 1370 (citations omitted).

108. *Id.*

109. *United States v. Anderson*, 626 F.2d at 1371.

The pertinent [legislative] history relating to this purpose can be concisely summarized into three basic categories: (1) broad statements emphasizing the need to curb the growth of racketeering, (2) frequent references to the desire to stop the infiltration of legitimate businesses by organized crime and the absence of any reference to any illegitimate association as an enterprise that would be included within the meaning of that term, and (3) congressional sensitivity to intrusion upon state law enforcement authorities.

Id. (citations omitted).

tion 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 towards 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."¹¹⁰

III. The Case Reasoning Analysis

A. Statutory Interpretation

The broad view courts¹¹¹ and the narrow view courts¹¹² each "statutorily interpreted" section 1961(4). The broad view courts, focused upon "congressional silence;" while the narrow view courts focused upon statutory language and structure.

1. The Broad View

The broad view courts primarily focused upon "congressional silence." The minimal attention paid to statutory language and structure focused upon the wrong language. The *Altese* court noted just the repetitive use of the word "any," and used Webster's definition of "any" to support its argument.¹¹³ *Rone* took this argument one step further by focusing upon the expansive expression "any enterprise."¹¹⁴ These arguments are flawed because "enterprise" is defined, for RICO's purposes, in section 1961(4) - it is not just "any" or "any enterprise" but any "enterprise" as defined in section 1961(4).¹¹⁵ The basic issue is the interpretation of this "definition," not of its modifiers.

Two broad view courts, *Elliot* and *Rone*, focused upon "enterprise's" "broad meaning." The *Elliot* court stated conclusorily that "enterprise" "clearly encompassed illegitimate businesses as well as conventional businesses."¹¹⁶ Defining "enterprise" to include "criminal enterprise" wrote the RICO "en-

110. *Id.* at 1372. The *Sutton* court had a different holding. See *supra* note 78.

111. See *supra* note 12 and accompanying text.

112. See *supra* note 13 and accompanying text.

113. *United States v. Altese*, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). See *supra* notes 34-35 and accompanying text.

114. *United States v. Rone*, 598 F.2d 564 (9th Cir. 1979). See *supra* note 44 and accompanying text.

115. See *supra* note 11 and accompanying text.

116. See *supra* notes 19, 20 and accompanying text.

terprise" right out of the statute.

The *Rone* court also employed variations of the "broad meaning" argument, noting that the "enterprise" definition was "all encompassing."¹¹⁷ Further, the *Rone* court noted the frequent broad and unrestricted use of the term "enterprise," a variation on its "any enterprise" argument.¹¹⁸ Again, such analysis misses the issue. It does not matter how many times "enterprise" is used in the statute. The word still must be used as defined by section 1961(4).¹¹⁹

Two broad view courts, *Elliot* and *Altese*, also emphasized Congressional silence in their analysis. In *Elliot*, the court stated that the Act did not distinguish between legitimate and illegitimate businesses. The *Elliot* court felt free to include "criminal enterprise" in section 1961(4) because Congress did not specifically exclude this broad scope. Further, the *Elliot* court felt it resolved the *Iannelli* footnote problem by the same approach. The footnote did not specifically exclude the *Elliot* "criminal enterprise" from the statute; therefore, it may be included in section 1961(4).¹²⁰ It should not matter whether Congress distinguished between legitimate and illegitimate businesses. Congress did mention legitimate businesses; it did not mention illegitimate businesses. Holding that section 1961(4) includes "criminal enterprises" clearly crosses the fine line dividing judicial interpretation and judicial legislation.

The *Altese* court in a variation of the *Elliot* "Congressional silence" approach noted that RICO lacked words of restriction and contained a liberal construction clause.¹²¹ This argument also misses the issue. The question is not a balance between lack of restrictive words and the liberal construction clause. As noted, the liberal construction clause may only be used "to effectuate [RICO's] remedial purposes."¹²² The question then is whether construing "enterprise" through the liberal construction clause to include illegitimate businesses "effectuates [RICO's] remedial purposes." Further, the Act *as written* should be liberally con-

117. *United States v. Rone*, 598 F.2d at 568.

118. *Id.* See *supra* text accompanying notes 41-42.

119. See *supra* note 11 and accompanying text.

120. See *supra* notes 21-24 and accompanying text.

121. See *supra* notes 36, 37 and accompanying text.

122. See *supra* note 36.

strued. *Altese's* terse look at section 1961(4) leaves serious doubts as to whether such examination was conducted.¹²³

In sum, the three broad view courts, using "statutory interpretation," have skirted the issue. The *Rone* court, after briefly stating that the definition of enterprise was "all encompassing," focused upon the number of "enterprises" used and its "any enterprise" argument. The *Altese* court, like *Rone*, focused on the word "any," but to such an extent that the court thought it relevant to examine Webster's definition of "any." *Altese* then focused upon the lack of Congressional restriction, filling that vacuum with the liberal construction clause. The *Elliot* court treated section 1961(4) tersely with its "broad meaning" characterization. Then, using the lack of legitimate-illegitimate distinctions and the *Iannelli* footnote, *Elliot* found a "criminal enterprise" in section 1961(4). By never really focusing upon section 1961(4), thereby omitting the initial step of any statutory analysis, the *Elliot*, *Altese*, and *Rone* courts devised a broad definition of the term "enterprise."

2. *The Narrow View*

The narrow view courts, *Sutton* and *Anderson*, focused primarily upon the statutory language and structure of RICO. These courts noted that the statute was complex,¹²⁴ that content must be given to each element of the statutory offense,¹²⁵ that the structure of the statute must be examined as a whole,¹²⁶ and that, unless Congress clearly conveys a purpose to the contrary, the statute will not be deemed not to have significantly altered the federal-state balance.¹²⁷

The *Sutton* court and *Anderson* court came to the same conclusion: the RICO "enterprise" must be an entity conceptually distinct from the predicate acts which form the "pattern of racketeering activity."¹²⁸ *Anderson's* statutory interpretation arguments are stronger than those in *Sutton*, however, because

123. See *supra* notes 34-37 and accompanying text.

124. See *supra* notes 56, 84 and accompanying text.

125. See *supra* notes 69, 92 and accompanying text.

126. See *supra* notes 67-68, 91, 92 and accompanying text.

127. See *supra* notes 75, 106-08 and accompanying text.

128. See *supra* notes 57, 86 and accompanying text.

the *Anderson* court focused upon the entire legislative scheme rather than merely upon RICO itself.¹²⁹ Section 1961(4) was examined both alone and in the context of its surrounding environs. The *Anderson* court's statutory analysis, found through application of the *ejusdem generis* principle that the troublesome broad language was limited by the previous specific example,¹³⁰ was flawed. The specific examples of section 1961(4) describe legal entities, while the broad language mentions non-legal entities.¹³¹ It is then inconsistent to limit the broad language with the specific examples of section 1961(4). The court, after examining section 1961(4), looked at section 1962 to see how "enterprise" was used, determining that "commonality among enumerated examples of section 1962 enterprises" is preferred.¹³² Since section 1962(a) clearly talks about legitimate enterprises, enterprise for section 1962(b), (c), and (d) should be similarly construed. The *Anderson* court then noted that the economically oriented racketeering offenses reinforced the view that Congress intended RICO to aim at the infiltration of legitimate businesses.¹³³ Further, the *Anderson* court, examining the RICO statute in the context of the entire Organized Crime Control Act of 1970, found that Congress's sensitivity to federalism questions in Title VIII should reflect a similar attitude for Title IX, RICO.¹³⁴ Here the *Anderson* court adapted the congressional silence approach of the broad view courts by noting the lack of explicit Congressional sensitivity to federalism questions in Title IX.¹³⁵ It could have been an intentional omission.

The *Sutton* court did not concentrate upon the statutory language as much as did the *Anderson* court.¹³⁶ In fact, *Sutton*, unsatisfied with the section 1961(4) definition, introduced a supplemental dictionary meaning of "enterprise."¹³⁷ This definition

129. Compare *supra* notes 67-71 and accompanying text with *supra* notes 84-92 and accompanying text.

130. See *supra* notes 89, 90 and accompanying text.

131. See *supra* note 11 and accompanying text.

132. *United States v. Anderson*, 626 F.2d at 1366. See *supra* notes 91-92.

133. See *supra* note 97 and accompanying text.

134. See *supra* notes 106-07 and accompanying text.

135. See, e.g., *supra* notes 23, 24 and accompanying text.

136. See *supra* note 129.

137. See *supra* note 53 and accompanying text.

is as irrelevant as was *Altese's* supplemental "any" definition.¹³⁸ *Sutton* did, however, examine the structure of section 1962 as a whole, concluding, as did *Anderson*, that "enterprise" should be read as in section 1962(a).¹³⁹

Both courts cited the liberal construction clause, but each handled it differently. The *Sutton* court felt that the clause did not give a court a license to rewrite the statute in order to uphold the government's position.¹⁴⁰ Inconsistently, the *Sutton* court did feel it could rewrite section 1961(4) with Webster's "enterprise" definition.¹⁴¹ Further, the basic issue is not one of rewriting section 1961(4), but of "liberally construing [section 1961(4)] to effectuate [RICO's] remedial purposes."¹⁴² Therefore, the government's broad construction could have been given to section 1961(4) by "liberally construing" it, not rewriting it.

The *Anderson* court noted that it did not know how much deference it should give the liberal construction clause. By citing arguments involving the *Rewis* lenity rule and due process the court did seek to negate any effect of the clause.¹⁴³ These arguments make little sense upon close examination. More deference should be given to the statutory liberal construction clause than any outside rule. Further, the *Anderson* court is not focusing here upon the relevant issue. The question is not whether the rule of lenity will temper the use of the liberal construction clause, but whether the government's "enterprise" contention "effectuates [RICO's] remedial purposes." The statute should always be internally construed first. Then, if needed, outside sources should be used. On balance, the *Sutton* treatment of the liberal construction clause is more defensible.¹⁴⁴

In conclusion, the narrow view courts "statutory interpretation" primarily focused on statutory language and structure, and not on Congressional silence and irrelevant language. Their conclusions were not always well founded, but at least these conclusions were based upon close examination of the relevant statu-

138. See *supra* notes 34, 35 and accompanying text.

139. See *supra* notes 67, 68 and accompanying text.

140. See *supra* notes 69-71 and accompanying text.

141. See *supra* note 137.

142. See *supra* note 36.

143. See *supra* notes 103-04 and accompanying text.

144. See *supra* notes 69-71 and accompanying text.

tory language.

B. *The Legislative History*

1. *The Broad View*

The broad view courts gave RICO's legislative history little deference. When they did, they again avoided the relevant issues.

The *Elliot* court stated that "the legislative history supported the broad application inherent in the words of the statute."¹⁴⁵ The court substantiated this statement, however, by citing the Congressional Statement of Findings and Purpose, ignoring more relevant legislative history which did not specifically support its views.¹⁴⁶ This writer believes "broad application" does not necessarily mean "enterprise" includes illegitimate businesses. Further, the statement did not exclude illegitimate businesses from the coverage of the Act; again, Congressional silence prevails. The *Elliot* court should have looked beyond the Congressional Statement into the relevant legislative history.

The *Rone* court stated that examination of the legislative history was inappropriate since section 1961(4) was unambiguous and extremely broad.¹⁴⁷ The *Rone* court, however, could not have determined from the face of the statute that Congress's "broad legislative scheme" did not include an intent to limit RICO. Further, *Rone* stated that nothing contrary to its position would be found if the legislative history was consulted.¹⁴⁸ This is just another example of the broad view court's reliance upon Congressional silence, since the legislative history does not specifically exclude illegitimate businesses. The *Altese* court, for unstated reasons, did not consult the legislative history.

2. *The Narrow View*

The narrow view courts, in examining the legislative history,

145. *United States v. Elliot*, 571 F.2d at 897 n.17. See *supra* notes 24, 25 and accompanying text.

146. See *supra* note 23.

147. *United States v. Rone*, 598 F.2d at 569.

148. *Id.*

continued their focus upon what had been said. The *Sutton* court noted that the legislative history did not solve the government's "criminal enterprise" problem, but it did support the defendants' contention that section 1962(c) was limited to "legitimate enterprises."¹⁴⁹ The *Anderson* court continued its exhaustive analysis by breaking down the legislative history into three basic categories.¹⁵⁰ It then noted that "[the] legislative history [did] not provide a definitive statement of Congressional intent concerning the term 'enterprise,' but it [did] help illuminate the intended meaning of the statutory language."¹⁵¹ In contrast to the broad view courts, the *Anderson* court did not use the lack of a definitive Congressional statement on "enterprise" as evidence of intent not to exclude illegitimate business.¹⁵²

C. Interpretational Effects

The circuit courts also discussed the potential effects of adopting a particular view of the scope of RICO. In some cases, the ultimate decisions were influenced by these considerations, in others they were not.

The *Altese* court, in adopting the broad view, noted that if "enterprise" was not deemed to include "illegitimate businesses" there would be a loophole in the law.¹⁵³ This argument fails when it is noted that the "illegitimate business" talked about by *Altese* are already sufficiently proscribed by other criminal statutes.¹⁵⁴

The *Rone* court, in adopting the broad view, stated that their decision effectuated Congressional intent in the first instance by preventing organized crime from making any money to invest.¹⁵⁵ This analysis assumes that organized crime will invest its money in legitimate business every time. Potential criminal activity has never been an excuse for its proscription.

The *Sutton* and *Anderson* courts, in adopting their narrow

149. See *supra* notes 72, 73 and accompanying text.

150. See *supra* note 109 and accompanying text.

151. *United States v. Anderson*, 626 F.2d at 1371.

152. See, e.g., *supra* notes 100-10 and accompanying text.

153. See *supra* notes 38-40 and accompanying text.

154. See *supra* note 64 and accompanying text.

155. *United States v. Rone*, 598 F.2d at 569. See *supra* note 46 and accompanying text.

views, cited federalism¹⁵⁶ and due process problems¹⁵⁷ with adoption of the broad view. The *Anderson* court, however, cited one additional problem: the adoption of the broad view might pose serious fifth amendment double jeopardy problems.¹⁵⁸ A careful examination will show that *Anderson* is only raising the specter of a "possible" problem. The missing ingredient in the *Anderson* analysis of the issue is that there is no guarantee that a second prosecution for the same crime will take place. Only if a second prosecution is attempted will there be a problem. The adoption of the broad view will not pose double jeopardy problems; the second prosecution will.

IV. Conclusion

The broad view courts, in fashioning an interpretation of section 1961(4), chose not to focus on the specific statutory language and structure of the Act. Rather, the broad view courts focused on what has been termed "Congressional silence" and on irrelevant statutory language.

In contrast, the narrow view courts focused upon the specific statutory language and structure of the Act. In addition, the narrow view courts considered many more factors, notably citing the effects of adopting or not adopting their view.

When courts employ "Congressional silence" in statutory interpretation, they are stepping into the province of the legislature and stepping out of the province of the judiciary. Obviously, this poses separation of powers questions. The courts are not empowered to legislate but to interpret what the legislature has written. It is extremely difficult to "interpret" what was written if a court focuses on "Congressional silence." When courts focus upon the specific statutory language and structure, they are "interpreting" rather than "legislating." "Congressional silence" may become a secondary factor in interpreting a particular statute, but it should not be allowed primacy over specific statutory language and structure.

156. See *supra* notes 75, 106-08 and accompanying text.

157. See *supra* notes 60, 103 and accompanying text.

158. See *supra* notes 94, 95 and accompanying text.

In view of the above analysis, the narrow view adopted by the *Anderson* and *Sutton* courts is the acceptable judicial "interpretation" of the RICO "enterprise."¹⁵⁹

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159. The United States Supreme Court decided, in *United States v. Turkette*, — U.S. —, 101 S.Ct. 2524 (1981), that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate businesses. *Id.* at 2527-34. An analysis of that decision, however, is beyond the scope of this article.