Cornell Law Review

Volume 66
Issue 1 *November 1980*

Article 6

Rico and the Liberal Construction Clause

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RICO AND THE LIBERAL CONSTRUCTION CLAUSE

The Racketeer Influenced and Corrupt Organizations Act (RICO)[1] is potentially the broadest statute Congress has passed to combat the harmful effects of organized crime.[2] Proscribing certain activities related to racketeering,[3] RICO contains an array of potent criminal sanctions,[4] and civil and antitrust-type remedies.[5]

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[1] 18 U.S.C. §§ 1961-1968 (1976 & Supp. III 1979). RICO is one of twelve substantive titles in the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23. *See* Title I, Special Grand Jury, 18 U.S.C. §§ 3331-3334 (1976); Title II, General Immunity, *id.* §§ 6001-6005; Title III, Recalcitrant Witnesses, 28 U.S.C. § 1826 (1976); Title IV, False Declarations, 18 U.S.C. § 1623 (1976); Title V, Protected Facilities for Housing Government Witnesses, *id.* § 3481; Title VI, Depositions, *id.* § 3503; Title VII, Litigation Concerning Sources of Evidence, *id.* § 3504; Title VIII, Syndicated Gambling, *id.* §§ 1511, 1955; Title IX, Racketeer Influenced and Corrupt Organizations, *id.* §§ 1961-1968; Title X, Dangerous Special Offender Sentencing, *id.* §§ 3575-3578; Title XI, Regulation of Explosives, *id.* §§ 841-848; Title XII, National Commission on Individual Rights, *id.* § 3331.

[2] This Note uses the term "organized crime" in its generic rather than popular sense. Senator McClellan, one of the principal sponsors of the Organized Crime Control Act of 1970, defined "organized crime" as "a functional concept like 'white-collar crime,' serving simply as a shorthand method of referring to a large and varying group of criminal offenses committed in diverse circumstances." McClellan, *The Organized Crime Act (S. 30) Or Its Critics: Which Threatens Civil Liberties?*, 46 NOTRE DAME LAW. 55, 60-61 (1970). Organized crime, as used in this Note, includes white-collar crime, organized crime in the popular sense (Mafia, Cosa Nostra), and other group activities proscribed by RICO.

[3] Section 1962 of RICO contains four substantive provisions. First, the section prohibits using income derived from racketeering activities to acquire or establish an enterprise engaged in interstate commerce. 18 U.S.C. § 1962(a) (1976). For a critical discussion of § 1962(a), see Note, *Investing Dirty Money: Section 1962(a) of the Organized Crime Control Act of 1970*, 83 YALE L.J. 1491 (1974). Second, § 1962 outlaws the acquisition of any enterprise engaged in interstate commerce through a "pattern of racketeering activity." 18 U.S.C. § 1962(b) (1976). Third, it proscribes conducting an enterprise's affairs through a "pattern of racketeering activity." *Id.* § 1962(c). Finally, the section outlaws conspiracies to violate any of the three previous provisions. *Id.* § 1962(d).

[4] Section 1963 authorizes maximum sanctions of up to a $25,000 fine, 20 years in prison, or both. More important, the statute authorizes forfeiture of any interest in an enterprise that the violator acquired or maintained in violation of § 1962. 18 U.S.C. § 1963 (1976).

Although the penalties seem severe, the statute requires the government to prove the violation of at least two racketeering acts. These acts are among the most serious state and federal offenses. Moreover, the violation of any individual predicate crime would potentially subject the convicted offender to harsh penalties roughly proportional to those provided in RICO. *See* Note, *supra* note 3, at 1493-94.

[5] The section on civil remedies provides in part:

> (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

To strengthen RICO's effectiveness, Congress included a unique liberal construction clause,[6] mandating that "the provisions of this title shall be liberally construed to effectuate its remedial purposes."[7] Most courts have followed the directive and interpreted RICO broadly.[8] Some commentators and courts, however, have

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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 therefore 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.

18 U.S.C. § 1964(a)-(c) (1976).

Except for § 1961, which provides definitional terms, the remaining sections of RICO are procedural. Section 1964(d) provides collateral estoppel benefits from any RICO conviction to the government in a subsequent civil proceeding against a convicted defendant. Section 1965 provides venue and process requirements. The expedition of RICO actions is permitted under § 1966. Section 1967 authorizes the court to hold open or closed proceedings at its discretion. Under § 1968 the Attorney General has the power to issue a civil investigative demand. Congress designed this section to afford prosecutors extensive pre-suit investigative powers, but the Attorney General has never used the provision. In fact, the Justice Department recommends that it not be used:

> It [Civil Investigative Demand] has never been used and we recommend that it not be employed in a racketeering investigation. In essence, we believe that a racketeering investigation is basically a criminal investigation which utilizes an investigative Grand Jury. If a civil action is warranted, it usually will proceed after the successful conclusion of a criminal case where the doctrine of collateral estoppel is in operation. Even if a civil action is initiated independently of a criminal investigation, we believe that the Civil Investigative Demand would not prove useful and that the same goals could be achieved by means of the regular process of civil discovery.

U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE 66-67 (4th ed.).

[6] Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947. No other statute in the United States Code that imposes criminal penalties has a liberal construction directive.

[7] *Id.*

[8] *See, e.g.*, United States v. Whitehead, 618 F.2d 523, 524 n.1 (4th Cir. 1980) ("enterprise" broadly construed to include organizations engaged in solely illegal activities such as prostitution); United States v. Grzywacz, 603 F.2d 682 (7th Cir. 1979) ("enterprise" broadly construed to include public entities such as the Madison, Illinois Police Department), *cert. denied*, 100 S.Ct. 2152 (1980); United States v. Rone, 598 F.2d 564 (9th Cir. 1979) ("enterprise" broadly construed to include organizations engaged in solely illicit activities such as extortion and murder), *cert. denied*, 100 S.Ct. 1345 (1980); United States v. Swiderski, 593 F.2d 1246 (D.C. Cir. 1978) ("enterprise" broadly construed to include a restaurant used as a front for trafficking in cocaine), *cert. denied*, 441 U.S. 933 (1979); United States v. Davis, 576 F.2d 1065, 1067 (3d Cir.) ("[T]he words 'chargeable under State law' in § 1961(1)(A)

advocated a narrow construction, asserting that the statute is ambiguous and spreads the criminal net too wide.[9] These critics misunderstand the nature of statutory ambiguity, flout the congressional directive, and misuse legislative history in their attempt to justify a narrow construction of RICO. The plain meaning of the statute should govern unless manifest ambiguity exists. When ambiguities arise, however, courts should obey the liberal construction directive.

I

RULES OF STATUTORY CONSTRUCTION

Courts resolve legislative ambiguities through the process of statutory construction. In interpreting an ambiguous statute, courts must choose whether to construe the ambiguity liberally or strictly.[10] The effect of strictly construing criminal statutes is to resolve ambiguities against the state in favor of the defendant.[11] This does not mean, however, that the court must accord the statutory language its narrowest possible meaning.[12] If a statute

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mean 'chargeable under State law at the time the offense was committed.' "), *cert. denied*, 439 U.S. 836 (1978); United States v. Forsythe, 560 F.2d 1127, 1137 (3d Cir. 1977) ("[B]y systematic paying of bribes to public official and employees, those making payments committed 'act[s] ... involving ... bribery' within the meaning of 18 U.S.C. § 1961(1)(A). The word 'involving' ... is broad enough to reach the conduct of owners and employees of a corrupt enterprise."); United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976) (RICO's remedies and prohibitions "extend to an illegitimate business as well as a legitimate one ...."), *cert. denied*, 429 U.S. 1039 (1977).

[9] *See* United States v. Turkette, No. 79-1545, slip op. at 6-7 (Sept. 23, 1980); United States v. Anderson, 626 F.2d 1358, 1365 (8th Cir. 1980) ("[T]he term 'enterprise' does not encompass an illegal association that is proved only by facts which also establish the predicate acts constituting the 'pattern of racketeering activity.' "); United States v. Sutton, 605 F.2d 260 (6th Cir. 1979) (RICO not applicable where persons engaged in racketeering activity unrelated to any legitimate organization), *vacated and submitted for rehearing en banc* April 2, 1980; United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1979); United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975) (RICO "enterprise" must be a lawful business enterprise.). *See generally* Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising In Its Interpretation*, 27 DE PAUL L. REV. 89 (1977); Comment, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies For "Criminal Activity"*, 124 U. PA. L. REV. 192 (1975); Note, *supra* note 3, at 1491-515.

[10] "The attitudes of judges toward legislation being construed, whether they are liberally or strictly disposed toward it, can have an important influence on how it is construed." 2A C.D. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 58.01 (rev. 3d ed. 1973) (footnote omitted).

[11] *See* Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 749 (1935).

[12] We are mindful of the maxim that penal statutes are to be strictly construed. And we would not hesitate, present any compelling reason, to apply it

has two reasonable meanings consistent with the legislature's intent, then the court applies the meaning most beneficial to the defendant. In contrast, when liberally construing a statute, a court gives an expansive, rather than restrictive, interpretation to the language in question.

If a statute is not ambiguous, courts should accord the language its plain meaning.[13] There is no need for liberal or strict

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> and accept the restricted interpretation. But no such reason is to be found here. The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language. As was said in *United States v. Gaskin*, 320 U.S. 527, 530, the canon "does not require distortion or nullification of the evident meaning and purpose of the legislation." Nor does it demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.

United States v. Brown, 333 U.S. 18, 25-26 (1947).

[13] Courts often invoke the plain meaning rule to exclude the use of external aids of construction on the ground that "[i]f the court decides that the meaning of the words is 'plain', then, of course, . . . 'interpretation' is unnecessary . . . ." Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1, 4 (1938). The Supreme Court enunciated the plain meaning doctrine in Caminette v. United States, 242 U.S. 470 (1917):

> [W]hen words are free from doubt they must be taken as the final expression of legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. . . . [T]he language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.

Id. at 490 (footnotes omitted).

Yet the Court seemingly sounded the death knell of the plain meaning rule in United States v. American Trucking Ass'ns, 310 U.S. 534, 543-44 (1940): "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Nevertheless, the frequent invocation of the plain meaning rule today suggests its miraculous resurrection, if indeed it ever died. *See, e.g.*, United States v. United Continental Tuna Corp., 425 U.S. 164, 184 (1976) (Stewart, J., dissenting) ("The plain language of the Suits in Admirality Act authorizes anyone to sue the United States for damages . . . . There is no need to inquire further . . . ."); Barrett v. United States, 423 U.S. 212, 217 (1976) ("[T]here is no ambiguity in the words of § 922(h) [of the Gun Control Act of 1968], and there is no justification for indulging in uneasy statutory construction."); Huddleston v. United States, 415 U.S. 814, 831 (1974) ("We perceive no grievous ambiguity or uncertainty in the language and structure of the [Gun Control] Act. The statute . . . clearly proscribes petitioner's conduct . . ."). *See generally* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975); 2A C.D. SANDS, *supra* note 10, at § 46.01. One commentator explains:

> A strong case can be made for the proposition that all words are inherently ambiguous, and that no statute or other statement in words can be absolutely free of ambiguity.
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> . . . .

construction when the words of the statute are clear. Of course, there are degrees of ambiguity, and it is difficult to draw the sometimes fine line between "plain" and "ambiguous" language. Nonetheless, the labeling process is often crucial; it determines whether the court will apply the plain meaning rule or resort to other constructional aids.[14] The attitude with which a court approaches its analysis of a statute is of the utmost importance.[15]

The scope of the plain meaning rule is narrow because statutory ambiguity,[16] or equivocation,[17] is virtually ubiquitous. A

> If no statute can be perfectly plain, should the plain meaning rule be abolished? Not necessarily. Although no statute may be absolutely unambiguous, the degree of ambiguity in most statutes is very slight when applied to most situations. The degree of ambiguity is likely to be substantial only in limited peripheral sets of situations. The result is that to a large extent statutes are substantially plain, so plain that except in marginal situations it would be a ridiculous forcing of a statute to put more than one meaning on the statutory language. For purposes of interpretation, a vast area of plain meaning exists. If the term plain in the plain meaning rule is understood as plain beyond reasonable question, then the rule makes sense, although admittedly a problem arises as to what is reasonable doubt or substantial lack of ambiguity.

Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 12-13 (1954) (footnotes omitted).

[14] Extrinsic aids are available to the courts when interpreting statutes. Some of these aids are more useful than others and many conflict. *See generally* 2A C.D. SANDS, *supra* note 10. Karl Llewellyn, in a renowned article, noted, "When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point." Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401 (1950). Professor Llewellyn laid out 28 different "thrusts" and "parries" that a lawyer could use to influence a court's approach to statutory construction. *See id.* at 401-06.

[15] 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. It is no doubt true that, as applied to a particular fact situation, several rules of interpretation may often be referred to, some looking in one direction and some in the opposite direction. It is also true that most of the rules are stated in a way which ends with the exception that the rule does not apply if the meaning of the statute is clear, *but a good deal of discretion remains in the courts as to when a statute is clear and when it is ambiguous.* At all events, . . . rules of statutory interpretation sometimes do decide cases.

W. LAFAVE & A. SCOTT, CRIMINAL LAW-70 (1972) (emphasis added) (footnote omitted).

[16] Professor Dickerson distinguishes three kinds of statutory ambiguity:

> Semantic ambiguity is uncertainty of multiple meaning that tends to follow particular words and phrases (e.g., "residence," "child") into the contexts of

certain amount of ambiguity is inevitable because words are imperfect vessels of meaning and thought.[18] Good statutory drafting cannot eliminate all ambiguities, because the drafter faces an inescapable dilemma; he must design a statute general enough to provide an adequate remedy for the evil the legislature seeks to attack and yet specific enough to provide fair warning of what the law prohibits. Our adversarial legal system contributes to the problem; lawyers attempt to bend the statute toward the interpretation that best serves their clients' interests. Thus, attorneys often scrutinize every word of a statute and its legislative history to find or create an advantageous ambiguity.[19] The competing arguments of counsel exert pressure on judicial decisionmaking, enhancing the likelihood that the court will find an ambiguity, and influencing whether the court will construe a term liberally or strictly.

The statutory scheme is entitled to the utmost deference because the words of the statute are the law, not the lawyer's suggested construction, nor the legislative history accompanying

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> actual use. Syntactical ambiguity is uncertainty of modification or reference (e.g., a squinting modifier). Contextual ambiguity is uncertainty as to how a statement affects or is affected by another statement with which it is inconsistent (e.g., two inconsistent contemporaneous statutes). It also includes uncertainty as to whether a particular relevant tacit assumption has been made.

R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 283 (1975).

[17] "Language is equivocal when it has 'different significations equally appropriate' or is 'capable of double interpretation,' that is, has two or more competing thrusts." *Id.* at 43-44 (footnote omitted).

[18] *See* Jones, *Some Causes of Uncertainty in Statutes,* 36 A.B.A.J. 321, 321 (1950). Statutes are particularly susceptible to ambiguity because a "statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts." Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 528 (1947).

[19] Regardless of its cause, this lack of precision in [drafting] criminal statutes affords numerous opportunities for astute and zealous defense counsel to discover or to create ambiguity in the meaning of a statute and then to urge an interpretation that will place the conduct of his client in a less unfavorable light.

Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law,* 3 VAND. L. REV. 531, 531 (1950). Although the adversarial system seems to generate ambiguity, some of the ambiguity may reflect uncertainty embedded in a particular statute:

> If . . . the words [of a statute] are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning, no man of sense would expect to find the question settled by a reference to such a vast and vague field as the "rest of the words of the Act" or "the part of human conduct with which the Act deals".

Willis, *supra* note 13, at 4-5.

the act.[20] Thus, the first step of any court in applying a statute is to determine what the words say.[21] When a court looks to legislative intent, it does so to derive the meaning of the *words*, not any subjective legislative intent.[22] Furthermore, unless defined otherwise, words should be given their plain meaning. "If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists."[23]

In general, the judge should apply, rather than interpret, the law. This leaves the legislature supreme in making the law,[24] sub-

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[20] *But see* 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 . . . .").

[21] *See* Lewis v. United States, 100 S. Ct. 915, 918 (1980) ("The Court has stated repeatedly of late that in any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself."); Frankfurter, *supra* note 18, at 535-36.

[22] Mr. Justice Holmes wrote, "[W]hen counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. *I only want to know what the words mean.*" Frankfurter, *supra* note 18, at 538 (emphasis added).

Justice Frankfurter observed:

> Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members. Against what he believed to be such an attempt Cardozo once protested [dissenting in United States v. Constantina, 296 U.S. 287, 298-99 (1936)]:
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> > "The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psycho-analysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body. . . ."

Id. at 538-39.

[23] *Id.* at 536.

[24] "[S]ound rules of statutory interpretation exist to discover and not to direct the Congressional will." Huddleston v. United States, 415 U.S. 814, 831 (1974) (quoting United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 542 (1943)). *See* 2A C.D. SANDS, *supra* note 10, at §§ 45.03-.07. As Professor Sands observed:

ject only to constitutional parameters. That is not to say that judges should never interpret the law. The legislature does not always draft statutes precisely; [25] by giving words their plain mean-

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> For the interpretation of statutes, "intent of the legislature" is the criterion, or test, that is most often recited. An almost overwhelming majority of judicial opinions on statutory issues are written in the idiom of legislative intent. The reason for this doubtless lies in an assumption that an obligation to construe statutes in such a way as to carry out the will, real or attributed, of the lawmaking branch of the government is mandated by principles of separation of powers.

Id. § 45.05. Professor Johnstone noted that "To deny that the plain meaning rule has any force or validity opens the door to violation of a fundamental objective in statutory interpretation. This position leads to a denial of legislative supremacy in the statutory field." Johnstone, *supra* note 13, at 13.

Apart from the constitutional doctrine of separation of powers, there are other reasons why the legislature should reign supreme in policy making. The legislature is far less insulated from the body politic and, in theory, more accountable to the populace. Moreover, Congress is structured to handle major policy questions; the investigative process, the input from interest groups and the partisan nature of Congress itself lead to compromise in public policy determinations. The courts, on the other hand, are not generally accountable (although they are often influenced by the political tenor of the times) and have limited data-gathering capabilities. The legislature is typically in a better position to make broad-based, integrated political decisions.

[25] It is generally accepted that courts should correct plain drafting errors:

> Sometimes a criminal statute is quite obviously worded erroneously—perhaps containing too much, perhaps containing too little. Suppose a health statute makes it a crime for a hotel proprietor to permit someone to sleep in a "hotel, dining room or restaurant." Defendant, a hotel proprietor, lets a guest sleep in his hotel. Literally, the statute makes him a criminal. Quite obviously, however, a comma was erroneously inserted between "hotel" and "dining room"; as the statute is thus corrected by the court, the defendant would not be guilty.

W. LAFAVE & A. SCOTT, *supra* note 15, at 71-72.

In Crooks v. Harrelson, 282 U.S. 55 (1930), the Supreme Court warned that courts should exercise restraint in correcting legislative "errors":

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of legislative power as to call rather for great caution and circumspection in order to avoid the usurpation of the latter. . . . Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such a case the remedy lies with the law making authority, and not with the courts.

Id. at 60 (citations omitted).

Courts at times have interpreted statutes to avoid manifestly unjust results. *See, e.g.*, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892) (federal statute forbidding the importation of aliens under contract to perform "labor or service of any kind" held not to include ministers). Sometimes, courts limit an otherwise unconstitutional statute with judicial glosses to maintain the statute's constitutionality. This exception acknowledges legislative intent; it must be presumed that the legislature intended to pass a constitutional law. *See* 1 C.D. SANDS, *supra* note 10, § 2.01; 2 *id.* § 45.11.

ing whenever possible, however, courts will effectuate a legislature's true intent and maintain the deference crucial to our notions of separation of powers.

II

THE VALIDITY OF RICO'S LIBERAL CONSTRUCTION CLAUSE

The congressional directive in RICO requires courts to adopt a liberal approach when construing ambiguities within the statute. A minority of courts have declined to adhere to the mandate, questioning its constitutionality on the ground that due process requires strict construction of penal statutes.[26] Additionally, some critics allege that the directive is an unconstitutional assumption of judicial power by Congress. These arguments, however, are unpersuasive. The RICO directive is constitutionally valid.[27] Moreover, policy considerations weigh in favor of construing RICO liberally.[28]

A. *Historical Perspective of Strict Construction*

The courts that suggest the Constitution requires strict construction of penal statutes misunderstand the role of constructional aids, but this broad view of due process is not surprising. American legal history is replete with reiterations of the maxim that courts must construe penal statutes strictly. As Justice Reed observed, "[t]hat criminal statutes are to be construed strictly is a proposition which calls for the citation of no authority."[29]

An analysis of the history of strict construction clearly indicates that the maxim is not constitutionally compelled but rather is a rule that developed during an early era in English law to deal with a particular situation that is merely a shibboleth of the past.[30]

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[26] *See* United States v. Anderson, 626 F.2d 1358, 1369-70 (8th Cir. 1980); United States v. Grzywacz, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting), *cert. denied*, 100 S. Ct. 2152 (1980); United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1979). *See also* United States v. Davis, 576 F.2d 1065, 1069 (3d Cir.) (Aldisert, J., concurring), *cert. denied*, 439 U.S. 836 (1978); United States v. Altese, 542 F.2d 104, 107 (2d Cir. 1976) (Van Graafeiland, J., dissenting), *cert. denied*, 429 U.S. 1039 (1977). *Cf.* United States v. Sutton, 605 F.2d 260, 269 (6th Cir. 1979) (acknowledging mandate but construing statute narrowly), *vacated and submitted for rehearing en banc* April 2, 1980.

[27] *See* notes 29-50 and accompanying text *infra*.

[28] *See* notes 51-58 and accompanying text *infra*.

[29] United States v. Bramblett, 348 U.S. 503, 509 (1954).

[30] For an excellent discussion supporting the general abrogation of the rule of strict construction of penal statutes, see Hall, *supra* note 11. *See generally* Rewis v. United States, 401 U.S. 808, 812 (1971); United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820); R. DICKERSON, *supra* note 16, at 205-12.

The rule of strict construction arose to ameliorate the harshness of English law which imposed the death penalty on convicted felons.[31] Beginning with the reign of Henry VIII, and through 1765, the Benefit of Clergy[32] was ousted for a number of felonies. The courts reacted, tempering the severity of the laws by strictly construing all penal laws. The maxim of strict construction, which had not existed in the sixteenth century, became firmly established by the mid-seventeenth century.

Colonists carried the rule of strict construction to America via common law and English legal texts of the period.[33] American courts adopted the English rule, but its "unrestrained application" led Chief Justice Marshall to admonish the courts:

> [T]hough penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. . . . The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words, there is no room for construction.[34]

The unbridled application of the maxim prompted some states to abrogate the rule explicitly, first for specific types of statutes and then for entire codes.[35] Many states have statutorily imposed a liberal construction rule, generally requiring courts to construe statutes according to the "fair import of their terms" to

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[31] For a historical analysis of strict construction, see Hall, *supra* note 11, at 749-52. *See generally* L. GABEL, BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES (1928).

[32] "According to common law [the benefit of clergy] may be defined as the exemption of members of the clergy from the jurisdiction of the temporal courts in certain criminal cases which normally would not have come within the competence of the ecclesiastical courts." *Id.* at 7 (footnote omitted).

[33] *See, e.g.*, 1 W. BLACKSTONE, COMMENTARIES * 88 ("Penal statutes must be construed strictly."). Blackstone described an application of very strict construction:

> Thus the statute 1 Edw. VI. c. 12. having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but *one horse*, and therefore procured a new act for that purpose in the following year. And, to come nearer our own times, by the statute 14 Geo. II. c.6. stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, "or "other cattle," [sic] being looked upon as much too loose to create a capital offense, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II. 34. extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name.

Id. (emphasis in original)

[34] United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95-96 (1820).

[35] *See* Hall, *supra* note 11, at 752, 752 n.22.

effectuate the purposes of the legislature.[36] The RICO directive extends this trend. Because felonies mandating the death penalty are virtually extinct, the rule of strict construction of penal statutes—"the sole relic of what had once been a veritable conspiracy for administrative nullification"[37]—has outlived its original rationale.

B. *Fair Warning*

The most persuasive modern justification supporting the general rule of strict construction is that "criminals should be given fair warning, before they engage in a course of conduct, as to what conduct is punishable and how severe the punishment is."[38] This is also one of the reasons underlying the constitutionally compelled "void for vagueness" doctrine.[39]

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[36] Many states have abrogated the strict construction rule or specifically provided for liberal construction. *See* ARIZ. REV. STAT. ANN. § 1-211 (1956); ARK. STAT. ANN. §§ 1-203, 1-204 (repealed vol. 1976); CAL. PENAL CODE § 4 (West 1970); DEL. CODE ANN. tit. 11, § 203 (rev. 1974); IDAHO CODE § 73-102 (1973); ILL. REV. STAT. ch. 131, § 1.01 (1975); IOWA CODE § 4.2 (1977); KY. REV. STAT. § 446.080 (1962); MICH. COMP. LAWS § 750.2 (MICH. STAT. ANN. § 28.192 (Callaghan rev. vol. 1962)); MO. REV. STAT. § 1.010 (1978); MONT. REV. CODES ANN. § 45-1-102(2) (1979); NEV. REV. STAT. § 29-106 (1975); N.H. REV. STAT. ANN. § 625.3 (repealed 1974); N.Y. PENAL LAW § 5 (McKinney 1975); N.D. CENT. CODE § 29-01-29 (repl. 1974); OR. REV. STAT. § 161.025(2) (1977); S.D. CODIFIED LAWS ANN. § 22-1-1 (rev. 1979); TENN. CRIM. CODE AND CODE CRIM. P., § 39-105 (Proposed Final Draft, Nov. 1973); TEX. PENAL CODE ANN. tit. 1, § 1.05(a) (Vernon 1974); UTAH CODE ANN. § 76-1-106 (1978).

Although many states have not expressly abrogated strict construction nor mandated liberal construction, they have provided that courts should construe the laws "according to the fair import of their terms" with a view toward effecting their purposes and promoting justice. *See* ALA. CODE § 13A-1-6 (1977); COLO. REV. STAT. § 18-1-102(1) (repealed 1978); HAWAII REV. STAT. § 701-104 (repealed 1976); LA. REV. STAT. ANN. § 14:3 (West 1974); MINN. STAT. ANN. § 609.01 (West 1964); NEB. REV. STAT. § 29-106 (1975); NEV. REV. STAT. § 193.030 (1973); N.J. STAT. ANN. § 2C:1-2 (West 1979); WASH. REV. CODE ANN. § 9A.04.02(2) (1977).

Only two states specifically require strict construction of penal statutes. *See* FLA. STAT. ANN. § 775.021 (West 1976); 1 PA. CONS. STAT. ANN. § 1928 (Purdon Supp. 1974-78).

[37] Hall, *supra* note 11, at 751.

[38] W. LAFAVE & A. SCOTT, *supra* note 15, at 72. Mr. Justice Holmes, in a famous passage from McBoyle v. United States, 283 U.S. 25 (1931), said:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.

Id. at 27.

[39] For an explanation of the "vagueness doctrine," see Note, 109 U. PA. L. REV. 67 (1960). *Compare* Huddleston v. United States, 415 U.S. 814, 831 (1974) ("This rule of narrow construction is rooted in the concern of the law for individual rights, and in the belief that fair warning should be accorded as to what conduct is criminal and punishable by

If a statute on its face is unconstitutionally vague, a court will often adopt a narrow construction to sustain its validity. In contrast, many courts have construed RICO broadly while simultaneously upholding its constitutionality against a vagueness challenge.[40] In *United States v. Hawes*,[41] for example, the Fifth Circuit broadly construed the term "enterprise," affirming the conviction of defendants who had operated an illegal gambling business. In response to the defendants' claim that the broad construction of "enterprise" rendered the statute unconstitutionally vague, the court said that " 'any person' of average intelligence, on a clear reading of that statute, together with relevant definitional provisions, could not help but realize that they would be criminally liable for participating in 'any enterprise,' including their own, 'through a pattern of racketeering activity.' "[42]

The vagueness doctrine guarantees that a potential offender will have adequate notice of the consequences of his future conduct. There is no fair warning problem under RICO because the act proscribes activities by reference to other state and federal statutes.[43] RICO can only be unconstitutionally vague if a statute

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deprivation of liberty or property.") *with* Connally v. General Constr. Co., 269 U.S. 385, 391 (1926) ("[A criminal] statute . . . so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application [is unconstitutionally vague].").

> Two principal postulates have grown out of the philosophy that an individual's life and liberty are to be vigilantly safeguarded. One rule is that criminal statutes are to be strictly construed; the other, that a statute which fails to meet certain requirements for definiteness of standard is not a legal basis for punishment. These approaches are often the same because they are rooted in the same basic consideration and because the distinction between them is primarily one of degree. Thus, the question in strict construction is whether particular conduct falls within the scope of the statute. The problem of vagueness, on the other hand, presents this question and in addition the question whether a court or individual *ever* can tell when conduct is or is not included and therefore whether the statute should fall completely.

Quarles, *supra* note 19, at 532.

[40] *See* United States v. Anderson, 626 F.2d 1358, 1364-65 (8th Cir. 1980) ("Some defendants have challenged the constitutionality of RICO on the grounds of vagueness and double jeopardy, but no court yet has found the Act unconstitutional.") (footnote omitted); Atkinson, *"Racketeer Influenced and Corrupt Organizations," 18 U.S.C. §§ 1961-68; Broadest of the Criminal Statutes*, 69 J. CRIM. L. & CRIMINOLOGY 1, 18 (1978).

[41] 529 F.2d 472 (5th Cir. 1976).

[42] *Id.* at 479.

[43] As used in this chapter—

> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under

defining an underlying predicate offense is impermissibly vague. Assuming that the predicate crimes are adequately defined, a person seeking to comply with the law need not speculate whether his action will violate RICO; he need only eschew violating an underlying offense. Futhermore, RICO requires the commission of at least two racketeering acts, which also provides the would-be offender with sufficient notice that his actions may subject him to the additional penalties imposed by RICO. Finally, to the extent that the activities proscribed in RICO are *malum in se* rather than *malum prohibitum,* courts should apply a more relaxed standard of what constitutes fair warning.[44]

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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 1034 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments) section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States ....

18 U.S.C. § 1961 (Supp. III 1979).

[44] The soundest rationale [for the rule of strict construction] is that all potential violators are entitled to fair warning. Here, it is useful to distinguish crimes that involve acts generally assumed to be antisocial *(malum in se),* in which a warning tends to inhere in the act itself, from crimes involving acts that are wrong only because they have been officially proscribed *(malum prohibitum),* which require independent warnings.

....

A rule of strict interpretation or application seems unjustified where the statute carries a strong probable meaning of criminality (even though it may not be entirely free of doubt) or where an independent warning is unneeded *(malum in se).*

R. DICKERSON, *supra* note 16, at 209-11. All of the predicate crimes listed by RICO as racketeering acts are arguably *malum in se.* The state crimes incorporated by reference in RICO are among the oldest and most heinous crimes. In addition, the federal crimes all carry a strong probable meaning of criminality. *See generally* United States v. Nardello, 393 U.S. 286 (1969).

C. *Separation of Powers*

Some critics allege that the RICO directive violates the separation of powers doctrine by delegating legislative power to the judiciary.[45] A liberal construction directive, however, strengthens, rather than violates, the separation of powers principles. Through the directive, the legislature informs the judiciary how to resolve statutory ambiguities.[46] The directive is analogous to statutory definitions indicating the special meaning the legislature attaches to a particular word or phrase in the statute. No one seriously

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[45] The argument is sometimes advanced that strict construction of criminal statutes is advisable because of the separation of powers among the branches of government. This argument must assume that courts punish or legislate when they construe statutes liberally or at least non-strictly and that the power to punish is given to the legislature alone. The answer to this proposition is obvious. It is the primary duty of the legislature rather than the judiciary to make the law, but the courts often make law by confining or broadening the principles of the common law. The function of the courts is primarily to construe or interpret the laws, but this requirement does not mean that the courts should construe or interpret the law in any particular manner. Separation of powers is a doctrine which may militate against the validity of a statute when the statute is so vague as actually to have no meaning. If a court should by interpretation or construction give vitality to a meaningless combination of words, it would undoubtedly be legislating and its action would be obnoxious to general principles of government in this country. But when a statute is ambiguous, interpretation is necessary. And if the court is "making law" when it interprets the statute, it is making law regardless of whether its interpretation is strict or liberal. To say that a court is legislating when it construes a statute to include doubtful conduct seems to require the concession that a strict construction , by limiting the operation of the statute, repeals the statute in part, and thus legislates just as fully as in the converse situation.

Quarles, *supra* note 19, at 534.

[46] [S]uch provisions [legislative mandates for liberal construction] can be rationalized as requests to the courts to stop subverting normal meanings under the guise of "interpretation." Rather than a legislative intrusion into the province of the courts, it may merely be an attempt, in the form of a rule of law, to keep the courts from paying insufficient deference to its pronouncements in the field of policy making, and thus from usurping the functions of the legislature.

C. NUTTING, S. ELLIOT, & R. DICKERSON, LEGISLATION 397 (1969). *See* R. DICKERSON, *supra* note 16, at 209; Hall, *supra* note 11, at 757. In response to the claim that a liberal construction clause results in legislative usurpation of the judicial function of interpreting the law, one commentator argues:

> Any serious suggestion at this day that since interpretation is a judicial function a general interpretive act, applicable only to future statutes, would be unconstitutional, could hardly be taken seriously. In both England and America we have long proceeded on the basis that, although ultimate interpretation is for the courts, it is within the legislative province to lay down rules of interpretation for the future.

Fordham & Leach, *supra* note 20, at 448.

doubts the power of the legislature to define words as it wishes.[47] Similarly, the directive provides the judiciary with a clear indication of the legislature's often amorphous intent. In essence, the directive prescribes the attitude that courts should adopt when construing the statute.[48]

D. *Policy Justifications Favoring Liberal Construction*

Policy reasons support abandoning the strict construction maxim. The rule of strict construction encourages a court to look for ambiguities in the law. To laymen, when a court construes a statute strictly, the court seems to rely on fine technicalities and dubious distinctions rather than a commonsense reading of the words in the statute. Roscoe Pound warned that "[t]he public cannot be relied upon permanently to tolerate judicial obstruction or nullification of the social policies to which more and more it is compelled to be committed."[49] Consequently, liberal construction may bolster public confidence in the legal system by making the law appear more rational.[50]

Liberal construction clauses provide legislatures with the opportunity to exercise their legislative responsibility to the fullest by providing guidance to courts struggling with ambiguities in the statute. Given the great incidence of ambiguity in statutes and the myriad of conflicting constructional aids that are available, few people attempting to abide by a statute can have confidence in

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[47] *See* 1A C.D. SANDS, *supra* note 10, at §§ 20.08, 27.02.

[48] *See* 2A C.D. SANDS, *supra* note 10, at § 58.01. Notwithstanding a legislative mandate, some courts have ignored or refused to apply liberal construction clauses. *See* W. LAFAVE & A. SCOTT, CRIMINAL LAW 73, 73 n.26 (1972); Hall, *supra* note 11, at 754-55. For examples of cases that have ignored the mandate in RICO, see United States v. Stofsky, 409 F. Supp. 609 (S.D.N.Y. 1973) ("pattern" construed as requiring more than accidental or unrelated behavior); United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975) (narrowly construing "enterprise" to legitimate businesses) (overruled by implication in United States v. Altese, 542 F.2d 104 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977)). Similarly, courts often ignore liberal construction clauses that abrogate the common law rule of strict construction:

> The effectiveness of the statutes is very difficult to determine. Presumably, if followed in good spirit they would bring about wider applications of primary statutes but this can hardly be demonstrated in fact. One cannot be sure that, absent the interpretive provision, the result would have been different in a particular case. We can say that they, by and large, have served to take away one formulation otherwise available to explain a restrictive interpretation. The statutes have not universally achieved even this much. There have been cases where they were ignored and the old canon applied.

Fordham & Leach, *supra* note 20, at 450-51.

[49] Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 407 (1908).

[50] *See* Hall, *supra* note 11, at 760, 760 n.63.

their understanding of a law until after a court has opted for one or more of the possible constructional aids and has interpreted the statute.[51] Mr. Justice Jackson once bemoaned this unpredictability and suggested that interpretive provisions would ameliorate the situation by requiring or limiting the choice of construction open to the court.[52] Although not a substitute for careful drafting, interpretational provisions give Congress some control over the attitude courts will adopt, enhancing the likelihood that the construction will reflect the true intent of Congress.

The Supreme Court has never held that strict construction of penal statutes is constitutionally compelled.[53] In fact, the Court has occasionally exempted statutes from the rule.[54] A persuasive argument can be made that even without a legislative directive, courts should construe most penal statutes liberally. As Professor Hall, the leading proponent of this view, has stated, "there is no sound reason for a general doctrine of strict construction of penal statutes, and *prima facie* all such should have as liberal a construc-

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[51] The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case.

. . . .

Yet, as matters stand today, I do not see how Congress can know, even roughly, the effect that will ultimately be given to any language it may use.

Jackson, *The Meaning of Statutes,* 34 A.B.A.J. 535, 538 (1948).

[52] Though it would not dispel all the doubts which are inherent in the situation, it would help give objectivity to the process of interpretation and assurance to drafting of statutes, if we could have general acceptance by the bench as well as the Bar of a few basic principles of statutory construction.

Id.

[53] Two cases commonly cited to support the proposition that strict construction is constitutionally mandated are Rewis v. United States, 401 U.S. 808 (1971) and Bell v. United States, 349 U.S. 81 (1955). *See* United States v. Mandel, 415 F. Supp. 997, 1022 (D. Md. 1976); United States v. Moeller, 402 F. Supp. 49, 59 (D. Conn. 1975). In *Rewis* the Court noted that "ambiguity concerning the ambit of criminal statutes *should* be resolved in favor of lenity." 401 U.S. at 812 (citing *Bell*) (emphasis added). The Court, however, also observed in *Rewis* that "the questions in this case are solely statutory. No issue of constitutional dimension is presented." *Id.* at 811 n.5. Moreover, the use of the word "should" in *Bell* and *Rewis* suggests that the strict construction rule is prudential rather than mandatory.

[54] *See* Gore v. United States, 357 U.S. 386 (1958) (Narcotic Drugs Import and Export Act); United States v. Brown, 333 U.S. 18, 25 (1948) (Federal Escape Act) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose."); New York Cent. R.R. v. United States, 265 U.S. 41 (1924) (Safety Appliance Act); Atchison, T. & S. F. Ry. v. United States, 244 U.S. 336 (1917) (Hours of Service Act held "remedial" and therefore subject to liberal construction); United States v. Kordel, 164 F.2d 913 (7th Cir. 1947), (Federal Food, Drug, and Cosmetic Act), *aff'd,* 335 U.S. 345 (1948).

tion as statutes generally, [except for] certain penal statutes [which] should be strictly construed to avoid injustice."[55] Fortunately, Congress has obviated the necessity of arguing for a general rule of liberal construction in RICO by including a specific mandate in the statute.

Significant policy considerations support Congress's decision to include a liberal construction provision in RICO. In enacting RICO, Congress intended to curtail and ideally eliminate the debilitating effect of racketeering activity on American society. Furthermore, Congress was concerned about the general deleterious impact of organized crime on commerce. To effectively attack these perceived evils,[56] Congress enacted a very broad and strin-

[55] Hall, *supra* note 11, at 762-63 (footnote omitted). Professor Hall does not suggest that all penal statutes should be liberally construed under all circumstances. He would exempt the following situations from application of a general rule of liberal construction: (1) "A statute imposing a penalty which the court regards as disproportionately heavy ... as compared with the culpability of the conduct which is sought to be penalized." *Id.* at 763-64 (footnote omitted); (2) "Where an honest attempt is ... made by those to whom the law applies to ascertain the precise limits of the legal sanction imposed ... in the regulation of business practices for the social welfare ...." *Id.* at 764-65 (footnote omitted); (3) "[O]ld legislation which is inapplicable [because of] changed social or economic conditions ...." *Id.* at 767 (footnote omitted).

[56] The Congressional statement of "Findings and Purpose" indicates the severity of the problem Congress was tackling.

> STATEMENT OF FINDINGS AND PURPOSE
>
> 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 dangrous 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 crime.

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23.

gent statute. Consistent with its goal of using innovative measures to tackle a severe problem,[57] Congress provided a liberal construction clause to ensure that RICO would have the greatest possible impact on the problem of racketeering. Because no constitutional impediments deny Congress's ability to provide interpretational clauses, courts have no basis for refusing to obey the express liberal construction mandate in RICO.[58]

III

APPLYING RICO'S LIBERAL CONSTRUCTION DIRECTIVE

To illustrate the application of the general principles developed above, it is helpful to analyze one of the most controversial questions arising under RICO—the scope of the term "enterprise." The Act defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not

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[57] *See* S. REP. No. 617, 91st Cong., 1st Sess. 79, 80 (1969). Professor Hall anticipated the emergence of this trend as early as 1935:

> Changing conditions of modern civilization, and the growth of scientific knowledge on criminology, render imperative a new approach to the problems of crime. New categories of crimes and criminals cannot always be accurately defined on the first attempt. Shall the new machinery be nullified from the start under the guise of "strict construction", or shall it be carried out liberally in the spirit in which it is conceived? Merely to state the issue is to answer it.

Hall, *supra* note 11, at 761 (footnotes omitted).

[58] In *United States v. Mandel*, 415 F. Supp. 997 (D. Md. 1976), *aff'd in part, vacated and remanded in part*, 591 F.2d 1347 (4th Cir. 1979), the district court limited the scope of RICO's liberal construction clause by holding it inapplicable to criminal provisions. The court distinguished the statute's penal (criminal) provisions from its remedial (civil) provisions. Professor Sands had previously noted the inadequacy of such an approach:

> It is an oversimplification to say that an act will be given a liberal or strict interpretation depending, for example, on the single factor of its being either remedial or penal, respectively, since a particular statute may be both penal and at the same time also remedial, in the sense that all original legislation is passed to remedy some prior "evil" in society's arrangements.

2A C.D. SANDS, *supra* note 10, at 461. More important, RICO's liberal construction clause on its face refers to "the provisions of this title" without distinguishing further. If Congress had intended to limit the scope of the directive, it easily could have inserted a modifier before the word "provision." *But see United States v. Grzywacz*, 603 F.2d 682, 692 (7th Cir. 1979) (Swygert, J., dissenting) ("It is unclear whether Congress intended its directive to apply to those sections which establish criminal liability or merely to the 'remedial' provisions of Title IX."), *cert. denied*, 100 S. Ct. 2152 (1980); United States v. Davis, 576 F.2d 1065, 1071 (3d Cir.) (Aldisert, J., concurring) ("[Section 904] must be read in light of the language of the statute and the legislative history. And in viewing the legislative purpose, I detect nothing that precludes the application of the rule of narrow construction of penal statutes."), *cert. denied*, 439 U.S. 836 (1978). *See also* Bradley, *Racketeers, Congress, and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 860 n.126 (1980).

a legal entity."[59] Defense counsel have attempted to convince courts that the term "enterprise" is ambiguous,[60] arguing that the legislative history of the Act indicates that RICO's sole purpose is to prevent infiltration of organized crime into legitimate businesses and, therefore, that RICO does not apply to enterprises established soley for illicit purposes.[61]

Most of the circuit courts of appeals that have considered the issue have broadly construed the term "enterprise."[62] In *United States v. Sutton*,[63] however, the Sixth Circuit held that a RICO enterprise must be "organized and acting for some ostensibly lawful purpose."[64] The court, therefore, reversed the RICO convictions

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[59] 18 U.S.C. § 1961(4) (1976).

[60] The liberal construction clause in RICO should apply only when a court has found an ambiguity in the statute. Because the Supreme Court has observed that the Organized Crime Control Act "is a carefully crafted piece of legislation," (Ianelli v. United States, 420 U.S. 770, 789 (1975)), courts should presume that the meaning of a particular word or phrase in the Act is plain rather than equivocal.

[61] *Compare* United States v. Sutton, 605 F.2d 260, 267 (6th Cir. 1979) ("The construction unmistakenly endorsed by the legislative history is the one appellants have urged—limiting section 1962(e) to the conduct of a 'legitimate' enterprise's affairs through racketeering activity."), *vacated and submitted for rehearing en banc* April 2, 1980, *with* United States v. Elliott, 571 F.2d 880, 897 (5th Cir. 1978) ("On its face and in light of its legislative history, the Act clearly encompasses ... 'enterprises which are from their inception organized for illicit purposes.'" (quoting United States v. McLauren, 557 F.2d 1064, 1073 (5th Cir. 1977), *cert. denied*, 434 U.S. 1020 (1978))), *cert. denied*, 439 U.S. 953 (1978).

[62] *See* United States v. Provenzano, 620 F.2d 985, 992-93 (3d Cir. 1980); United States v. Baker, 617 F.2d 1060, 1061 (4th Cir. 1980); United States v. Whitehead, 618 F.2d 523, 525 n.1 (4th Cir. 1980); United States v. Aleman, 609 F.2d 298, 302-06 (7th Cir. 1979); United States v. Rone, 598 F.2d 564, 568, (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980); United States v. Swiderski, 593 F.2d 1246, 1248-49 (D.C. Cir. 1978), *cert. denied*, 441 U.S. 933 (1979); United States v. Elliott, 571 F.2d 880, 896-99 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978); United States v. Altese, 542 F.2d 104, 106-07 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *But see* United States v. Turkette, No. 79-1545, slip op. at 2-19 (1st Civ. Sept. 23, 1980); United States v. Anderson, 626 F.2d 1358, 1364-65 (8th Cir. 1980). In United States v. Sutton, 605 F.2d 260, 270 (6th Cir. 1979), the Sixth Circuit also construed "enterprise" narrowly. Subsequently, however, the court vacated the decision and reheard the case en banc. The Tenth Circuit has not considered the issue.

[63] 605 F.2d 260 (6th Cir. 1979). *vacated and submitted for rehearing en banc* April 2, 1980.

[64] *Id.* at 270. In United States v. Anderson, 626 F.2d 1358, 1372 (8th Cir. 1980), the Eighth Circuit made a similar argument:

> 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."

According to the *Anderson* court, the holding differs from *Sutton* "only to extent that we do not rest our holding on the word 'legitimate' but rather on the need for a discrete economic association existing separately from the racketeering activity." *Id.* at 30. *See also* Bradley, *supra* note 58, at 854-55.

of defendants who had organized for the sole purpose of engaging in criminal activities. Although the court subsequently vacated the decision and reheard the case en banc, the original panel's opinion provides a useful context for examining the application of RICO's liberal construction clause.

In *Sutton,* nine defendants had been convicted under RICO for conducting a racketeering enterprise. The Court of Appeals for the Sixth Circuit determined that by construing the term "enterprise" to include solely illegitimate organizations, the district court had effectively read the enterprise requirement out of the statute. The Court of Appeals argued that under the lower court's broad interpretaton, every "pattern of racketeering activity"[65] would also be an "enterprise," thus eliminating the separate enterprise requirement.[66]

Although the court's argument has surface appeal, its rationale does not withstand close scrutiny. The *Sutton* court failed to recognize that the terms "enterprise" and "pattern of racketeering activity" are not coterminous even in solely illegitimate organizations. "Enterprise" describes the *unit* of organization required under the statute. "Pattern of racketeering activity" describes the *type* of activity in which the enterprise must engage to violate the statute.

Moreover, by holding that a solely illegitimate organization is not an "enterprise," the court ignored the plain meaning of RICO, which does not limit its prohibitions to legitimate enterprises. Rather, it includes *any* enterprise,[67] although Congress

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[65] *See* 18 U.S.C. § 1961(5) (1976) (defining "pattern of racketeering activity" under RICO).

[66] It requires no great insight to recognize that applying the statute in [the fashion suggested by the government] renders the "enterprise" element of the crime wholly redundant and transforms the statute into a simple proscription against "patterns of racketeering activity." Under [this approach] every "pattern of racketeering activity" becomes an "enterprise" whose affairs are conducted through the "pattern of racketeering activity." Plainly, that is not the statute Congress has written.

United States v. Sutton, 605 F.2d 260, 265-66 (6th Cir. 1979), *vacated and submitted for rehearing en banc* April 2, 1980. *See* United States v. Anderson, 626 F.2d 1358, 1369 (8th Cir. 1980) ("[T]he Government proved the enterprise element of the offense solely by evidence indicating an association to commit the pattern of racketeering activity. This interpretation of the statute effectively eliminated the enterprise element of the offense.").

[67] In fashioning the statute, Congress promulgated a broad legislative scheme to encompass a variety of criminal activities, regardless of their direct effect on legitimate business. The words "legitimate" or "illegitimate" appear nowhere in Title IX, and nowhere does Congress evince an intent to make such a distinc-

could easily have limited the statute by inserting the word "legitimate" before the word "enterprise." [68]

Assuming, arguendo, that the *Sutton* court correctly rejected the plain meaning doctrine, its narrow construction of the word "enterprise" is still unjustifiable in light of RICO's liberal construction directive. The court stated that the liberal construction clause,

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> tion. Section 1962(c) does not restrict "enterprise" to a legitimate one only because it uses the words "*any enterprise.*" Further, § 1961(4) provides an all-encompasing definition of enterprise, including "any union or group of individuals associated in fact although not a legal entity." Broad and unrestricted use of the term "enterprise" appears throughout Title IX. 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.

United States v. Rone, 598 F.2d 564, 568 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 1345 (1980). *See* United States v. Altese, 542 F.2d 104, 106 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *But see* United States v. Turkette, No. 79-1545, slip op. at 6 (1st Cir. Sept. 23, 1980) ("[T]he government uses the word 'any' to engraft into the section a phrase that is not there: 'enterprise includes' wholly criminal activity.")

[68] In *United States v. Anderson*, 626 F.2d 1358, 1366 (8th Cir. 1980), the court applied the *ejusdem generis* rule of statutory construction to show that the language of RICO is not plain, and therefore, that the court should "probe more deeply into the statutory language and structure."

> The syntactical form of the section 1961(4) definition warrants application of the traditional maxim of statutory construction, *noscitur a sociis*. The definition sets forth two conjunctive phrases, listing the types of groups included in the definition of "enterprise." The first phrase describes legal entities: "individual, partnership, corporation, association, or other legal entity." The second phrase refers to non-legal entitles: "any union or group of individuals associated in fact although not a legal entity." In this case, the enterprise charged in the indictment allegedly falls within the category of a "group of individuals associated in fact although not a legal entity." We find that these general words are *ejusdem generis* to the previous words defining types of groups which can constitute an enterprise. The meaning of the general phrase, "group of individuals associated in fact although not a legal entity," is thus controlled by the preceding specifically enumerated examples.

Id. According to the doctrine of *ejusdem generis*, "[w]here general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A C.D. SANDS, *supra* note 10, at § 47.17.

The *Anderson* court clearly misused the doctrine. The court noted that the first half of the definition of "enterprise" applies to legal entities. Certainly, it makes sense to define the scope of "other legal entity" with reference to the more specific enumerations. The second phrase of the definition, however, is conjunctive, referring to "any union or group of individuals associated in fact although not a legal entity." In other words, the second phrase expands the definition to include all non-legal entities associated in fact. The second phrase does not pertain to the class enumerated by the specific examples in the first clause (legal entities). Consequently, the doctrine of *ejusdem generis* has no application. In addition, the very use of this doctrine contravenes the liberal construction directive because *ejusdem generis* is a form of strict construction. *See* United States v. Powell, 423 U.S. 87, 90-91 (1975).

by its own terms, should only be used to effectuate RICO's remedial purpose. The court concluded that by limiting the scope of "enterprise" to legitimate organizations, it was fully serving the Act's sole remedial purpose.[69]

The *Sutton* court attempted to support its position by relying on the Act's legislative history.[70] The court cited many different

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[69] The *Sutton* court explained:

> Although Congress has declared that RICO's provisions should be "liberally construed to effectuate its remedial *purpose*," we do not read that directive as authorizing us to write a new and substantially different law. Appellants' construction [limiting the scope of "enterprise" to legitimate organizations] fully serves the statute's remedial *purpose*.

605 F.2d at 269 (emphasis added). Apparently, the *Sutton* court misread the liberal construction directive. The directive clearly refers to the statute's "remedial *purposes*." The *Sutton* court twice referred to "purpose." This misreading may have led the court to believe that the statute had only one remedial purpose—the elimination of the infiltration of organized crime into legitimate businesses—a conclusion that the explicitness of the directive belies. *See* United States v. Anderson, 626 F.2d & 1358, 1370 (8th Cir. 1980) (referring to RICO's "remedial *purpose*") (emphasis added).

[70] The court found the legislative history to be "remarkable for the clarity with which it speaks to the issue of the intended scope of the 'enterprise' element of the crime. . . . The construction unmistakably endorsed by the legislative history is the one appellants have urged—limiting section 1962(c) to the conduct of a 'legitimate' enterprise's affairs through racketeering activity." 605 F.2d at 266-67. *See* United States v. Anderson, 626 F.2d 1358, 1371 (8th Cir. 1980) ("The relevant legislative history bolsters our interpretation of the definition of a RICO enterprise.").

Although a questionable practice, courts customarily turn to legislative history to resolve specific questions concerning the ambit of a statute. Too often courts view legislative history as a panacea rather than an occasionally useful aid to clarification. A court, however, should rarely turn to legislative history when the language of the statute is clear.

> It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. Legislative materials may be without probative value, or contradictory, or ambiguous, it is true, and in such cases will not be permitted to control the customary meaning of words or overcome rules of syntax or construction found by experience to be workable; they can scarcely be deemed to be incompetent or irrelevant.

United States v. Dickerson, 310 U.S. 554, 562 (1940).

This position is not universally accepted. The English judiciary generally recoils at the suggestion that legislative history be used to discern the "intent" of Parliament. *See generally* R. DIAS, JURISPRUDENCE 218-45 (4th ed. 1976). Professor Dickerson persuasively argues that "[t]he more realistic approach to legislative history would be to end or severely limit its judicial use." R. DICKERSON, *supra* note 16, at 195.

In Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), Justice Jackson presented a forceful and eloquent critique of judicial use of legislative history:

> Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. . . . It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill the President

legislative sources supporting the proposition that the *only* purpose of RICO is the "elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." [71] In drawing this conclusion, the court fell prey to a logical fallacy. The court erroneously drew the negative implication that "enterprise" does not encompass solely illegitimate organizations from the affirmative statement that "enterprise" does encompass legitimate organizations. Although it is true that the purpose found by the *Sutton* court is the primary purpose of the statute, it does not follow that it is the *sole* purpose.[72] This

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endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. . . . Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: "We do not inquire what the legislature meant; we ask only what the statute means."

Id. at 395-97 (Jackson, J., concurring) (citation omitted).

[71] 605 F.2d at 267 (quoting S. REP. No. 617, 91st Cong., 1st Sess. 76 (1969)).

[72] One of the bill's primary sponsors, Senator McClellan, realized this. In an oft-quoted passage, he noted that the bill has a broad scope aimed at the *activities* normally engaged in by organized crime.

[The New York] city bar committee attacks title IX and the statement in the Senate report that the list of crimes the commission of which constitutes one element of the prohibitions in title IX is a list of "specific State and Federal criminal statutes now characteristically violated by members of organized crime." The bar committee complains that the list is too inclusive, since it includes offenses which often are committed hy persons not engaged in organized crime. The Senate report does not claim, however, that the listed offenses are committed *primarily* by members of organized crime, only that those offenses are characteristic of organized crime. The listed offenses lend themselves to organized commercial expolitation, unlike some other offenses such as rape, and experience has shown they are commonly committed by participants in organized crime. That is all the title IX list of offenses purports to be, that is all the Senate report claims it to be, and that is all it should be.

McClellan, *supra* note 2, at 142-43 (footnote omitted) (emphasis in original).

The Supreme Court has never ruled directly on the scope of RICO's proscriptions. In *Iannelli v. United States*, 420 U.S. 770 (1975) (§ 1955 illegal gambling case), the Court stated that "Title IX . . . seeks to prevent the infiltration of legitimate business operations affecting interstate commerce by individuals who have obtained investment capital from a pat-

view is buttressed by the title of the statute, "Racketeer Influenced *and* Corrupt Organizations."[73] If Congress had intended the Act to apply only to legitimate organizations, the title "Racketeer Influenced Organizations" would have sufficed. Instead, Congress indicated that "Corrupt Organizations" are also within the purview of the act. Any other reading of the statute renders the words "and Corrupt Organizations" surplusage.

Moreover, contrary to the *Sutton* court's assertion, the legislative history is hardly clear. For example, although one commentator stated that "the published legislative history of Title IX ... convincingly indicates that Congress aimed exclusively at legitimate organizations,"[74] another commentator found that the "legislative history supports the broad interpretation of 'enterprise' as encompassing illegitimate organizations."[75] Most of the circuits considering the issue have adopted the latter view.[76]

The plain meaning of the statute covers illegitimate enterprises. The legislative history is equivocal. The liberal construction clause mandates that the court resolve doubts in favor of the state. Accordingly, courts should construe "enterprise" to include solely illegitimate organizations. The result is not unfair. People engaged in solely illicit enterprises pose a pernicious threat to society. Therefore, "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."[77]

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tern of racketeering activity." *Id.* at 787 n.19 (dicta). Some courts have inferred that this was RICO's sole purpose. The Fifth Circuit, however, recognized that this is an overly expansive interpretation of *Ianelli:*

> Although we quite agree with [the *Ianelli*] statement, we see no indication that it was intended to describe fully, or to limit, the ambit of the Act's coverage. The appellants would have us read the footnote in question in a manner reminiscent of the principle of statutory construction *expressio unius est exclusio alterius,* adopting the view that the Court has by negative implication excluded thoroughly illicit businesses from the Act's proscriptions. This we decline to do absent a clearer and fuller directive from the Court.

United States v. McLaurin, 557 F.2d 1064, 1073 (5th Cir. 1977).

[73] 18 U.S.C. §§ 1961-1968 (1976 & Supp. III 1979) (emphasis added).

[74] Comment, *Title IX of the Organized Crime Control Act of 1970: An Analysis of Issues Arising In Its Interpretation,* 27 DE PAUL L. REV. 89, 98 (1977) (footnote omitted).

[75] *See* Atkinson, *supra* note 40, at 13.

[76] *See* note 62 *supra.*

[77] United States v. Rone, 598 F.2d 564, 569 (9th Cir. 1979).

IV

CONCLUSION

In the final analysis, the construction of RICO, or any other law, reduces to a commonsense reading of the statute. The words of the statute—the culmination of the legislative process—deserve the utmost deference. Because they embody the objective intent of the legislature, the words should be given their plain meaning whenever possible.

When a statute is ambiguous, courts must decide whether to construe the language liberally or strictly. Congress has, through the liberal construction clause, mandated the approach the courts should adopt when construing RICO. Unquestionably, RICO is a broad statute designed to provide prosecutors and plaintiffs with an effective weapon against organized crime. It it catches too many in its broad criminal net, it is for Congress to amend the law, and not for the courts to emasculate it under the guise of interpretation.[78]

Craig W. Palm

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[78] As this Note went to press, the Sixth Circuit Court of Appeals, *en banc,* decided United States v. Sutton, No. 78-5134-39, slip op. (6th Cir. Dec. 3, 1980). *See* notes 62-77 and accompanying text *supra.* In a split decision, the court, contrary to the vacated panel decision, held that the term "enterprise" unambiguously included wholly illegitimate organizations. *Id.* at 13. (Alternatively, the court found that an "ostensibly legitimate" enterprise was involved. *Id.* at 16.)

Relying on the plain language of the statute's definition of enterprise, the court refused to invoke the canon of strict construction "particularly [because] Congress provided specifically that [RICO] 'Be liberally construed to effectuate its remedial purposes.'" *Id.* at 13 (citation omitted). The majority's rationale and holding in this portion of the opinion substantially comports with the analysis and conclusions of this Note.