ORGANIZED CRIME AND THE INFILTRATION OF LEGITIMATE BUSINESS: CIVIL REMEDIES FOR "CRIMINAL ACTIVITY"

I. INTRODUCTION

Members of organized crime operations often rationalize their conduct with claims that theirs is just another business and they are ordinary businessmen. In 1970, Congress may have used such claims as a basis for developing new methods of controlling organized crime activities. The result was Title IX of the Organized Crime Control Act of 1970 (OCCA-70), designed, through the use of civil remedies of the type traditionally used against antitrust violators, to prevent the infiltration of legitimate business enterprises by organized crime.

1 The secretive and hostile nature of criminal activity has made it impossible to determine the precise structure of "organized crime." But there is sufficient available information to support the conclusion that there are one or more such organizations in existence. See U.S. President's Comm'n on Law Enforcement and the Administration of Justice, Task Force Report: Organized Crime 33 (1967) (hereinafter cited as Task Force Report).

2 See, e.g., Eskenazi, 'We're Just Businessmen,' Bookie Insists, N.Y. Times, Jan. 20, 1975, at 36, col. 5.


4 Sherman Act § 4, 15 U.S.C. § 4 (1970). One commentator, who was critical of the entire OCCA-70, called Title IX the worst provision of the Act. He described it as a "melange which appears to have come from someone's notion that concepts borrowed from the antitrust field might be applied to get at successful racketeers who have used their ill-gotten gains to expand into legitimate enterprises." King, Wild Shots in the War on Crime, 20 J. PUB. L. 85, 108 (1971) (footnote omitted).

5 For the significance and propriety of the term "legitimate" see text accompanying notes 36-76 infra.

6 Actually none of the provisions of OCCA-70 are limited to only the activities of "organized crime." United States v. Campanale, Nos. 73-2643, 73-2833, 73-2747, 73-2865 (9th Cir., June 4, 1975):

There is no doubt that Congress was concerned with organized crime in passing this amendment to the Hobbs Act. The official short title of the statute evidences this concern. But quite obviously Congress focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence. The statute, 18 U.S.C. § 1962, makes unlawful such activities no matter who engages therein.

Evidence of such incursion is well documented. In a report on the forerunners of Title IX the Antitrust Section of the American Bar Association, relying primarily on the Task Force Report for its evidence, said:

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

Section 1962(a) defines the "prohibited activities" to which Title IX is directed. Section 1962(a) prohibits the use of proceeds derived from a pattern of racketeering activity or through collection of an unlawful debt to acquire an interest in an enter-

(1970): "Therefore although it is entitled 'The Organized Crime Control Act of [1970]', the term, 'organized crime' indicates primarily the occasion and motivation for its enactment and only in varying degrees the target for its impact."


The Antitrust Section Report also contains a brief history of the use of antitrust laws in combating organized crime infiltration of legitimate business. The Section found the antitrust laws insufficient and endorsed Title IX.


10 18 U.S.C. § 1962(a) (1970) 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, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or [sic] racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one
prise engaging in or affecting interstate commerce. Section 1962(b)\textsuperscript{11} proscribes the acquisition of an interest in such an enterprise by means of a pattern of racketeering or loansharking. Section 1962(c)\textsuperscript{12} focuses on the method of operating the enterprise once it is acquired and prohibits the use of racketeering or loansharking in the conduct of the business.\textsuperscript{13}

The key phrase, "racketeering activity," is given a broad scope in section 1961(1),\textsuperscript{14} where it is defined to include a mul-

\textsuperscript{11} 18 U.S.C. § 1962(b) (1970) 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.

\textsuperscript{12} 18 U.S.C. § 1962(c) (1970) 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.

\textsuperscript{13} See generally text accompanying note 53 infra.

\textsuperscript{14} 18 U.S.C. § 1961(1) (1970) provides:

"[R]acketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 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 bankruptcy fraud, 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.
titude of crimes. Section 1961(5)\textsuperscript{15} sets two as the minimum number of racketeering acts necessary to create a "pattern." Section 1963,\textsuperscript{16} entitled "Criminal Penalties," includes a maximum prison sentence of twenty years, a maximum fine of $25,000, and the forfeiture of any business interest acquired or held in violation of the Act. Section 1964\textsuperscript{17} permits civil actions against violators of section 1962. Subsection (a) gives United States district courts jurisdiction to "prevent and restrain violations of section 1962," through orders requiring divestiture, restrictions on future activities and investments, dissolution or reorganization of the enterprise, or other orders at the court's discretion.\textsuperscript{18} Subsection (b) gives the Attorney General authority to institute these civil actions; subsection (c) permits private individuals to bring treble damage suits; and subsection (d) provides for collateral estoppel in any civil action as to issues decided in a previous criminal prosecution.

The remaining sections of Title IX govern venue and service of process,\textsuperscript{19} expedition of cases,\textsuperscript{20} public access to the proceedings,\textsuperscript{21} and the use of the "civil investigative demand."\textsuperscript{22}

Title IX, in its entirety, is an attempt to meet, in part, the criticism that the criminal law has been oriented toward the individual too much to be of much use as a weapon against or-

\textsuperscript{18} 18 U.S.C. § 1964(a) (1970) provides:
The district courts of the United States have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

Under the civil investigative demand, the Attorney General can compel presentation of documentary material he believes relevant to a civil racketeering investigation. It is the civil counterpart to the grand jury as an information seeking device. 15 U.S.C. §§ 1311-14 (1970).
organized crime. Professor of Sociology Donald Cressey has aptly expressed that failing:

[T]here is a proclivity in our society . . . to view criminality as an individual matter rather than as an organizational matter. . . . [T]he criminal's behavior is usually viewed, both popularly and scientifically, as a problem of individual maladjustment, not as a consequence of his participation in social systems. Consistently, the law enforcement process has been, by and large, designed for the control of individuals, not for the control of organizations.  

Title IX's criminal forfeiture provision and its civil remedies —especially divestiture and dissolution—are directed towards reducing the power of those people in organized crime through restraint of their economic activity. The new civil remedies, however, are not the only advantages prosecutors derive from section 1964. The section also eliminates troublesome problems in prosecuting organized crime: the existence of strict constitutional protections for criminal defendants and the difficulty of accumulating evidence.  Senator McClellan, a co-sponsor of the bill that was incorporated into OCCA-70 as Title IX, explained the importance of Title IX in hearings before a House Judiciary Subcommittee:

[T]he criminal process has suffered from two major limitations as a means of protecting our economic institutions from . . . infiltration [by organized crime]. The first . . . is procedural. . . . [O]ur law quite properly has burdened the government in a criminal case with strict procedural handicaps . . . .

He noted that civil proceedings would provide the government advantages unavailable in a criminal case, such as a lower standard of proof, the right to amend pleadings, the right to appeal an adverse verdict, and the opportunity to use discovery procedures. The second major limitation of the criminal pro-

23 D. CRESSEY, supra note 7, at 67. See also Senate Report, supra note 22, at 78-79; Task Force Report, supra note 1, at 114-15.
26 Id. 106, 107.
cess in combatting organized crime's penetration of legitimate business, according to Senator McClellan, is "the limited scope of criminal remedies." All of these advantages of a civil action were certainly major considerations in Congress' desire to deal with organized crime without being bothered by the niceties of criminal procedure.

These new Title IX methods of attempting to contain organized crime through civil remedies present troublesome questions. This Comment will first examine the question whether section 1964, through the prohibitions of section 1962, reaches the operation of wholly illegitimate enterprises as well as the infiltration of legitimate businesses. For instance, may the government bring a Title IX action against the operators of an illegal gambling or narcotics business which has no connection with any legitimate business?

The Comment will next examine constitutional problems in connection with section 1964 actions. First, the question will be explored whether the use of civil actions by the United States Government as a means of combatting selected "criminal" activity deprives defendants in such actions of constitutionally guaranteed protections. The assurance of assistance of counsel, the right to refuse to be a witness against oneself, and the government's burden of proving its case beyond a reasonable doubt are absent from civil proceedings. But the importance of these safeguards to a criminal defendant, confronted with the power of the state, is enormous. It has long been established that the government may not deprive citizens of these constitutionally

---

27 Id. 107.
28 See Senate Report, supra note 22, at 80, 81; House Hearings, supra note 25, at 106, 107; letter from Deputy Attorney General Richard Kleindienst to Senator McClellan, Aug. 11, 1969, in Senate Hearings, supra note 8, at 404, 408:
[The civil remedies] . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. . . .
[T]he civil procedure under which section 1964 actions are governed, with its lesser standard of proof, non-jury adjudication proceedings, amendment of pleadings, etc. will provide a valuable new method of attacking the evil aimed at in this bill.
See also Pennsylvania Crime Comm'n, Report on Organized Crime 93 (1970). This report includes a comment on Pennsylvania's reasons for enacting a racketeering statute copied almost verbatim from section 1964 (Pa. Stat. tit. 18, § 911(b), (d) (1973)): "One feature of the legislation is that by treating violations as civil questions, it lessens the burdens of proof, simplifies legal procedures, and affords the government broader rights of pre-trial discovery."
29 U.S. Const. amend. VI.
30 U.S. Const. amend. V.
protected rights merely by attaching the "civil" label to a judicial proceeding. On the other hand, the power of the government to employ civil actions pursuant to its regulatory powers in the control and promotion of commerce is also well settled. This Comment will attempt to place the section 1964 action somewhere along the continuum stretching from the clearly criminal case (for example, a murder prosecution) to the clearly regulatory action (for example, a suit to enjoin a merger). Second, the Comment will examine the constitutional problems of assuring compliance with orders issued under section 1964 by a further court order requiring guilty defendants to provide the government with sworn reports of their current addresses, sources of income, and other business records, to demonstrate compliance with the injunction.

The Comment will conclude, first, that Title IX is meant to reach only cases in which members of organized crime acquire or influence businesses that are otherwise legitimate; and second, that the statute, whether or not so limited, is a constitutional exercise of the federal government's power to regulate commerce even though certain remedial orders may be constitutionally prohibited.

II. The Scope of Title IX: Are Illegal Enterprises Included?

A. The Effect of a Broad Interpretation of "Enterprise"

The Senate Judiciary Committee summed up the purpose of Title IX as follows: "It has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Section 1961, however, which provides definitions for the operative terms used in Title IX, makes no reference to "legitimate organizations" in defining "enterprise." The definition is extremely broad, encompassing "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

---

35 U.S. CONST. art. I, § 8 (commerce clause).
36 SENATE REPORT, supra note 22, at 76 (emphasis supplied).
If the literal, expansive reading of the statute prevails over the limited congressional purpose expressed above, the utility of Title IX will be substantially enlarged. It will be a weapon capable of use against conventional criminal operations such as gambling, counterfeiting, or any of the other criminal acts described as “racketeering activity,” regardless of the perpetrators’ involvement in any legitimate business. Since criminal penalties already exist in the statutes defining the racketeering acts specified in Title IX,38 to say that racketeering alone subjects one to Title IX’s criminal penalties is not particularly significant. The principal importance of the expansion lies in Title IX’s civil remedies, because none of the basic criminal statutes provide for civil remedies as authorized in section 1964.

Section 1964 authorizes district courts “to prevent and restrain violations of section 1962” through orders requiring inter alia divestiture of the “enterprise” or restrictions on engaging in similar “enterprises.” If section 1962 is read as requiring infiltration into legitimate enterprises, the district courts’ orders might be limited to the removal of the corruptive influence from the legitimate enterprise rather than prohibition of the underlying racketeering activity.

The expansive reading of “enterprise” to include totally illicit operations would make the civil remedies applicable to a greater number of potential defendants. Despite the substantial evidence of criminal infiltration of legitimate business39 there is no indication that all or even most organizations that engage in racketeering activity also have legitimate interests. Criminal organizations whose activity is limited to illicit operations would be immune from a section 1964 civil action if Title IX is limited to infiltration of legitimate business.

Moreover, the use of the government’s new remedies against organized crime activities would be facilitated by the elimination of a major evidentiary obstacle. Instead of having to show, first, that the defendants have engaged in a pattern of racketeering activity, and second, that the racketeering activity is the basis for acquisition or operation of a legitimate business, the government would have to show only the commission of acts

38 See, e.g., 18 U.S.C. § 1955 (1970) (gambling); 18 U.S.C. §§ 471-73 (1970) (counterfeiting). There would, however, be some additional benefit to prosecutors in being able to use § 1963’s criminal penalties because these penalties are generally much more severe than the penalties provided in the primary criminal statutes.

39 See sources cited note 7 supra.
constituting racketeering activity. Thus, even if the government decided to bring a section 1964 action against a narcotics distributor, for example, who used some of his profits to purchase a trucking business, the government would have a much easier case for the use of its new civil remedies if it could treat the narcotics operation as the "enterprise" and not have to show the connection with the trucking business.

In United States v. Cappetto, the only reported decision involving section 1964, the government alleged violation of sections 1962(b), (c), and (d). Defendants were charged with operating an illegal gambling operation on the premises in which one defendant maintained an otherwise legitimate billiards parlor. The government could have sustained a section 1964 action under the narrow reading of "enterprise" by showing that the pool hall was operated through a pattern of racketeering activity. Because the courts must be careful, in implementing regulatory policies, to impose only the least burdensome remedy consistent with the purpose of the statute, the proper remedy under such a proceeding would have been mere divestiture of the pool hall or an order requiring separate operation of the two activities. If Title IX's scope is limited to preservation of the integrity of legitimate enterprise there would have been no justification for the application of civil remedies against the illicit activity.


Their statements, written with a Title IX criminal prosecution in mind, speak accordingly of proof beyond a reasonable doubt. Even under a reduced civil burden of proof, having to prove the connection between the illicit and licit operations would be a substantial burden. The example described in the text envisions a case based on § 1962(a) but similar problems of proof would exist under subsections (b) & (c).

This difficulty may have been the reason for Title IX's dormancy throughout its first three years, and its infrequent use thus far. The United States Attorney's office for the Northern District of Illinois, the principal user of Title IX, has only brought three cases, two civil and one criminal. See letter from Peter F. Vairo, Attorney in Charge, Chicago Strike Force, to the University of Pennsylvania Law Review, Jan. 23, 1975, on file with the University of Pennsylvania Law Review.


The most difficult hurdle under this approach would have been establishing that the pool hall was an enterprise engaged in or affecting interstate commerce.

See note 129 infra and accompanying text.

Courts have wide latitude in fashioning equitable remedies for antitrust violations
In *Cappetto*, however, the government was not content with a remedy that would permit the gambling operation to continue. The major thrust of its prayer for relief was a request for an order enjoining the defendants from participating in any gambling businesses regardless of its effect on legitimate business. The government apparently realized that such relief could not be justified unless a gambling operation was an "enterprise" over which the district court had jurisdiction under Title IX. Only then could the mere conduct of such an operation be treated as a continuing violation of the statute. Both the district court and the court of appeals approved of the expansive reading of the term "enterprise," paving the way for an injunction prohibiting the defendants from future participation in any gambling "enterprises."

**B. The Proper Scope of "Enterprise"**

The Seventh Circuit, in *Cappetto*, claimed support for their broad interpretation of "enterprise" in the statutory language and the legislative history. While conceding that one of Congress' concerns was the corruption of legitimate businesses, the court found this concern to be expressed in subsection (a) of section 1962. Subsections (b) and (c), the court reasoned, are addressed to any racketeering activity affecting commerce, whether or not a legitimate business is involved. Violation of any of the three subsections, however, depends on the existence of an "enterprise." The court's strained distinction in *Cappetto* between subsection (a) and subsections (b) and (c) is not warranted. The attempt to distinguish between "enterprise" as used in subsection (a) and its use in subsections (b) and (c) conflicts with the clear statutory purpose expressed in section 1961(4) that there be a uniform definition of the term through-

and have been permitted to prohibit actions which are not per se illegal, see, e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944). Such a rationale might permit a court to prohibit illegal racketeering activity, but only if the court were convinced that such an order created less of a burden than divestiture of the business.

45 Complaint for Injunction, filed Feb. 22, 1974, in Appendix to Petitioner's Brief for Certiorari at 44.

46 Decision of the District Court Rendered Orally, Apr. 22, 1974, in Appendix to Petitioner's Brief for Certiorari at 25.

47 502 F.2d at 1358.

48 Id.

49 Note 10 supra.

50 Note 11 supra.

51 Note 12 supra.
out Title IX. The difference in the subsections is explained by the different ways in which legitimate enterprises can be corrupted. The true significance of dividing section 1962 into three subsections is clearly expressed in the House Report on OCCA-70: "Section 1962 establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations."

Professor Donald Cressey's analysis provides a logical basis for having three subsections each of which is protective of legitimate business. "Some businesses are legitimately purchased with the fruits of crime and operated legitimately. Others are legitimately purchased with the fruits of crime and operated illegitimately. A third possibility involves illegitimate acquisition and legitimate operation, while the fourth alternative is to acquire a business illegitimately and then operate it illegitimately." Section 1962 is designed to cover all these permutations. The first possibility is prohibited by subsection (a); the second by (a) and (c); the third by (b); and the fourth by (b) and (c).

In attempting to find support in the legislative history for its position, the Cappetto court quoted a statement from the Senate Report on OCCA-70 which concluded that the federal government must be given power "to prohibit directly substantial business enterprises of gambling." The quoted material is not part of the report on Title IX, however; it was offered in support of Title VIII, Part C of OCCA-70, which was codified as section 1955 of title 18 of the United States Code. Prior to passage of section 1955, direct federal control over gambling offenses could be exercised only when there was interstate transmission of wagering information, interstate travel in aid of racketeering, or interstate transportation of wagering paraphernalia. Based on a congressional finding that gambling operations above a certain

52 Since Cappetto did not involve section 1962(a), the court's comments about the differing purpose of subsection (a) were dictum. The language is important, however, because it indicates that the court recognized that Title IX is not simply another way of defining acts already made illegal in other parts of title 18 of the United States Code.
54 D. Cressey, supra note 8, at 100.
55 502 F.2d at 1358, quoting Senate Report, supra note 22, at 73.
size affect interstate commerce, section 1955 was designed to permit federal criminal prosecution of gambling without having to show specific interstate travel or transportation.

It is significant that section 1955, which is designed to deal specifically with gambling per se, provides only for criminal penalties with no mention of civil remedies. Yet the Cappetto court was able to find justification for the extension of the civil remedies of section 1964 to gambling operations in a statement made in support of section 1955.

The inappropriateness of the court's reasoning is demonstrated further by its failure to perceive that gambling is but one of more than a dozen types of racketeering activity defined in section 1961(1). The court's language does not suggest that it would limit Title IX's coverage of illicit enterprises to gambling operations; and, indeed, nothing in the statute's language or legislative history indicates that an illegal gambling business is to be singled out from other illegal businesses. The reason for enacting section 1955 was to equate gambling offenses with the other forms of racketeering by providing for a federal criminal prohibition. If the defendants in Cappetto had been operating an illegal counterfeiting or narcotics business, the court presumably would have realized the irrelevance of using the statement on the need for federal criminal prosecution directed against gambling in construing the scope of Title IX.

Although Cappetto is the only appellate decision in a Title IX civil case and the only decision on the inclusion of illicit businesses, the court found support in United States v. Parness, a Title IX criminal prosecution in the Second Circuit, for the proposition that "enterprise" was intended to have a broad meaning. The government charged the defendants in Parness with interstate transportation of stolen property and with acquisition of an interest in an enterprise through a pattern of racketeering activity consisting of the transportation of the stolen property. The enterprise in question was a hotel, unquestionably within the scope of Title IX. The defendants argued, how-

---

59 See Senate Report, supra note 22, at 73.
60 18 U.S.C. § 1955 (1970) has been held constitutional, United States v. Sacco, 491 F.2d 995 (9th Cir. 1974).
61 503 F.2d 430 (2d Cir. 1974), cert. denied, 95 S. Ct. 775 (1975).
ever, that because the hotel was located in a foreign country, it was not an “enterprise” within the meaning of the Act. The court rejected this rather frivolous argument, citing the reference to “interstate or foreign commerce” in section 1962 and therefore defining “enterprise” broadly enough to include both domestic and foreign corporations:

“Enterprise” is defined in § 1961(4) to include “any . . . corporation.” On its face the proscription is all inclusive. It permits no inference that the Act was intended to have a parochial application. The legislative history, moreover, strongly indicates the intent of Congress that this provision be broadly construed.

The court, however, used this broad language and supporting legislative history only to buttress its narrow holding that the Title IX prohibitions include foreign as well as domestic enterprises, and did not address the question whether “enterprise” encompasses illegal as well as legal businesses.

Furthermore, even a casual examination of the legislative history reveals that although Congress certainly was concerned with the effect of totally illicit operations on the economy, it chose to limit Title IX to a more direct assault on our economic system—the infiltration of legitimate business. It is impossible to point to any specific congressional refutation of the idea that Title IX applies to illicit businesses. This absence appears to be explained not by congressional uncertainty but by the apparent unanimity of belief that the Act would apply only to infiltration of legitimate business. The Senate Report, the House Report, the Justice Department's recommendation, the concurring view of Senator Scott, the views of the House dissenters, and dis-

---

64 The court pointed out that the hotel had been owned by an American citizen, financed with American funds, had numerous American creditors, and primarily served American tourists. 503 F.2d at 439 n.11.

65 503 F.2d at 439.

66 The Parness court can perhaps be excused for its excessive prose because it was justifiably concerned with the patently frivolous attempt to limit the definition of “enterprise” to domestic operations. Prior to Cappetto there was never any suggestion that Title IX would cover illicit enterprises.

67 Senate Report, supra note 22, at 76-83, 159.

68 House Report, supra note 40, at 56-57.

69 Letter from Deputy Attorney General Richard Kleindienst to Senator McClellan, Aug. 11, 1969, in Senate Hearings, supra note 8, at 405.

70 Senate Report, supra note 22, at 211, 214.

71 House Report, supra note 40, at 4081.
cussions 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.

The Senate Report states that "[Title IX] has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." Senate Report, supra note 22, at 76. A section discussing organized crime's penetration of legitimate business follows the statement of purpose. Id. 76-78.

The Senate Report, in a section by section analysis of Title IX, also states: "Subsection (4) [of section 1961] defines "enterprise" to include associations in fact, as well as legally recognized associative entities. Thus, infiltration of any associative group by an individual or group capable of holding a property interest can be reached." Id. 158. Explaining that "enterprise" was defined to reach the infiltration of "any associative group" indicates that Title IX in its entirety is aimed at curtailing the infiltration of organizations rather than the underlying criminal activity. Although this analysis on its face suggests that "infiltration of any associative group" could include the infiltration of illegal business (e.g., using proceeds derived from narcotics activity to acquire an interest in a loansharking operation), the statement of purpose in the Senate Report precludes finding an intent to deal with infiltration of illegal enterprises in Title IX.

When the Senate debated OCCA-70, Senator McClellan provided a synopsis of the bill, which explained that Title IX "[p]rohibits infiltration of legitimate organizations by racketeers or proceeds of racketeering activities where interstate commerce is affected." 116 Cong. Rec. 585 (1970). Senator McClellan's opening remarks during the debate referred to Title IX as "aimed at removing organized crime from our legitimate organizations." Id. 591: see also McClellan, supra note 6, at 141, 144: Title IX is aimed at removing organized crime from our legitimate organizations.

... Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX.


In hearings before a subcommittee of the House Judiciary Committee, Representative Celler, Chairman of the Committee, said, "As I understand title IX it combines criminal and civil penalties, which are directed towards 'organized crime' infiltration of legitimate business." House Hearings, supra note 25, at 188. He repeated his understanding in debate before the full House of Representatives. 116 Cong. Rec. 35196 (1970). Several representatives, including Representatives Celler, McCulloch, St. Germain, Kleppe, Poff, Anderson, and Pepper, spoke of the provision as aimed at fighting organized crime's penetration of legitimate business. Representative Poff's remarks were typical: "Title IX . . . provides the machinery whereby the infiltration of racketeers into legitimate business can be stopped and the process can be reversed when such infiltration does occur." Id. 35295.

Other commentators on the Act also assumed that Title IX was limited to legitimate business infiltration. See Wilson, supra note 6, at 51-52; Note, supra note 10, at 1492. Even
Only two isolated references, one in each House of Congress, were made to the application of Title IX outside of the infiltration of legal business. Neither instance undermines the conclusion that Congress intended to deal solely with the infiltration of legitimate business.

Although the language of the statute draws no distinction between legitimate and illegitimate operations, neither does it explicitly encompass illicit enterprise. The legislative history reveals clearly that Congress' sole target was infiltration of legitimate business. For the courts to parlay the product of that limited intent into an expression of statutory authorization for civil remedies against racketeering per se would be an unwarranted stretching of the statute. The use of civil remedies for behavior that has traditionally been controlled through criminal penalties is an innovative step. Congress was careful in limiting the extent of its creativity and the courts should be equally careful not to ignore that limit.

the most caustic critics of the Act, who presumably would have been quick to denounce any suggestion that the civil remedies could be applied beyond the limits discussed by Congress, did not perceive any such possibility. See, e.g., King, supra note 3, at 108; Statement by the American Civil Liberties Union, in Senate Hearings, supra note 8, at 489-92.

In a discussion among Senators Magnuson, McClellan, and Hruska, Senator Magnuson expressed concern over the possibility that the Judiciary Committee, through Title IX, was usurping the authority of the Committee on Commerce and inquired about the Act's scope.

Mr. McClellan: [I]f it is illegal gambling, engaged in by syndicates or shylocking or whatever, and those funds are used for investment in legitimate business in interstate commerce that would constitute a crime under title IX. That kind of activity is what we are trying to prevent.

Mr. Magnuson: I think that clears up the matter. Also I suppose the proceeds from illegal activities in one State that are transported to another State to be used in further illegal activities would be included?

Mr. Hruska: They might be involved in title IX. I agree with the comments of [Mr. McClellan].


In the House of Representatives, some representatives remarked generally about the problem of organized crime and referred briefly to provisions of the bill. Id. 35205-206, (remarks of Representative Clancy), 35206 (remarks of Representative Kleppe), 35211 (remarks of Representative Kyl), 35289 (remarks of Representative Podell). Representative Meskill, in one such brief speech, summarized Title IX as "... mak[ing] it a crime to engage in a pattern of racketeering activity." Id. 35328.

Representative Meskill's brief observation and Senator Magnuson's isolated speculation followed by Senator Hruska's noncommittal reply and his reaffirmance of Senator McClellan's reference to legitimate business, certainly are not sufficient to overcome the preponderance of support for the more limited statutory interpretation.

76 See Senate Hearings, supra note 8, at 151-52 (statement by Senator Hruska); cf. id. 476 (statement by the American Civil Liberties Union).
III. CONSTITUTIONAL PROBLEMS

A. Is a Section 1964 Case Civil or Criminal Under the Constitution?

Congress was aware of the potential constitutional implications of dealing with criminal activity in a civil context without the constitutional safeguards afforded criminal defendants. A thorough effort was made to fend off potential attack. The legislative history of section 1964 contains ample reference to the remedial, equitable nature of the statute and to its analogy to well-established antitrust provisions.

In Cappetto the issue was raised in an interesting manner. At the discovery stage of the proceedings the defendants were granted immunity from the use, in any subsequent criminal prosecution, of anything disclosed through discovery. Because the government considered the section 1964 action civil, however, it saw no need to immunize the defendants from the use of their compelled discovery statements in the case at bar. The defendants contended that the case was "essentially a criminal proceeding" and refused to comply with discovery requests. The court rejected the "criminal" characterization of the suit, basing its conclusion on its belief that the relief permitted under section 1964 "is the same kind of equitable relief that federal courts have been granting for generations in civil actions under Section 4 of the Sherman Act and Section 15 of the Clayton Act . . ." For failure to comply with discovery, the defendants were judged in default, preliminarily enjoined from future gambling activity, and ordered committed for contempt pending compliance.

---

77 See, e.g., Senate Report, supra note 22, at 81, 160.
78 E.g., id. 81. The solicitation of the American Bar Association Antitrust Section's opinion might also be construed as an effort to solidify the comparison.
79 United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 95 S. Ct. 775 (1975).
80 Immunity was granted pursuant to the "use immunity" provisions of OCCA-70, 18 U.S.C. § 6002 (1970).
81 502 F.2d at 1355.
82 502 F.2d at 1357. If the defendants had prevailed in their contention, the government would have been unable to continue discovery. Discovery is valid only as a tool for gathering information for a particular case, not as a general investigative device.
83 502 F.2d at 1355. The commitment order was stayed pending appeal.
In relying on precedents established in the antitrust area, the court failed to consider a significant distinction between section 1964 and the antitrust laws. Sections one and two of the Sherman Act,\(^8\) for example, describe the prohibited conduct and provide for criminal penalties while section four\(^8\) authorizes equitable relief in government suits charging violations of sections one and two. It is generally agreed that civil actions may be brought in cases in which criminal prosecution would not have been justified,\(^6\) even though the statute on its face provides no basis for such a distinction. Thus, a civil action may succeed if the government shows that the statute has been violated; the government need not show that the violation constituted a \textit{criminal} act.

On the other hand, a violation of section 1962 is an act punishable as a crime. The circumstance that keeps the government from bringing a criminal prosecution is not the absence of criminal behavior (as it is in antitrust enforcement) but difficulty of proof.\(^7\) Even a section 1964 civil action requires the government to show commission of a criminal act. Even if it were possible to show that the incursion into legitimate business was sufficiently "innocent" not to be criminal per se, the other necessary element—a pattern of racketeering activity—requires commission of at least two acts explicitly labeled criminal.

Thus, the charge that a section 1964 action is "inherently criminal" is true. A defendant who loses such a suit will leave the court having been judged, by a preponderance of the evidence, to have committed at least two acts deserving of criminal punishment. Whether this labeling of the defendant as having committed criminal acts, together with the burden of complying with whatever orders the court may issue, is sufficient to require the government to afford the defendant the protections tradi-

---

\(^6\) See P. Areeda, \textit{Antitrust Analysis} 52-53 (2d ed. 1974). "We must thus recognize that the courts would reconcile—if they have not already implicitly done so—the Sherman Act's purpose as a charter of freedom with its criminal sanctions by divorcing the latter from the statute's civil sweep." \textit{Id.} 53. See also Kadish, \textit{Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations}, 30 \textit{U. Chi. L. Rev.} 423 (1963).
\(^7\) There undoubtedly are cases in which the government fails to bring a criminal antitrust action, even though it is believed that the defendant's behavior would justify criminal penalties, because of the difficulties of proof. Nevertheless, once the decision to bring a civil suit is made, no criminal activity need ever be shown and the civil violation carries with it no inherent criminality.
tionally guaranteed to criminal defendants\textsuperscript{88} has never been answered definitively.

When dealing with other statutes, however, the Supreme Court has developed two tests to determine whether a case is actually civil in substance when a legislature has affixed that label to a judicial proceeding.\textsuperscript{89} The first test focuses on the intent of the legislature. A punitive legislative intent indicates a criminal prosecution. The other test recognizes that the burdensome nature of the result, upon a defendant, may require the granting of some or all of the constitutional safeguards usually associated with criminal prosecutions, even when an action is founded on benevolent or disinterested intentions. The latter test requires a balancing of the governmental function involved against the interests of the individual.

1. The Punitive Intent Test

In \textit{Trop v. Dulles},\textsuperscript{90} a statute mandating automatic forfeiture of citizenship upon conviction, by court-martial, of wartime desertion was under attack on grounds of "cruel and unusual punishment." The government's principal argument was that the statute was technically regulatory, not penal, and thus there was no "punishment."\textsuperscript{91}

Writing the plurality opinion, Chief Justice Warren dismissed this argument\textsuperscript{92} and proceeded to describe the proper test to which the government's label must be put.

In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.\textsuperscript{93}

\textsuperscript{88} The constitutional protections traditionally guaranteed to, and associated with, criminal defendants, will hereinafter be referred to as "criminal protections."


\textsuperscript{90} 356 U.S. 86 (1958).

\textsuperscript{91} Id. at 94.

\textsuperscript{92} "How simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them?" \textit{Id.}

\textsuperscript{93} Id. at 96 (footnotes omitted).
The plurality, finding the forfeiture provision to be punitive, concluded that it was cruel and unusual.  

The importance of congressional intent was illustrated dramatically in Perez v. Brownell, decided the same day as Trop. In Perez the petitioner, a native-born American, attacked a statute under which he had been held to have forfeited his citizenship by voting in a foreign election. The Court found the statute to be the product of Congress' exercise of its power to regulate foreign affairs and permitted the forfeiture to stand. The Court, in dealing with two individuals who had suffered identical disabilities, granted one a higher level of constitutional protection than the other. Paradoxically, Trop, who was "guilty of the very serious crime of desertion in time of war" was given greater constitutional protection than Perez, who had "committed no crime" by voting in a foreign political election. Thus, there may be sound precedent for giving a section 1964 defendant greater protection than an antitrust defendant, even though they are both subject to the same type of remedial orders, if the congressional purpose in enacting section 1964 can be shown to have been punitive.

To show that Congress had no punitive intent in adopting section 1964 would be extremely difficult. Although the legisla-
tive history of section 1964 appears to refute such intent, it cannot be denied that the civil remedies are but a minor part of OCCA-70, one of the most severe federal attacks on crime in the nation's history. Title X, for instance, prescribes increased sentences of up to twenty five years upon conviction of any felony by "dangerous special offenders." Title IX itself provides in section 1963 for maximum penalties of a twenty year prison sentence, a $25,000 fine, and forfeiture of any interest in an enterprise acquired or held in violation of section 1962. The forfeiture alone could amount to a fine of millions of dollars.

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

Nevertheless, Congress was probably motivated by a desire to stop interference or intimidation by organized crime as well as by a desire to punish and deter. For example, one would think that a purely punitive purpose would carry with it a well-defined punishment, yet Congress refrained from mandating the im-

98 See notes 77 & 78 supra and accompanying text.
100 See notes 25-28 supra and accompanying text. The prosecution in Cappelto argued that other, valid reasons exist for bringing a civil rather than criminal action, namely, cessation of future criminal activity and acquisition of information. Brief for the United States at 23-24. This argument ignores § 1964(d), which prevents a defendant from relitigating, in a subsequent civil case, issues decided in a criminal proceeding. A successful criminal action would virtually assure a later civil victory. Thus whenever the government could prove criminal liability it would be advantageous for it to do so. Future illicit activity could be prevented more efficiently by imprisonment of the offender than by injunction and by the economically more severe criminal forfeiture than by civil divestiture. If in a particular case the government were unhappy with the punishment imposed in the criminal case, § 1964(d) would make a subsequent civil order obtainable without doing much more than filing the right papers. If, however, § 1964 were construed as a criminal statute, the government would be precluded from bringing an action thereunder after bringing a criminal action under § 1963. See generally Note, supra note 16, at 1501 n.44.
position of any specific penalty in successful section 1964 cases. Indeed, a penal statute that granted a judge this degree of discretion might be considered in violation of due process requirements. A civil court of equity, however, is characterized by wide discretionary power in fashioning remedies.\textsuperscript{102}

Even subsection (a) of section 1962, which might appear at first to have the least credible regulatory foundation of the section's provisions, has a rational connection with the promotion of commerce. Subsection (a) is violated when an individual acquires and operates his business honestly, if he obtained the acquisition funds illegally. A requirement that one who wishes to participate in an industry secure legitimate financing provides increased opportunity for the investment of funds earned through legitimate channels, thus promoting fair competition within the industry. On the other hand, the illegal origin of funds might portend illegal operation of the business. Thus even section 1962(a) has an arguably rational connection with the promotion of commerce.

Chief Justice Warren's statement of the punitive intent test does not recognize the possibility of dual motivation of the kind present in the drafting of section 1964.\textsuperscript{103} Analysis of the \textit{Trop} decision suggests that punitive intent should preclude resort to civil regulatory remedies only when no substantial, valid basis for the statute, independent of the desire to punish, exists. When conduct, such as racketeering, affects the nation's commerce, it falls within the Congress' commerce clause powers to regulate.\textsuperscript{104} The fact that the government might also like to see the offender imprisoned does not destroy that power. This rule is consistent with \textit{Trop}\textsuperscript{105} because in that case punitive intent was the only rationale for the statute.

2. Balancing Test

Even when the legislature's intent does not require that the proceeding be treated as a criminal case, the Court has held that some criminal safeguards may nevertheless be appropriate. In re \textit{Gault}\textsuperscript{106} was the landmark case for balancing the effect upon the

\textsuperscript{102} See, e.g., May Dep't Stores Co. v. NLRB, 326 U.S. 376, 390-92 (1945).


\textsuperscript{104} Note 33 supra and accompanying text.

\textsuperscript{105} Trop v. Dulles, 356 U.S. 86 (1958); see text accompanying notes 90-94 supra.

\textsuperscript{106} 387 U.S. 1 (1967).
defendant against the governmental interest to determine the necessity of granting criminal protections. Gault was a juvenile who claimed the fifth amendment's protection against self-incrimination in a juvenile court proceeding, technically a civil case. The Court did not challenge the benevolent, non-punitive intentions of the draftsmen of the juvenile justice system, but still found the interests of the juvenile sufficiently important to require the protection afforded by the right to counsel, the privilege against self-incrimination, and the right to confront witnesses—protections traditionally enjoyed only by criminal defendants.

The Court based its conclusions primarily on the possibility that the juvenile would suffer an extended commitment to a detention center as a result of the proceeding. In this respect, the Court's holding is of little use to section 1964 defendants since a proceeding under that section does not carry with it the threat of a similar loss of liberty.

The Court was also concerned, however, with the effect on reputation that would flow from the stigma of an adjudication of delinquency. The question whether the fifth amendment can be invoked to protect one's reputation has arisen in connection with grants of immunity. In Brown v. Walker, a witness was offered transactional immunity in return for his testimony. For a suggestion that public condemnation is precisely the difference between a civil and criminal sanction, see Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROB. 401, 405 (1958):

[Crime] is not simply anything which a legislature chooses to call a “crime.” It is not simply antisocial conduct which public officers are given a responsibility to suppress. It is not simply any conduct to which a legislature chooses to attach a "criminal" penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the condemnation of the community.

"Transactional immunity" gives the recipient absolute immunity from prosecution for any act to which he testifies. It is contrasted with "use immunity" under which the witness receives only a guarantee that his testimony will not be used to aid in his prosecution. He may still be prosecuted for the acts to which he testifies with other, independent evidence. See, e.g., Kastigar v. United States, 406 U.S. 441 (1972) (upholding the constitutionality of the use immunity provisions in OCCA-70).
He refused to testify, claiming that his privilege not to incriminate himself was absolute and provided protection from the public airing of his crimes whether or not criminal prosecution would follow. The Court rejected this argument: "The design of the constitutional privilege is not to aid the witness in vindicating his character, but to protect him against being compelled to furnish evidence to convict him of a criminal charge."

When the question arose again in *Ullmann v. United States*, the witness attempted to distinguish *Brown* by claiming that the damage would not be to his reputation in the abstract, but would result in various concrete disabilities including probable loss of employment. The Court once again rejected the claim of privilege, because of the non-criminal nature of a sanction that flows indirectly from public disapproval rather than from governmental punishment.

The concern for reputation in *Gault* can be reconciled with its absence in *Brown* and *Ullmann* by their differing degrees of governmental action in establishing the stigma. In situations such as *Brown* and *Ullmann* the stigma results indirectly from the witness' own testimony, while in delinquency proceedings the stigma is a direct product of the judicial pronouncement of delinquency.

The section 1964 situation resembles *Gault* more than *Brown* and *Ullmann*. The judicial labeling of the defendants as racketeers would carry with it the same potential for public censure that the label of juvenile delinquent carried in *Gault*. It is unlikely, however, that the *Gault* Court would have based its decision on damage to reputation alone. The potential loss of liberty was clearly the linchpin of the decision. This loss of liberty, together with the more compelling policy reasons for protecting a juvenile's reputation than for protecting that of a racketeer, sufficiently distinguishes *Gault* from a section 1964 case to rule out a claim of damaged reputation as a sufficient basis for a

---

114 161 U.S. at 605-06.
116 Justice Douglas dissented, joined by Justice Black, arguing that there are no exceptions to the literal language of the protection against self-incrimination. 350 U.S. at 445 (1956).
117 See 387 U.S. at 50.
118 A juvenile's actions are considered the product of an immature mind. Taking such actions as indicia of the character of the individual upon his reaching adulthood is less valid than judging character by acts committed during adulthood. Cf. Fed. R. Evid. 609(d).
claim of fifth amendment or other constitutional protection under section 1964.

The defendants in Cappetto attempted to support their claim to a privilege against self-incrimination with an alternative argument. They contended that testimony secured by a grant of use immunity should be treated like a coerced confession with regard to the declarant. Such a confession, it was argued, would not be permitted as proof even if the action were clearly a civil suit. This analogy is inappropriate, but the Cappetto defendants are not solely responsible for the faulty reasoning. The Court in Kastigar v. United States, in upholding the statutory authorization of use immunity contained in OCCA-70, characterized use immunity as "analogous to the Fifth Amendment requirement in cases of coerced confessions."

The reasons for prohibiting the use of coerced confessions in civil cases do not exist, however, when the testimony is compelled through a grant of immunity. First, there is the strong possibility that a coerced confession will be untruthful, because made solely to stop the bullying. No such risk exists under an immunity grant. Second, a coerced confession requires exertion of governmental force in an illegal way. The policy of preventing official lawlessness requires denying the government the use, in any way, of the product of its wrongful behavior. A grant of immunity, of course, is not an illegal government action that should be discouraged. Thus, to secure the protection of the fifth amendment or other criminal protections, the section 1964 defendant must show the significance, as compared to criminal sanctions, of the other potential harms that accompany a section 1964 civil proceeding.

The other potential adverse effect of losing a suit under section 1964 is economic. The district court may order the defendant to divest himself of his interest in the enterprise involved in the violation. Under a divestiture order, the defendant would be required to sell his interest in the enterprise but would be allowed to retain the proceeds from the sale. Even if he ob-

---

119 Petitioner's Brief for Certiorari at 20.
121 406 U.S. 441 (1972).
122 Id. at 461.
tained the investment funds illegally, the defendant would be free to reinvest in government bonds, savings accounts, or publicly held companies if he kept his holding in any one company below one percent.\textsuperscript{125}

Divestiture has a lesser economic impact than the forfeiture possible under section 1963,\textsuperscript{126} which terminates the defendant's ownership without permitting him to be compensated. Forfeiture, even when disguised behind a civil label, has been held to be a criminal penalty\textsuperscript{127} and is recognized as such by section 1963. Divestiture may produce adverse economic consequences, however. For example, a seller under compulsion to sell will generally be in a disadvantageous bargaining position and may be unable to secure as high a price as he otherwise could. Also, a divestiture order under the circumstances involved in Title IX may damage severely the enterprise's goodwill; payment for goodwill is often a major part of the purchase price of a going concern. In some cases, the defendant may have developed expertise in the management of the enterprise which will be sacrificed if he sells the business. Other circumstances undoubtedly would produce other negative economic effects.

Despite these adverse economic results, whose effect could make divestiture indistinguishable from a partial forfeiture or fine, the Supreme Court has not found economic loss sufficient to remove the civil label from divestiture.

Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest . . . .

... [T]he Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies.\textsuperscript{128}

\textsuperscript{128} United States v. E.I. Du Pont de Nemours & Co., 366 U.S. 316, 326-27 (1961). DuPont was ordered to divest itself of its large holding of General Motors stock. The release of such a large block of shares on the market, it was agreed, would reduce the
Even divestiture is permitted only when necessary, however, because choice of a harsher remedy instead of an equally effective and less burdensome option that is available is clearly punitive. Therefore, as in antitrust cases, particular remedies may pose constitutional problems, given the wide discretion allowed by the Act in fashioning remedies. A defendant who is the object of a punitive judicial intent could attack the order as an unconstitutional imposition of punishment. The rule enunciated in Du Pont, however, precludes reliance on unfavorable economic consequences alone as a basis for requiring criminal protections.

The damage to reputation, the economic loss inherent in divestiture, and the other interests a section 1964 defendant may have at stake (such as loss of employment), though certainly not trivial, do not rise to the level of overriding the government's need for regulation and supporting remedies in the area covered by Title IX. Although Gault’s extension of criminal protections to technically noncriminal defendants was not limited to cases in which imprisonment could occur, the Court's consistent approval of the type of equitable remedies permitted under section 1964 strongly suggests that Gault should not be extended to cover these defendants.

B. A Problem in Monitoring Compliance

After an antitrust decree is handed down, the government is generally able to monitor compliance through “visitation rights.” The government is given the right to demand specific market price of the stock, so that Du Pont would be able to realize only a fraction of the stock's then current market value. Interestingly, Congress reacted more sympathetically than the Court: It enacted a provision, Int. Rev. Code of 1954, § 1111, to ease the financial loss through a tax “break.”


130 Part II of this Comment concluded that Title IX does not encompass illegal operations that do not have connections with legitimate enterprises. Under the alternative interpretation, that the statute applies to both legitimate and illicit enterprises per se, the statute would still be sufficiently regulatory in purpose and harmless in effect to permit civil remedies. The congressional findings on the direct effect of organized crime on commerce, Senate Report, supra note 22, at 1-2, would provide a sufficient basis for regulation designed to deal specifically with racketeering.

131 387 U.S. 1 (1967).

reports, examine company documents, and interview company employees. It has been termed an important and customary provision of an antitrust decree.\textsuperscript{133}

The United States Attorney's Office requested a similar provision in \textit{Cappetto}. The court was asked to issue "an order directing each of the defendants to submit to the United States Attorney for a period of ten years sworn quarterly reports stating his current address, business sources of income and other information bearing on his compliance with the injunction the Court is asked to enter . . . ."\textsuperscript{134} Both the district court\textsuperscript{135} and the court of appeals\textsuperscript{136} expressed doubts about the propriety of such an order but neither passed final judgment on it. The district court postponed decision on this question and on the request for a permanent injunction, pending defendants’ appeal of the default and contempt orders. The appellate court affirmed the district court's orders and remanded for decision on the remaining issues.

The doubts expressed, however, are well founded. In \textit{Shapiro v. United States}\textsuperscript{137} the Court held that the fifth amendment privilege against self-incrimination does not extend to records that the defendant is required to keep by law, to provide information on transactions properly subject to government regulation. Government regulations that required the keeping and production of records needed for the enforcement of price controls were upheld. This exception to the fifth amendment would preclude protestations that the antitrust visitation rights violate the Constitution.\textsuperscript{138}

In \textit{Marchetti v. United States}\textsuperscript{139} and \textit{Grosso v. United States},\textsuperscript{140} however, the \textit{Shapiro} exception was held inapplicable to a statute requiring the keeping of records and filing of reports for the purpose of assessing a gambling tax. The \textit{Marchetti} Court distinguished \textit{Shapiro} because of the absence of the three necessary

\begin{itemize}
\item \textsuperscript{133} United States v. Grinnell Corp., 384 U.S. 563, 579 (1966).
\item \textsuperscript{134} 502 F.2d at 1355.
\item \textsuperscript{135} Decision of the District Court Rendered Orally on Apr. 22, 1974, in Appendix to Petitioner's Brief for Certiorari at 14, 17.
\item \textsuperscript{136} 502 F.2d at 1359.
\item \textsuperscript{137} 335 U.S. 1 (1948).
\item \textsuperscript{138} Because the fifth amendment does not apply to corporate or partnership records, the \textit{Shapiro} doctrine would only be necessary in antitrust cases against individual entrepreneurs. \textit{See} Bellis v. United States, 417 U.S. 85 (1974).
\item \textsuperscript{139} 390 U.S. 39 (1968).
\item \textsuperscript{140} 390 U.S. 62 (1968).
\end{itemize}
elements of the Shapiro doctrine. First, the records at issue in Marchetti were not "of the same kind as he has customarily kept." Second, the "public aspects" of the Shapiro records were not present. Third, the Shapiro records involved "an essentially non-criminal and regulatory area of inquiry."\textsuperscript{141} In Grosso, the Court focused on the same criteria, finding it unnecessary to "examine the relative significance of these three factors," because at least two of them were plainly absent.\textsuperscript{142} The Court did not question the credibility of the government's insistence that its concern was collection of revenue not prosecution of gamblers, but the Court held that this legitimate concern could not render insignificant "the characteristics of the activities about which information is sought, or the composition of the group to which the inquiries are made."\textsuperscript{143}

The type of report requested in Cappetto would also fail to satisfy at least two, and probably all three, of the Shapiro criteria. First, the requested reports would not be the kind of records ordinarily kept by individuals. This would be especially apparent if the court ordered divestiture, forcing the defendants out of business and into a different, probably more private, way of earning a living. Second, the reports would not have the kind of "public" character of records kept by a publicly licensed business, such as the one operated in Shapiro. Finally, the group to which the order in Cappetto would be directed is precisely the group involved in Marchetti and Grosso: gamblers—a group whose business dealings can hardly be classified as "essentially non-criminal."\textsuperscript{144}

The legitimate regulatory purpose of Title IX is as irrelevant as was the legitimate taxing purpose in Marchetti and Grosso. Although this conclusion appears to contradict the rationale just developed to permit discovery,\textsuperscript{145} there is a significant difference between these requested reports and discovery. The permissible use of information gathered through discovery is limited to proving a civil case. The reports, on the other hand, could become the basis for a criminal prosecution for any racketeering activity reported, or for a contempt prosecution if the reports indicated

\textsuperscript{141} 390 U.S. at 57.
\textsuperscript{142} 390 U.S. at 67-68.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 57.
\textsuperscript{145} Text accompanying notes 106-30 \textit{supra}.
noncompliance with the court order.\textsuperscript{146} If the government's concern was primarily enforcement of the order, immunity from criminal prosecution for the racketeering activity might be granted. This probably would solve the problem encountered in Marchetti and Grosso of directing the inquiry against persons suspected of criminal activity. Nevertheless, the Cappetto request would still fail to meet two of the Shapiro criteria, and in Grosso that failing sufficed to preclude application of the Shapiro exception.\textsuperscript{147}

Thus the reports to be filed would have to be considered testimony subject to the privilege against self-incrimination. The privilege has long been recognized as applicable in criminal contempt proceedings.\textsuperscript{148} If the reports revealed noncompliance they could not be used in a criminal contempt prosecution.

The government might, however, attempt to initiate a civil contempt action. The privilege has never been held applicable in a civil contempt action even though imprisonment may result. The Supreme Court in Shillitani v. United States\textsuperscript{149} approved of imprisonment based on civil contempt. The Court distinguished civil from criminal contempt by the former's coercive rather than punitive purpose. "While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to [comply]."\textsuperscript{150}

The holding in Shillitani should not be taken as an indication that the self-incrimination privilege does not apply in any civil contempt proceeding. The Court was considering two limited issues: how to define civil contempt and whether an indictment and jury trial are required prior to civil commitment. The Court held that they are not required.\textsuperscript{151} In the juvenile justice area the

\textsuperscript{146} The antitrust laws specifically provide for punishment for disobedience of court orders, 15 U.S.C. § 1314(d) (1970). A comparable provision in Title IX was omitted because it was considered redundant; the legislators felt that the power to compel compliance inheres in the power to issue the order. See House Report, supra note 40, at 4036.

\textsuperscript{147} This presumes, of course, that all three factors are to be given equal weight—a question left open by the Grosso Court, see text accompanying note 142 supra. It is not unlikely that the "essentially non-criminal and regulatory" factor (missing in Grosso) is the crucial one, so that if this concern were satisfied through a grant of immunity, the absence of the other two factors might not be fatal.

\textsuperscript{148} See Michaelson v. United States, 266 U.S. 42, 66 (1924).

\textsuperscript{149} 384 U.S. 364 (1966).

\textsuperscript{150} Id. at 370.

\textsuperscript{151} Id. at 370-71.
Court has held the fifth amendment applicable even though it found a jury trial unnecessary.\footnote{152}{Compare In re Gault, 387 U.S. 1 (1967) with McKeiver v. Pennsylvania, 403 U.S. 528 (1971).}

The rationale of Gault makes the fifth amendment applicable whenever imprisonment is threatened.\footnote{153}{[C]ommittance is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty—a command which this Court has broadly applied and generously implemented. . . . 387 U.S. at 50.}


See, e.g., Boyd v. United States, 116 U.S. 616, 633-35 (1886).}
If the government is deprived of these reports, civil remedies need not be unenforceable. Although the easiest means of obtaining information may well be foreclosed, presumably the sources of information through which the government found enough evidence to win its original case would still be available. The added governmental burden may be offset by the deterrent effect that the threat of a continuing governmental investigation, for which no immunity need be granted, may bring.

IV. Conclusion

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.\(^\text{155}\)

Despite the criminal nature of the underlying problem, the grant of regulatory power under section 1964 is sufficiently unburdensome in effect to justify the use of equitable remedies without the grant of criminal protections. The racketeering crimes covered by the Act are economic crimes. The objective of the criminals affected by Title IX is profit. Their willingness to violate criminal laws in their pursuit of profit should not create a constitutional shield that is denied to more conventional businessmen, when they are called to answer in civil suits for economic wrongs.

\(^{155}\) Even without specific statutory authorization, the courts' power to restrain particular acts that threaten significant, irreparable harm to the nation's commerce is not disputed. See, e.g., United States v. San Francisco, 310 U.S. 16 (1940); cf. In re Debs, 158 U.S. 564 (1895). Thus if particular racketeering activity poses such a threat it may be enjoined without reference to section 1964.