LAWYERS, GUNS AND MONEY
TOWARDS A COMPARATIVE JURISPRUDENCE OF ORGANISED CRIME

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I'm hiding in Honduras
I'm a desperate man
Send lawyers, guns and money
The shit has hit the fan.

— *Warren Zevon*

INTRODUCTION

Police and government sources confirm the story. We are "at war": the enemy — organised crime, their chief weapon — drugs. As President Bush sends the US Navy off the shores of Colombia, calls are made for the government here to use the Royal Australian Navy in drug interdiction.

As the propaganda reaches a fever pitch, the "law and order" rhetoric intensifies — truth in sentencing, longer terms for convicted "drug dealers" etc., etc. But the enemy is not so easily defeated. Stronger, more effective measures are required to successfully combat a foe that is "organised" — cunning, strong and resourceful — most of all, resourceful. The rewards associated with "drugs" are enormous. Not only do drugs eat away at the very moral fibre of our society, but the enemy "drug lords", "drug barons", "narco-terrorists", make huge profits. A successful strategy in the "war on drugs" will require innovative new weapons and tactics. We must attack the enemy where he lives. Now, instead of bombing Berlin or Tokyo or the Ho Chi Minh trail, we must attack the "money trail" — asset seizures, forfeitures, money laundering offences — these are the saturation bombing of the "war on drugs".

Of course, as is always necessary during wartime, certain sacrifices must be made for the greater good. Banking security and privacy must be sacrificed to ensure more accurate cash transaction reporting. Notions of burden of proof must be limited if assets are to be seized effectively. For some, this is an unwarranted assault on civil liberties. For

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others, the real culprits are the enemy — organised crime. Police Minister Ted Pickering claims:

> It's an infringement of my civil liberties to have the drug trade securing the assets they do.[2]

Mr Pickering has, probably unwittingly, given the absurd and stupid nature of his statement, stumbled upon a fundamental truth of the so-called "war on drugs". The real issue here is not a struggle for the moral fibre of society against a foreign conspiracy.[3] Nor are the major issues such legal niceties as "burden of proof", "civil liberties" or "the rights of third parties" (see *infra*). The real nature of the "war on drugs" and of legislation dealing with assets seizure and forfeiture and money laundering is nothing more complex than a battle over control of the market. The struggle is not one of good against evil, but of capitalist against capitalist. In some instances, it is a conflict over the very existence of a market (e.g. the "black market" in drugs). In others, it is simply an attempt to regulate activities to ensure that the market functions in a neutral and fair way (e.g. use of so-called organised crime statutes against insider trading or fraud, see *infra*).

The issues, rhetoric and ideology of the "war on organised crime" are nothing new. The use of asset forfeiture as a weapon to protect the market or the fisc is hardly without precedent. Nor, as history amply demonstrates, is the invocation of the threat of a "foreign devil" a new tool to be employed by a government or a police force which wants new and more extensive powers.

THE LESSONS OF HISTORY

The extension of powers of the state to seize and make forfeit assets connected with the commission of crimes appears, on the surface at least, to be a return to the days of the Star Chamber, attainder and the deodand.[4] Asset seizure and forfeiture seems contrary to the individualised and personalised utilitarianism which has characterised much of our criminal law since Mill. Moreover, the concept of "offending" property might well strike us as a reified abstraction which has no place in today's criminological theory or practice.

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2 Quoted in Sue Quinn "Spoils of War: Drugs lords' assets to be caught up in legal net" *Sunday Telegraph* 18 March 1990 p 139

3 It is interesting to note the ideological/rhetorical parallels between the "war on drugs" and the "threat of international communism" after World War II. Both involve an "enemy" which is highly organised, structured in secrecy and dominated from abroad. Both are bullshit. See Bradley, "Racketeering and the Federalization of Crime" (1984) 22 *Am Cr L Rev* 213 at 236 and Lynch, "RICO: The Crime of Being a Criminal" Parts I & II (1987) 87 *Col L Rev* 661 at 668

4 See Bracton, H., *On the Laws and Customs of England*, (Thorne trans. 1968) p 328; Pollock, F. and Maitland, F., *The History of English Law* (2nd ed 1911) p 474; Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty" (1973) 46 *Temp L Q* 169

However, the history of attainder, deodands and statutory seizure of property shows a certain continuity in our notions of criminal law and criminal justice. As others have pointed out, asset seizure and forfeiture:

> . . . is one of the oldest sanctions of Anglo-American law, originating with the beginning of public wrongs during the Anglo-Saxon period.[5]

Thus the deodand, the forfeiture of the instrument of crime, although perhaps *sui generis*, was a well-known concept of criminal law. Similarly, various statutory provisions, particularly those related to customs and navigation,[6] gave extensive rights of forfeiture to the Crown. Similar statutes were adopted, to a greater or lesser extent, in the American colonies and continued as part of the legal system of the newly-formed United States.

As Maxeiner points out, courts were reluctant to allow in personam forfeitures and sought to limit the extent of in rem forfeitures. A national emergency, ideologically not dissimilar to today's "war on drugs", the Civil War:

> . . . brought about a radical change in the law of forfeiture. Congress abandoned pre-War constitutional limitations on forfeiture and approved the use of in rem proceedings to impose purely punitive sanctions. Shortly after the War began, it became clear that traditional treason statutes were inadequate to punish the Southern rebels; most rebels were safely behind Confederate lines, protected from treason prosecutions. Nevertheless, many Confederates owned property in the North that was subject to confiscation.[7]

After the War, federal power was invoked against other forms of "organised crime". Anti-lottery legislation[8] allowed for seizures as did Prohibition era statutes.[9] Modern anti-organised crime measures can be seen, then, as a simple continuation of this trend.

While in each modern instance of asset forfeiture legislation one can find rhetoric about decaying moral fibre and fundamental values, it is quite easy to see that a fundamental purpose of forfeiture has not changed from the earliest days of attainder and deodand. That purpose is simply the augmentation of the Crown's coffers. In other words, a fundamental motivation, if not the fundamental motivation, behind asset forfeiture as a part of the criminal law has been, and remains, economic. At one level, the economic rationale has been the expansion of the purse of the Crown. At another, and interacting with the first, the function of asset seizure has been the happy blending of the public and the private. The assets of the Crown are increased and government regulation (customs, navigation, lotteries, drugs), effectively enforced while at the same time the private interest of the market is protected. Those who buy and sell goods subject, for example, to customs duty, are not undercut by those who would buy and sell the same goods smuggled without

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5 Maxeiner, "Bane of American Forfeiture Law — Banished At Last?" (1977) 62 *Cornell L Rev* 768 at 770 (Footnote omitted)

6 *ibid* 774 *et seq*. See also Bradley, *supra* n 3; Lynch, *supra* n 3

7 Maxeiner, *supra* n 5 pp 785-86

8 Bradley, *supra* n 3 pp 215 *et seq*

9 *ibid* 225 *et seq*

the additional cost of customs duties. The market is restored to, and remains at, an equilibrium. Those who would circumvent the level playing field of a properly regulated market are punished by forfeiture and deterred from future illicit economic activity. The cost of doing "illegal" business is dramatically increased as both capital and income are forfeited and, if the regulation is properly effective, illicit activity is made unprofitable. In a real sense, the purpose of asset forfeiture legislation has always been to ensure that "crime does not pay".

THE US LEGISLATION AND JUDICIAL EXPERIENCE

Others have detailed the legislative and judicial history of the United States' efforts to combat organised crime through asset forfeiture legislation[10] and I will not attempt to replicate their efforts here. I wish to focus on two basic points which come from the American legislative and judicial history and which indicate quite clearly the strengths and weaknesses in the current "war on organised crime".

These two points are, as I have said, relatively basic and simple. The first is that the American legislation, unlike its Australian counterparts (see *infra*) is targeted specifically at "organised crime". The second basic point is that the American legal system has from the very beginning recognized the primarily economic nature of the "war on crime".

This latter point is crucial. From the very beginning both legislators and judges made it abundantly clear that the aim of their efforts was to root out organised crime from the American economy.[11] In order to do this, they recognized that the most effective way of getting organised crime out of the economy was to use economic measures, that is, forfeiture. In a statement of legislative purpose in relation to RICO,[12] we find that it:

> attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains.[13]

The Senate Report is even more directly on point:

> What is needed here, the committee believes, are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an

10 See Bradley, *supra* n 3 and Lynch, *supra* n 3; see also Spaulding, "Hit Them Where It Hurts: RICO Criminal Forfeitures and White Collar Crime" (1989) 80 *J of Crim Law & Criminology* 197

11 Lynch, *supra* n 3 Indeed, Lynch argues that the original intent of the American legislation was to combat organised crime's infiltration into legitimate enterprise. Attacks on illegitimate enterprises *per se* (e.g. drugs) was not envisaged at the outset.

12 *id.* Passed as part of the *Organized Crime Control Act* of 1970, the "Racketeer Influenced and Corrupt Organizations" statute (RICO) (1986) 18 USC 1961-1968 is "one of the most controversial statutes in the federal criminal code".

13 (1970) 116 Cong Rec 591

> attack must be made on their source of economic power itself, and the attack must take place on all available fronts.[14]

Nor did the Supreme Court attempt to shrink from these clear statements of legislative intent and purpose. In a leading case on RICO, Blackmun J. speaking for the Court held, ". . . the RICO statute was aimed at organized crime's economic power in all its forms"[15] and he added that:

> The legislative history clearly demon-strates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.[16]

The primary rhetorical focus of US activity against "organised crime" has been aimed at the heart of crime, that is, the economic gains and power which come with success.

The second element in the American scheme, closely connected to "the money trail", is indicated in the RICO title. Its focus is collective, it aims at organisations because it is attempting to deal with "organised crime" and because it is attempting to deal with the economic power of "organised crime" which comes through profits derived from enterprises and firms (see *infra*) which act in an "organised" or collective fashion.

This collective approach, epitomised in the title of the statute, is embodied in its substantive provisions. In its key section, RICO attacks "a pattern of racketeering activity" which leads to an interest "any enterprise". While each of these concepts "pattern"[17] and "enterprise"[18] is, in its own way, complex and problematic, each clearly shifts the focus of the legal enquiry from the traditional individualised idea of crime, criminality and the criminal to a more collectivist notion of an "organisation".

In the leading case, *Sedima, SPRL v. Imrex*,[19] the Supreme Court clearly emphasised that the key to RICO was this shift away from notions of an isolated act by an individual, to a new approach. Thus:

> . . . the compensatable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.[20]

The pattern is a "factor of *continuity plus relationship*".[21] The move to an enterprise/pattern concept is not a total abandonment of traditional ideals of criminal liability. The statute aims at "systematic organized crime" but still continues to prosecute "individuals". Liability is based upon the commission of predicate crimes[22] which then are

14 (1969) S Rep No 91-617 p 79
15 *Russello v. United States* (1983) 464 US 16 at 25
16 *ibid* at 26
17 See *inter alia*, Goldsmith, "RICO and 'Pattern': The Search For 'Continuity Plus Relationship'" (1988) 73 *Cornell L Rev* 971
18 See O'Neill, "Functions of the RICO Enterprise Concept" (1989) 64 *Notre Dame L Rev* 646
19 (1985) 473 US 479
20 *ibid* 498
21 *id*
22 (1984) 18 USC 1961(1)

found to fit into a "pattern" involving an "enterprise". The criminality is simply enhanced by its organisational or "organised" nature.

While the "pattern" and "enterprise" requirements of RICO share in a collectivist origin, they remain conceptually distinct, as well as constituting independent and separate elements of RICO offences, each of which must be proved. At the same time, the courts have given an expansive reading to each. While *Sedima* broadened "pattern", other Supreme Court cases have broadened "enterprise". In *United States v. Turkette*,[23] the Court held that "enterprise":

> includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises than it does legitimate ones.[24]

This should come as little surprise given the Court's clear practice of giving an expansive reading to RICO in order to ensure that legislative purpose is attained. In both *Turkette* and *Russell* (*supra*) the Court gave a broad reading to the statute because in each case it recognized that the intent of Congress was to attack "organised crime" and to attack it at its economic roots.

Some, like Professor Lynch,[25] argue that the "transaction-based model of crime", that is, the traditional ideal of an individual committing an illegal act, is essential if the purposes of criminal sanction are to be well-served. For him, RICO's emphasis on "enterprise" and "pattern", in other words, collective concepts, is inimical to the function of a criminal justice system.

There are several reasons why Lynch's critique should be rejected. First, as I have already mentioned, RICO's focus on a collective approach is nonetheless based on the prosecution establishing the necessary "criminal" predicate act(s) and the defendant's participation therein. At this level, it is indeed based upon a "transaction model" of crime. RICO simply expands and extends the criminal sanction to acts which might otherwise not be criminal. In this, it is no different from any statute which imposes a "new" criminal liability.

Second, as I have pointed out elsewhere,[26] the concept of the "individual" committing "individual" acts is a highly problematic social construct which masks the complexity of human existence. One could perhaps speculate that RICO, with its emphasis on a more "social" approach to crime, more closely reflects the complex nature of human society and interaction.

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23 (1981) 452 US 576

24 *ibid* at 580-581

25 "RICO: The Crime of Being A Criminal" Parts III & IV (1987) 87 *Colum L Rev* 920 at 932 *et seq*

26 See my "Still Crazy After All These Years: A Critique of Diminished Responsibility" in Yeo, S.M.H. ed, *Partial Defenses to Murder* (in press)

Next, while it may be true that the collectivist approach of RICO extends beyond traditional transaction-based models, this does not mean that it is completely and totally isolated from common law principles. To take an obvious example, the common law itself has always been concerned with "criminal combinations". The law of conspiracy is an almost trite example of the law making "an act" illegal simply because it involves more than one person. Of course it can be objected here that conspiracy remains nonetheless attached to the transaction model and *Gerakiteys*[27] offers ample proof of this.

On the surface, this argument that RICO merely extends the common law appears to founder in the conspiracy example. As Lynch points out,[28] the facts in *Turkette* extend criminal liability beyond that of a traditional conspiracy count. Turkette was charged under RICO with participating in several arson-for-profit schemes. On the facts, there were at least four different schemes. In two, Turkette hired a third party to burn down properties, collecting a fee from the owners. In the other cases Turkette himself was the insured. Yet the Court found that Turkette was involved in a "pattern of racketeering" through which he obtained an "interest in an enterprise", in this case the "enterprise" being "arson-for-profit". While there is, as Lynch points out, a degree of confusion in the Court's decision concerning the distinction between the "pattern" and "enterprise" requirements, and while this case clearly involves liability greater than a *Gerakiteys* conspiracy, it is no more revolutionary or artificial than most "concepts" of the criminal law. Given the clear legislative intention behind RICO, the expansive reading of the Court's decision is hardly surprising. Nor is there anything conceptually difficult in its reasoning. Why should not the arson-for-profit schemes be seen to constitute a "pattern" even though the parties change? Turkette remains the central figure in each "scheme" extracting profit for violence against property. Is this conceptually more difficult than believing that a "corporation" is different from the people who constitute or work for it? For lawyers, each involves only a little imagination and no revolutionary upheaval in the way we see the world. Legislators and judges expand (and contract?) criminal liability all the time. On this level, RICO is no big deal.

THE AUSTRALIAN EXPERIENCE

Others[29] have chronicled the still nascent Australian legislative and judicial history of the use of asset seizure and forfeiture to combat organised crime and again I will not duplicate their efforts here. Nor will I offer a detailed exegesis of the Australian or New South Wales legislation. Suffice it to say that while many objections can be raised against these statutes, all debate must take place within the traditional and normal paradigm of criminal law. Unlike the United States where RICO is seen by legislators and judges as a tool in the

27 (1983) 153 CLR 317

28 Lynch, *supra* n 3 at 704 *et seq*

29 See Fisse, "The Proceeds of Crime Act: The Rise of Money Laundering Offences and the Fall of Principle" (1989) 13 *Crim L J* 5; Fisse, "Confiscation of the Proceeds of Crime: Funny Money, Serious Legislation" (1989) 13 *Crim L J* 368; Temby, "The Proceeds of Crime Act: One Year's Experience" (1989) 13 *Crim L J* 24; Aarons, "The National Crimes Commission: a Focus on Legislation Relating to Illegal 'Laundering of Money' and 'the Paper Trial'" (1983) 57 *Law Inst J* 1349

"war against organised crime" and where consequently, it is structured to deal with "collective" crime, one can find little such evidence in Australia.

Rather, Australian legislation deals with these matters as if they were simply part of the traditional common law. For example, the *Commonwealth Proceeds of Crime Act* 1987 (POC), creates in s. 81 the offence of money laundering. Yet money laundering is defined in terms of a single "transaction". Some apparent attempt at a more refined approach is made in s. 83 which creates a new offence of "organised fraud". Organised fraud means inter alia "acts or omissions that constitute three or more public fraud offences" which are defined to include various violations of *Crimes Act* and the *Crimes (Taxation Offences) Act* 1980, but not repeated or patterned violations of the POC. Thus while RICO focuses on "pattern" with its requirement of continuity and relation, POC focuses solely on "three or more acts", like a simple repeat offender statute. It seems quite clear that while "we" may be involved in a "war on organised crime", like others before "us", "we" are fighting the new battles with weapons and tactics from the previous war.

AN EXEGESIS ON THE ECONOMICS OF ORGANISED CRIME

Whether the American approach with its collectivist emphasis on "enterprise" and "pattern" will, in the long run, be more successful than the Australian insistence on traditional transaction-based criminal law models remains to be seen. Indeed, the first thing which must be done is to define our ideal of success. Current trends in NSW Inc. would indicate that rates of incarceration are seen by some as an important benchmark. Such a standard is, however, problematic because it ignores the reality of criminal enterprise.

Nothing could more succinctly explain the reality of criminal enterprise than the following quote, attributed by Temby to Bruce Richard "Snapper" Cornwell while doing a minimum sentence of 14 years:

> I don't give a fuck what they do to me as long as we keep safe all that we have worked for.[30]

Faced with attitudes like this, incarceration is not likely to win the "war on drugs".

The real goal of asset seizure and forfeiture is to hit the crims where it hurts. Criminal forfeiture and money laundering statutes as I stated earlier are economic measures. They are intended to remove valuable assets from criminals (or criminal enterprises) in order to make crime an economically unviable occupation. Success in the "war on organised crime", then, must be measured in terms of its effectiveness in achieving this goal. In other words, success here is to be measured in economic terms. Rhetoric and propaganda about moral fibre notwithstanding, the goal of asset forfeiture must be to make criminals operate at a loss, to make marginal cost exceed marginal profit, thereby putting them out of business.

30 Temby, *ibid* at 30

Before beginning a somewhat more detailed analysis of this ideal of economic control of organised crime, it should be noted that different considerations may apply to an economic analysis of various "organised crime" activities. For example, some types of organised crime (for example, drugs) may involve problems of cartel or monopoly, while other types of activity covered by these statutes (for example, white-collar fraud) may involve simpler forms of market imperfections such as increased transaction costs and information disequilibrium. Thus while the goal of asset forfeiture remains the same, its actual or even potential effectiveness may depend on any number of case-specific factors.

It remains nonetheless a self-evident truth that criminals like all other rational wealth-maximizing capitalists are in it for the money. From the paradigmatic junkie stealing a television set, to Ivan Boesky and Michael Milken, people commit crimes for purposes of personal utility — more money, more power, more drugs. This is the reality at which asset forfeiture legislation is aimed, for if the state can reduce or eliminate the profit-margin of crime, crime will diminish or cease. At this very basic level, then, asset forfeiture legislation is another form of market regulation by the state.

What "organised crime" has realized, just like General Motors or BHP, is that the most important economic actors in the capitalist system are corporate entities or firms. As Hirshleifer puts it:

> Firms are the crucial *productive* agents of society, engaged in the conversion of resources into final goods.[31]

Just as the move to corporate identity allowed capitalism to flourish, the move to "organised crime" allows crime to flourish. Economies of scale and limited liability operate within criminal organisation just as they operate for BHP. Entrepreneurship is rewarded and profit-maximization is the ultimate goal of both the legal and illegal enterprise. Costs are internalized and the possibility of monopolistic pricing is ever-present.

It is, I think, this prospect of monopolisation, which most raises the ire of the state and which is behind the move to asset forfeiture. We are constantly assaulted with dollar figures in the hundreds of millions or even the billions when the spectre of "organised crime" is raised. However speculative or unscientific those figures may be, it is nonetheless an obvious experiential truth that "organised crime", as epitomised by the drug trade, makes lots of money. And the reason that it makes lots of money is that, at a theoretical level at least, it functions like a monopoly or a cartel. The manufacture and distribution of a commodity, for example, cocaine, is controlled by a single entity (a firm, a "family", a "gang") or a grouping of entities (the infamous Colombian or Medellín Cartel) which can, because it is a monopoly, price in a fashion which allows enormous profits. In the case of a cartel, an agreement is entered into to engage in monopolistic price-fixing. In general economic theory, cartels are less stable than monopolies, because any of the parties may, if the incentive is strong enough, enter into competition by leaving the cartel, thereby dragging down profits to a market, rather than a monopolistic, rate. This

31 Jack Hirshleifer, *Price Theory and Application* (3rd ed 1984) at 173

scenario is less likely in a "criminal" cartel situation both because the other members have greater scope in available remedies to deter those who might want to leave (murder, kneecapping, kidnapping) than do "legal" cartel members and because of the nature of the commodity involved in the cartelisation. Because of the alleged "addictive" nature of cocaine or heroin, the demand for the product is likely to be highly inelastic in relation to price. In other words, the market for the product will not be adversely affected by monopolistic pricing, therefore, economic incentive to abandon the cartel may be much lower than in ordinary cartel situations.

This monopolistic pricing is highly profitable for the members of the cartel, but for the "market", it is a classic example of inefficiency. Because monopoly causes lower output and higher price than a competitive situation, trade in a monopoly situation is coercive and not naturally beneficial. Therefore, the fundamental norms of free market transactions are violated and there is an overall loss of efficiency.[32] At this basic level then, organised crime is extracting exorbitant profit. The only effective means of deterring such conduct, on the rules of the market, is to engage in trust-busting economic sanctions like asset forfeiture. Moreover, it should also be noted that these profits, unless and until they are laundered (*infra*), are not subject to taxation. All the social costs of the "drug monopoly" are therefore, in the absence of an effective forfeiture mechanism, subsidised by the general tax market. The "externalities" are not internalised by the cartel, they are simply passed along to third parties and the monopolistic profit is further increased as "real costs" of the transaction are made irrelevant to the profit-taker.

It should be noted, however, that not all forms of vertical integration, even to the extent of monopolisation or cartelisation, are completely "inefficient" in a welfare sense. The savings through integration in terms of management expertise as well as the potential employment benefits are only two examples of such welfare efficiency.[33] Thus, while it may well be argued that "organised crime" is an evil presence in the economy, especially if it uses monopolistic racketeering practices against legitimate "efficient" business, or if it uses monopolistic or cartel-based practices to prevent further competition once it gains control of legitimate businesses, it should and must be recognised that "crime", "organised" or not, often serves a "valuable" economic function. At the basic level, it provides goods and services for a demand which exists in the marketplace. There is, whether the government of NSW Inc. wants to recognize it or not, a market for marijuana and cocaine. Depending on the demand elasticity of different commodities, for asset forfeiture to be successful, it must recognize this fact. Crime-fighting strategy must be so efficient that there is no profit to be made in the supply to meet consumer demand. If the American experience of Prohibition is any example, the likelihood of such efficiency in a state trust-busting process is minimal.

32 While this analysis is focused on the drug trade, the same outlook can be applied to white-collar crime. If we look, for example, at insider information, it can be argued that not only does this violate fundamental norms of "the equal playing field" of the market, but it allows someone trading in such information to obtain not only "speculative" profits, but to engage in monopolistic pricing in the sale/use of that information.

33 For a more detailed analysis, see Williamson, O., *Markets and Hierarchies* (1975)

It must also be recognised that "organised crime" often provides a service at a lower cost than the "market" or a state monopoly. The example of gambling is the classic one. Even where gambling is legalised, illegal forms of gambling continue to exist and flourish because they offer services or returns to their customers which are not met in the legal "white" market. "Black market" gambling can offer higher returns in part at least because it is not subject (again until the money is laundered) to taxation. Again, to cope with this problem, asset forfeiture can only be successful if enough money or value is seized so that marginal cost exceeds marginal revenue. There is no evidence that this is likely to be the case.

More important, however, is that, outside the problem of monopolisation or cartelisation, "organised crime" often brings certain attributes and skills to the "market" which the market values. "Criminals" are often non-risk averse, in other words, they possess entrepreneurial verve and skill and are willing to take chances for the possibility of profit. They possess exactly the same skills and attributes that we appear to honour and cherish in an Alan Bond except that they often put these skills to work in "illegal" activities. At the same time, these activities, "illegal" or not, create employment and provide services for which there is a demand. In some instances it might also be possible to suggest that "illegal" funds might well keep an otherwise "inefficient" legitimate business in operation where predatory market forces (LBOs and so on) might force the break-up of the same enterprise with resultant social dislocation through unemployment and unproductive profit-taking by the predators.

Similarly, because they are cash-rich, "organised crime" groups may be able to enter the "legitimate" market at times when "market forces" or monetary policy (for example, high interest rates, recession) might prevent other actors from doing so:

> A continuous cash-rich position suggests that members of organized criminal groups may have a competitive advantage in industries where providing capital is a means of competing.[34]

Some might argue that because of the "illegal" origin of such capital, steps must be taken to keep it out of the "legitimate" market. Such an argument, however, has little to do with efficiency criteria. The capital, whatever its source, may be put to efficient use, even if it has been originally gained through illegitimate means. There is little difference here between "illicit" organised crime capital or that obtained through tax avoidance schemes or inheritance. The only distinction is the "licit" or "illicit" nature of its origin. In other words, the policy-makers behind asset-forfeiture legislation and practice must recognise that certain decisions may well have both long and short-term efficiency or welfare consequences. Again, such decisions can be justified only if their programme reaches the level of marginal profit.

Similarly, once it has entered "legitimate" business, "organised crime" may well bring its skills gained in criminal activity to the "legitimate" market. For example, as

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34 Anderson, A., *The Business of Organized Crime: A Cosa Nostra Family* (1979) p 115

Anderson points out,[35] the ability to accurately assess credit risk gained in loan-sharking is a skill clearly transportable to the "legitimate" world of banking and insurance.

Indeed, her study points clearly to the fact that there is no per se competitive injury in the market when "organised crime" enters "legitimate business":

> None of the major reasons for entry of members of the group into legitimate business — to acquire tax covers, establish fronts, and diversify — in itself leads to damage to competition, consumers, or taxpayers. The group's legitimate business activities are not generally predatory and cannot be characterized as an aggressive effort to achieve profits through illegal means.[36]

If "organised crime" brings valuable skills to the "market" and if it does not engage in illegal activity once it is in the "market" as Anderson's study suggests, then asset forfeiture practised against "interests" in such activities must be justified on a broader efficiency basis. Asset forfeiture of "legitimate" businesses must be shown to adversely effect the marginal profit/cost ratio of the "illicit" activities. Again, there is no evidence that such is the case.

In order to effectively demonstrate that asset forfeiture can and does work, we need something more concrete than "hitting them where it hurts". What it required is a theoretically sound, empirically verified idea about the actual decision-making processes of members of "organised crime" as well as an accurate assessment of the economic value of their activity.[37] In addition to the factors of monopolisation and cartelisation mentioned earlier, such a model/study would also have to consider such elements as entrepreneurial skill and risk-preference which appear to characterise participants in "organised crime". Also necessary to the calculus would be the impact (positive or negative) of "organised crime" on the economy at large — for example, employment creation, risk or venture capital availability, the demand for black market goods and services, tax and welfare consequences, and so on. Moreover, the other costs and benefits of "organised crime", especially of "criminalisation" must be carefully examined.

For example, an almost necessary consequences of "criminalisation" and the creation of black markets is police and government corruption. Corrupting police and government officials is simply a necessary cost of doing business for the "organised" criminal. Not only do bribes or other emoluments ensure non-enforcement of criminal sanctions (acting therefore as insurance and cost-cutting measures at the same time), but they may also serve to further enhance the monopolist's position. While criminalisation itself serves as a barrier to entry into the ("black") market, selective enforcement, insured through corruption, against potential or existing competitors may result in the

35 *ibid* at 121 *et seq*

36 *ibid* at 140-141

37 While the latter is probably impossible, interesting studies and theoretical models of "organised crime" do exist. See, for example, Anderson *op cit supra* n 4; Ehrlich, "Participation In Illegitimate Activities: A Theoretical and Empirical Investigation" in McPheters and Stronge eds *The Economics of Crime and Law Enforcement* (1976) p 141; Schelling, "Economic Analysis and Organized Crime" in Kaplan and Kessler, eds, *An Economic Analysis of Crime* (1976) p 367

strengthening or creation of a monopoly. Thus, monopoly practices are enforced by both licit and illicit police practices.

At the same time, corruption of public officials may permit a non-competitive entry into a limited "legitimate" market (for example, licensing) or into a legal monopoly (for example, municipal contracted refuse services). Such an entreé may not merely harm competition for that particular "market" or "monopoly", but may also harm competition within the broader market if the original contract allows a front for laundering or extortion through "racketeering". At the same time, of course, money for bribes enters the economy in one form or another and may create wealth or employment. Again, the fisc may find itself deprived of income in any number of forms. Finally, the cost of policing corruption (see *infra*) will be increased and passed along to the "innocent" consumer/taxpayer.

Other ideas which might be considered in such a model must take into account the actual choices of "organised" criminals and the factors which influence such choices. For example, among such factors I have just mentioned, both the law itself and corruption may operate as a form of insurance for the criminal. The availability of other forms of insurance may also influence his cost/benefit analysis. Three main types of "insurance" are available: (1) real insurance against liability; (2) the availability of legal representation to "insure" protection against forfeiture; and (3) the "insurance" of asset divestiture to avoid seizure and forfeiture. Let me examine each of these briefly.

Even though it is likely that "criminals" are more risk-preferring than the population at large, it should be noted that even for those who are not risk-averse, the availability of insurance may be a relevant consideration. Moreover, American experience clearly demonstrates that RICO forfeitures can be employed not only against the paradigmatic "criminal" but against so-called "legitimate" businessmen, for example, white-collar criminals, and so on. In those cases, the availability of insurance may be relevant.

In the RICO scenario, insurance is of course not relevant when considering criminal sanctions. RICO, however, permits a civil suit by a party damaged by racketeering activity and permits recovery of treble damages. I will not enter into a detail analysis here.[38] Suffice it to say that the availability of insurance protection of RICO treble damages depends on the future judicial characterisation of such damages. If they are compensatory, they will be insured: if they are punitive, they are not. Thus, not only is the availability of insurance coverage likely to be a relevant economic consideration for asset forfeiture legislation, but if civil RICO losses are insurable, this is likely to result in increased costs of insurance for all business (and perhaps for other consumers as well) and increased costs in the use of public resources through litigation as insurers and insured fight out the limits of coverage in court.

38 For a cogent and complete exposition of the issues, see Hellerstein and Mullins, "The Likely Insurance Treatment of Treble Damage RICO Judgements" (1986) 42 *Business Lawyer* 121

The second factor — the availability of legal "coverage" — is not only likely to be an important factor in any "criminal's" cost/benefit analysis, but is one of the most controversial in both Australia[39] and the United States.[40] Critics of asset forfeiture often single out the problem of attorney's fees. Under RICO and similar Australian legislation, *all* proceeds of crime, including cash paid to attorneys, may be seized (assuming the nexus broadly defined is established to make such cash "proceeds of crime"). This deprives the accused of representation of counsel of his choice and therefore of a fundamental right.

Response to such criticism is relatively obvious. First, it does not deprive the accused of representation, simply of "Rolls Royce" representation. Second, if asset forfeiture is to be effective as an economic deterrent, no assets should be immune if they are indeed proceeds of crime. (Unless the "value" of the right to an attorney of choice is priced more highly in a welfare sense than the "value" of asset forfeiture as a weapon.)

In other words, at the level of economic analysis, the issues appear to be relatively simple. If the unavailability of "Rolls Royce" "drug" attorneys will provide a disincentive to criminals to engage in their nefarious activities, seizure of attorneys' fees is a useful weapon. On the other hand, there is clearly a social cost in interfering with the availability of qualified criminal defence attorneys. In response to this, however, one might argue that "fundamental" value-based normative arguments in relation to the forfeitability of lawyers' fees often hide both an inherent class bias and the self-interest of the legal profession. In so far as this latter point is concerned, it is self-evident that it is in the interest of the profession to be immune from seizure and forfeiture of fees, regardless of the "fundamental values" involved. Secondly, on the former point, it is true that there is little attempt from either the profession or the legislature to deal with the problem of "Rolls Royce" attorneys in any other context. In all other cases, "you get what you pay for". Only the rich can afford "Rolls Royce" lawyers, whether they are rich "criminals" or simply "rich". Arguments about "fundamental values" hide the real social costs of the inequalities of the legal system based on an ability-to-pay market scheme.

In short, we must determine whether the social and personal cost of forfeiting attorneys' fees is greater than the benefit in providing a further economic disincentive to "criminals" by forcing them to be even more self-insured. We must consider not only those costs mentioned already, but the cost of lawyers dropping out of criminal practice, in general, and in particular the cost of further enforcing the prosecutions power by diminishing the strength of the defence Bar.[41]

It must also be noted that entrepreneurial types may well be simply more inventive when it comes to developing self-insurance schemes. In a recent Florida case, a lawyer was convicted for taking fees from drug dealers before their drug-running trips. If

39 See Fisse, *supra* n 29

40 See *inter alia* Winick, "Forfeiture of Attorney's Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It" (1989) 43 *U Miami L Rev* 765

41 There is some anecdotal evidence that this may be happening in the United States. See Fricker, "Dirty Money" (Nov 1989) *ABA Journal* 60 at 64

the smuggling trip was successful, he would keep the US$10,000, if unsuccessful, he would defend them without further charge. Although he was caught, it is not unlikely to assume that similar "legal lottery" schemes would be one possible self-insurance mechanism.[42]

In the end, however, it seems that current policy is moving towards the rationale announced by the Supreme Court of the United States in its latest decisions on the question[43] where White J said simply:

> There is a strong governmental interest in obtaining full recovery of all forfeitable assets, an interest that overrides any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense.

Again, however, it remains to be seen whether this "interest" analysis will reflect the actual cost/benefit analyses upon which asset forfeiture legislation must depend for practical success.

The third type of "insurance" which a criminal might employ to avoid forfeiture of valuable assets is a pre-trial "disposal" of these assets to a third party. Such transactions are not unfamiliar to taxation or bankruptcy practitioners, nor is the idea of "tracing" such assets in the hands of third parties. The legislative practice, however, has been to simplify the procedure to ensure that the state has assets against which it can act effectively.

Two mechanisms are used to prevent asset dissipation. The first is a pre-trial order "freezing" assets pending the outcome of the trial.[44] While such orders may appear harsh and in violation of the "golden thread" presumption of innocence, certain "due process" provisions alleviate many of these difficulties. Given the growth of *Mareva* injunctions and *Anton Pillar* orders in equity, the criminal law pre-trial freezing of assets is hardly revolutionary or without antecedents.

The second mechanism is the relation-back provision.[45] Under these provisions property is deemed forfeit at the time the criminal act occurred, not at the time of conviction. Thus, assets which have been transferred in the period between the commission of the offence and conviction are "traceable" because they actually "belong" to the government during this period. Indeed, recent amendments to RICO permit the state to "trace" and seize other assets in place of forfeit property which has been dissipated, transferred or hidden.[46]

It is clear that such provisions potentially increase the efficiency of asset forfeiture legislation by permitting the government greater scope in the assets it may seize, by establishing a legislative nexus between the assets and the crime, thereby greatly reducing burdens and costs of proof and by removing another form of self-insurance from the "criminal". At the same time, in the absence of data, we must ask again whether in practice

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42 Anderson, "Illegal Legal Insurance" (Nov 1989) *ABA Journal* 34

43 *US v. Monsanto* 109 S Ct 2657 and *Caplin & Drysdale v. US* 109 S Ct 2646

44 For a discussion, see Fisse, *supra* n 29; Spaulding, *supra* n 10 at 215 *et seq*

45 *id*

46 (1988) 18 USC 1963(n)

even this greater scope and cost-reduced enforcement scheme can be effective against monopolistic pricing by "organised crime". We are, as they say "talking big bucks here".

The cost of enforcement practices is, of course, an important factor in determining the effectiveness or efficiency of asset forfeiture legislation. Not only must the government succeed in bridging the gap between the marginal profit and the marginal cost of "organised crime", it must do so in a way that the cost to society (or taxpayers) does not exceed the benefit we derive from law enforcement.

One mechanism for reducing the so-called "social" cost of law enforcement is the much touted "privatisation" route. In the United States, RICO, as I have mentioned, allows a "private" civil action, with treble damages, to parties injured in their business by "organised crime" racketeering activities. Although subject to the criticism of misuse,[47] civil RICO does appear to offer several advantages often seen as flowing from "privatisation" and from the public/private distinction in law. Thus, civil RICO claimants operate under the less onerous civil burden of proof. Remedial provisions in civil RICO permit, in addition to the already mentioned treble damages, divestiture orders, restrictions on activities by "racketeers" and dissolution or reorganisation of the infiltrated enterprise.

Thus, one can achieve the economic goal of driving out predators and restoring the market to a "level playing field" while reducing the costs of the heavy criminal law burden of proof. At the same time, the availability of treble damages may encourage litigants to act more willingly as private attorneys-general. In addition, under a contingent fee arrangement, impoverished litigants may still sue and lawyers may be more willing to undertake such actions because of the possibility of increased recovery.

The treble damages rule serves not only to compensate the victim for his loss, it also insures that some losses which might not be provable but which nevertheless were incurred, are recovered. It also "punishes" and "deters" not only directly, but indirectly as well by making it more difficult to hide "profits" or "assets" because the treble damages rule may get at such assets anyway.

On the other hand, it may well be that again even treble damage awards do not effectively attack the profit margin. Moreover, similar "private" remedies are not without their "public" costs. The lower standard of proof may unjustly deprive an "innocent" of his assets. The costs of court time etc. are borne by the public, as are the costs of other trials moved down the docket by the plethora of civil RICO cases. As usual, of course, the costs of unsuccessful contingent litigation are borne by the public, as successful litigants subsidise the unsuccessful or lawyers simply refuse to take cases which are difficult, thereby depriving litigants of recovery and allowing potential "illegal" profits and assets to escape detection and forfeiture.

It is the possibility that assets may escape detection and forfeiture which most concerns law enforcement. One cannot seize what one does not know exists. Thus,

47 See Abrams, "A New Proposal for Limited Private Civil RICO", (1989) 37 *UCLA L Rev* 1

measures must be adopted to make hiding assets more difficult and eventually inefficient. Thus do we have Cash Transaction Reporting and anti-money laundering legislation.

Money laundering is quite simply the process through which "dirty" money, (proceeds of crime) is washed through "clean" or legitimate sources and enterprises so that the "bad guys" may more safely enjoy their ill-gotten gains.[48] Money laundering is important in the economics of "organised crime" because it is here that the "assets" of criminals come close to the surface. "Criminals" must launder to enjoy the proceeds, the state must stop laundering because once "dirty" money becomes "clean" it is practically beyond their grasp, except as "legitimate" money, subject to the same rules as everyone else's money.

Again, to determine whether legislative and police efforts are "successful", we must determine whether they effect the profit/cost margin to such an extent that "crime does not pay" at a cost that does not burden society. In other words, it must be both internally and externally efficient. And again, the evidence is either not there or what evidence there is indicates that, so far, the state has failed in its saturation bombing of the money trail.

One of the real difficulties with any analysis of money laundering is that we really cannot know what sums are involved. Evidence is either journalistic and anecdotal or partial at best. Thus, recent journalistic reports state that "as much as $600 million in ransom proceeds of organised crime (in Italy) had been laundered in Australia".[49] Another story, in the same newspaper tells us, "After 15 years, there's still no evidence of Mafia ransom laundering".[50] Aarons reports that:

> Figures provided by Mr Justice Williams in the Report of the Australian Royal Commission of Inquiry into Drugs indicate that as much as $A16 million leaves Australia each year to buy heroin and when subsequently, the proceeds of such supply leave the country to be "laundered", the amount increases to $A100 million.[51]

In two cases cited by the President's Commission on Organized Crime, one group laundered US$25 million in under two years and in a similar period another group laundered US$94 million.[52]

Although we have no idea of how much money is involved in money laundering, we can say with some certainty that there is a lot of money to be made. And because there is so much money to be made, there is a great incentive to be involved in such activities. The government anti-money laundering scheme must therefore provide a sufficient and

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48 It should be noted that at this level at least, this is the one area where the *fisc* benefits from proceeds of crime. As money is "cleaned", it can be reported as income.

49 Seccombe, M., "Inquiry Ordered into claims of Mafia money link" *Sydney Morning Herald* 5 April 1990

50 Whitton, E., *Sydney Morning Herald* 9 April 1990

51 Aarons, *supra* n 29 (footnote omitted)

52 *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984) p viii. The first case involved the infamous "Pizza Connection", the second the Great American Bank.

efficient disincentive. As I have said, there is little evidence to support a government claim to such effectiveness. Figures from 1981 in the United States indicate that at that time, government efforts were highly ineffective and inefficient. Karchner states:

> ...one concludes that $0.0062 out of every illegally earned dollar from narcotics traffic is subject to the initiation of some type of government removal action. This figure loses further significance when one looks at the outcome of various removal actions: less than half the amounts involved in seizure and forfeiture actions were actually surrendered to the government, and no more than 2 percent of IRS jeopardy and termination assessments (which totalled $81.3 million in 1981) ended up being collected. In light of these statistics, the value of asset removal strategies is highly questionable.[53]

Even assuming that, with increased resources, better focus and legislative intervention, the forces of law and order have significantly lifted their game, we must also assume that entrepreneurial criminals have reacted in kind with practices such as Smurfing[54] and more sophisticated international banking and business practices.

Also, it should be noted that it is possible that partial government success in this field might simply exacerbate the problem by raising "criminal" profit. As I argue *supra*, criminalisation and law enforcement practices often operate as a barrier to entry or to eliminate competition so that, in combination, they may well result in monopoly or cartel situations. If money laundering legislation operates against only some "criminals", that is, those whose activities are detected, it might simply decrease competition and increase profits, thereby increasing the amount of money being laundered.

Furthermore, as I also argued *supra*, "clean" money enters the *fisc* and the legitimate economy, often providing economic benefit through growth, employment and increased efficiency. Again Karchner succinctly summarises the situation:

> Overall it could be argued that society stands to suffer relatively less harm from the investment of racketeering proceeds in sectors where financial transactions are expected to conform to certain basic standards that govern the uses which those assets can be put consequently (*sic*) criminals whose laundered funds come to reside in banking, real estate, and securities investment must sacrifice a degree of discretion to behave illegally with respect to those investments in order that they might preserve the illusion of propriety, which, after all, is largely responsible for laundering activity in the first place.[55]

In summary, there is no evidence that money laundering legislation is effective in reducing the profit/cost margin of crime. While activities like Smurfing might involve additional cost to the "criminal", it is not likely that these costs approach the margin. Indeed, there is some evidence to support the argument that some social benefit might arise from the insertion of laundered funds into the economy. Money laundering

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53 Karchner, C., "Money Laundering and the Organized Underworld" in Alexander and Caiden, eds,*The Politics and Economics of Organized Crime* (1985) 37 at 39-40

54 Welling, "Smurfs, Money Laundering and the Federal Criminal Law: the Crime of Structuring Transactions" (1989) 41 *Fla L Rev* 217; Popham and Probus, "Structural Transactions in Money Laundering: Dealing with Tax Evaders, Smurfs, and Other Enemies of the People" (1988) 14 *Am J Crim Law* 83

55 Karchner, *supra* n 53 at 43-44

legislation does not appear, in the absence of evidence to the contrary, to be "externally" efficient.

Is it internally efficient, i.e. what are the actual costs of enforcement? Again there is little evidence here. While there are occasional announcements of the government's intention to dedicate funds to eradicate drugs or stop money laundering, there is no comprehensive analysis of all the costs associated with such a programme. Police and civilian staff must be trained in specialised investigative techniques. Expert computer programmes must be developed and people trained in their use and application. International cooperation must be obtained and maintained and prosecutions must be successfully launched. Assets must be tracked down and seized. These are all obvious, but so far, undocumented and unanalysed data.

Moreover, the actual offence of money laundering and associated offences related to Cash Transaction Reporting apply to banking and financial institutions. These institutions often have the burden of reporting potential violations of statutory provisions and face severe penalties for non-compliance. However, compliance itself may be costly and complex. Changes in corporate culture and corporate management techniques are often required.[56] The responsibility for spotting "suspicious transactions" is placed most immediately on often under-paid, under-trained clerks and tellers. Corporate compliance calls for masses of paper work and/or complex computer operations, all of which are costs imposed on a "private" party who in all likelihood, will simply pass them on to its customers. It is little wonder, then, that:

> The American Bankers Association has urged the Treasury Department to assume most of the responsibility for policing large-scale money laundering activities, and not to expect banks to uncover suspicious transactions in their international funds transfer operations.
>
> . . . The banking trade group expressed concern that compliance with anti-laundering regulations would disrupt service to companies and institutions that require rapid processing of large-dollar payments . . .[57]

The banking establishment's clear objection to its watch-dog role is premised on business (economic) principles and on the public/private distinction. The role of law enforcement and crime detection is, for the bankers, a public one and the costs should not be imposed upon private institutions like banks, nor should such regulation operate in such a way as to infringe on this commercial/customer service relationship.

On the other hand, it appears unlikely that banks will be relieved of responsibility, especially since many cases indicate the banks' "willing" participation in laundering.[58] Given this reality of "policy", it may well be that some banks may actually "profit" from their role in Cash Transaction Reporting. At the very least, banks will avoid potential

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56 See, for example, *US v. Bank of New England* (5th Cir. 1987) 821 F 2d 814

57 "Bankers Want Smaller Role In Drug Probes", in *American Banker* 4 January 1990 p 3; see also Intriago, "Money Laundering: New Penalties, Risks, Burdens for Bankers", *The Bankers Magazine* March/April 1990 p 50

58 See, for example, *US v. Ponce Federal Bank* (1st Cir 1989) 883 F 2d 1

losses due to adverse publicity if they are seen to be "soft on drugs". They may also benefit from positive publicity if they are seen to participate, or promote themselves as participating, in "the war on drugs". Moreover, there exists the possibility that certain "industry leaders" might well market (as is happening in the United States) their expertise in compliance systems and management training to other banks and financial institutions. Thus, while money laundering may not prove to be successful against "organised crime", it may will serve as yet another money-maker for the banks, and, after all, what's good for the banks is good for us all. In the banking industry's objection to bearing the administrative and financial burdens of monitoring money laundering, we can see a complaint which is often raised by critics of asset forfeiture legislation — the imposition of burdens on innocent third parties. While many such objections might appear to be justified given the sometimes extravagant nature of recent legislative language,[59] they founder in both theory and practice. For example, American third-party seizures are governed by stringent due-process standards which clearly protect *bona fide* purchasers.[60] In both theory and practice, then, the "innocent" third party is protected.

Particular third parties, that is, family members, are singled out as potentially innocent victims.[61] For the objectors, this is particularly nefarious and smacks of ancient and outdated ideas of the loss of rights of inheritance following attainder. But current legislation does not aim at "inheritance" as a legal category. Rather it aims at "proceeds of crime". At this level, it is hardly surprising that government might target assets in the hands of family members since this is an obvious choice for someone who might wish to "transfer" assets to avoid liability. In addition, it should be pointed out that while defining family members as "innocent" third parties may well be a technically correct legal categorisation, it is a somewhat disingenuous treatment of reality. Bobbie and Susie only go to the private school and drive a Porsche, if Daddy is a racketeer, *because* Daddy is a racketeer. In a very direct and real way, all the material benefits of "family" life they enjoy are a result of "organised crime". To attack the family, in this way, if the family is a valuable "asset" to the "criminal", may have a definite deterrent effect. Finally, it is always the case in the criminal justice system that "innocent" third parties are effected, especially members of the "criminal's" family. If the objection is valid in relation to asset forfeiture, it is equally valid for incarceration.

Finally, opponents of asset forfeiture legislation as it now exists argue that forfeiture should somehow be limited to "profits", usually net profits, rather than proceeds because to attack "proceeds" may constitute a form of double jeopardy or disproportionate punishment.[62] While the Australian experience is still in an embryonic form and offers little, if any, guidance on this question, American experience points to the problematic nature of the "profits" *versus* "proceeds" debate.

59 See, for example, Fisse, *supra* n 29
60 See Spaulding, *supra* n 10 at 284
61 See Fisse, *supra* n 29
62 *id*

Congress, in passing RICO, specifically adopted the term "proceeds" rather than "profits", in part at least, "to alleviate the unreasonable burden on the government of proving net profits".[63] Despite this, the issue of exactly what "costs of doing business", if any, should be taken into account in determining liability for forfeiture remains hotly contested.

In *US v. Lizza Industries*,[64] the defendant argued that the trial judge erred in calculating seizures under RICO on a gross profits basis. Defendant was convicted of participating in a bid-rigging conspiracy for public road-building contracts. The trial judge:

> . . . calculated the forfeiture by deducting from the money received on the illegal contracts *only* the direct costs incurred in performing those contracts.[65]

The Court points out, correctly I think, that:

> RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain. Using net profits as the measure for forfeiture could tip such business decisions in favour of illegal conduct.[66]

The preventive/deterrent nature of forfeiture under RICO virtually compels this result if this role as an economic sanction is to make any real impact. Marginal profit is more likely to be attacked under the gross profit approach. In addition, prosecution costs are lessened because net profits are more difficult to prove than gross profits, especially when:

> Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative.[67]

The net profit approach would simply put the amount of seizure within the control of the avoidance-wise "criminal", hardly a deterrent. In addition, as Spaulding points out,[68] there is some confusion in the legal test for forfeiture because of the varying nature of activities caught under RICO. *Lizza Industries* involved "white-collar" crime where deductible expenses were presumably incurred in the execution of an otherwise legitimate contractual obligation. In drug cases, on the other hand, the serious question remains as to whether "expenses" like the purchase price of heroin, airplane fuel used in smuggling, laboratories etc. should be "deductible". Of course, this problem arises only if the direct expenses deduction is the proper approach. One could argue, persuasively I think, that *no* deduction for expenses should be permitted so that, consistent with the disincentive function of RICO, the defendant must eat his loss, thereby, in good market fashion, forcing him to calculate his cost/benefit *ratio* on the basis of fully internalized costs.

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63 Spaulding, *supra* n 10 at 260

64 (2nd Cir 1985) 757 F 2d 492; *cert. denied*, (1986) 475 US 1082

65 *ibid* at 475. The government did not appeal this direct cost deduction although logically it would appear inconsistent with the financial disincentive function of RICO to permit even this deduction.

66 *ibid* at 498-499

67 *ibid* at 491

68 Spaulding, *supra* n 10 at 264

TOWARDS A JURISPRUDENCE OF ORGANISED CRIME

A fundamental conceptual and practical difficulty which surrounds any attempt to analyse asset forfeiture legislation is to define, in any meaningful way, the target. While rhetorical invocations about "racketeers" and "organised crime" are numerous, little, if any, agreement about what these terms mean can be found. While our popular culture is full of Brandoesque images of "The Family" or the "The Mob" or "La Cosa Nostra", there is little or no evidence[69] to indicate that such organisations play a major role in crime. Nor is there any evidence that Italians or Colombians are more prone to organised criminal activity than WASPS. In 1977, the Comptroller General of the United States claimed:

> There is no agreement on what organized crime is and, consequently, on precisely whom or what the government is fighting.[70]

But the difficulty of defining "organised crime" and the ubiquitous and offensive stereotypes of popular culture are not merely semantic or "symbolic" difficulties. They actually effect in a serious way the manner in which RICO works in practice. The recent decision of the US Supreme court in *H J Inc. v. Northwestern Bell Telephone Co.*[71] epitomises this tension. At issue in this case was the definition of "pattern" and the holding by the appellate court[72] that a "pattern" must involve multiple schemes. Behind this somewhat technical argument was an attempt by white-collar institutions and pressure groups:

> to resurrect previously rejected doctrine limiting RICO to traditional organized crime. Various amici representing white collar interests have filed briefs arguing that pattern must be interpreted in light of a supposed congressional intent to limit RICO to organized crime.[73]

The Court rejected these propositions in no uncertain terms.

The ideological basis of such a position is of crucial importance in defining not only "organised crime" but the function and purpose of asset forfeiture legislation. If white collar crime is excluded from the concept of "organised crime", not only will we perpetuate racist notions that only Italians or Colombians participate in organised criminal activity, but our conception of criminal justice will be unduly narrowed.

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69 For a detailed analysis, see Mack, J. and Kerner, H.-J. *The Crime Industry* (1975)

70 *Report to the Congress: War on Organized Crime Faltering — Federal Strike Forces Not Getting the Job Done*

71 (1989) 57 USLW 4951. Before I had heard of this case I developed, along with Cary Lederman, JD, and Michael Sobel, JD, a similar theory. According to this theory, the collective versus the individual approach to economic crime can be seen in terms of religion. The collective approach is a Catholic one, the individual, a Protestant one. On the jurisprudential origins of this idea, see my "Truth and Hierarchy: Will the Circle Be Unbroken?" (1985) 33 *Buffalo L Rev* 727 pp 757 *et seq*) RICO's collective approach was adopted and implemented because it targeted Catholic groups (Italians, Colombians). It became problematic when it sought to invoke a Catholic approach against traditional Protestant capitalists (WASP stock brokers, investment bankers etc.) See Weber, M. *The Protestant Ethnic and the Spirit of Capitalism* (1958). I call this the "Stella Blue" theory of RICO, after its place of origin, Stella Pastry in San Fransisco and also after the 'Grateful Dead' song of the same name. In its own way, it makes as much sense as any other theory of organised crime.

72 (8th Cir 1987) 829 F 2d 648

73 Goldsmith, *op cit supra* n 3 at 687

The idea that white-collar crime as not really "crime" is not a new one. It is however a wrong-headed and dangerous one. White-collar crime is enormously burdensome to society as a whole and in many cases more dangerous to our collective well-being and moral fibre than a few pounds of marijuana or an SP betting operation. To adopt the "Godfather" definition of "organised crime" is not only based on biased stereotypes, but it allows the major criminals who engage in activities in concert to escape with their ill-gotten gains.

If RICO and similar asset forfeiture and related provisions are to be effective in their primary aim, that is, to get to the economic roots of "organised crime", then clearly an expansive idea of the concept is required. It seems quite clear that the greatest amount of anti-competitive, anti-market behaviour comes not from black-market activities (which after all, are "market" activities) but from crimes like organised fraud, insider trading and stock manipulation, which distort and destroy "the market". If one values "the market" and its ideals, one must support an expansive effort to eradicate anti-competitive combinations. If this is, as I have suggested, the motivating force behind asset forfeiture legislation, then we must adopt the RICO approach that, as Professor Lynch, (somewhat disapprovingly) puts it, "Organized crime is as organized crime does".[74]

ON THE SUCCESS OR FAILURE OF ASSET FORFEITURE

The success or failure of asset seizure and forfeiture, on its own terms, depends on very complex efficiency analyses based in a mass of detail about profits, losses, costs, benefits, risk-preference, risk-aversion, insurance etc.

On these terms, it is perhaps impossible to offer a "scientific" analysis of the current success/failure status of RICO and Australian statutes. On the available evidence however, it is quite feasible, I believe, to speculate that, given the enormous profits to be made and the incentive to entrepreneurial skills and monopolisation or cartelisation within "black" or illegal "white" markets, and given the enormous costs of detection, prosecution and forfeiture, it is most unlikely that any asset forfeiture programme will put an end to the profitability of any market.[75]

Indeed, it would appear that the only "success" for which anyone can hope in relation to asset forfeiture is its failure. From this, ". . . a fundamental bureaucratic principle emerges: *failure is success*".[76]

In other words as the evil of the exorbitant profits made by organised crime emerges, (an evil so great that in the opinion of our Police Minister (*supra*) our civil liberties are threatened by its very existence), the need to combat it emerges. As the nature of the evil grows, stronger measures are required. Yet these measures, and the police and

74 Lynch, *supra* n 3 at 687

75 On these difficulties in the corruption "market", see Findlay, "Institutional Responses to Corruption: Some Critical Reflections on the ICAC" (1988) 12 *Crim Law J* 271 at 280 and sources

76 Bradley, *supra* n 3 at 215

enforcement agencies which must implement them, depend for their very existence on the continuing evil. Thus the all-too-familiar scenario, "we are making headway, here are our statistics to prove it. We could make much more headway with more _____ (money, computers, personnel — you fill in the blank)". "Organised crime" and the police have a symbiotic relationship not only through the exchange mechanism of corruption, but because at a basic ideological level, they ensure each other's existence.

Those who believe that "organised crime" is an evil will continue to try to root it out. Those who believe that it is primarily an economic evil will continue to try to root it out through asset forfeitures so that the forces of the free market may continue to rule. Those of us who believe that the "free market" is itself a form of "organised crime" can only continue to shake our heads in disbelief as mere intra-capitalist struggles are portrayed in terms of a battle for the heart and soul of our moral fibre.