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Margins of the Mob: A Comparison of *Reves v. Ernst & Young* with Criminal Association Laws in Italy and France

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Margins of the Mob: A Comparison of *Reves v. Ernst & Young* with Criminal Association Laws in Italy and France

Alexander D. Tripp

Abstract

Part I of this Comment discusses the background of Racketeer Influenced and Corrupt Organizations Act (RICO) by examining the history of common law conspiracy, the legislative background of RICO, and the evolution of the RICO enterprise through court decisions. Part I also examines laws in Italy and France prohibiting criminal associations. Part II analyzes *Reves v. Ernst & Young* and its test for determining participation in a RICO association-in-fact enterprise. Part III argues that the legislative history of RICO, the role RICO plays in federal criminal law, and the functional similarity of criminal association laws abroad demonstrate that peripheral associates should be liable as members of a RICO association-in-fact enterprise. The most effective and unambiguous method of interpreting RICO would require that membership in an association-in-fact be based on the intent and actions of a participant rather than on a managerial role in an organizational hierarchy. The language of the RICO statute, the legislative history, and analogous provisions in foreign criminal codes call for a more expansive reading of RICO. This Comment concludes that applying an inclusive definition of RICO to people who participate in patterns of racketeering activity with the requisite mens rea, mental state, would best carry out Congress' intent to attack racketeering and criminal organizations.

COMMENT

MARGINS OF THE MOB: A COMPARISON OF *REVES v. ERNST & YOUNG* WITH CRIMINAL ASSOCIATION LAWS IN ITALY AND FRANCE

Alexander D. Tripp*

What are gangs of thieves but small kingdoms? The gangs too are made up of men, under the authority of a leader, joined by a common agreement, dividing their plunder according to established rules.¹

INTRODUCTION

Congress created the Racketeer Influenced and Corrupt Organizations Act² ("RICO") as part of a broad attack on enterprise criminality³ through the Organized Crime Control Act of 1970 ("OCCA").⁴ By attacking the organizational structure that underlies criminal enterprises,⁵ Congress directed RICO not only

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1. 4 SAINT AUGUSTINE, CITY OF GOD § iv. (Translation by Comment author).

2. Racketeer Influenced and Corrupt Organizations Act of 1970 Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-68 (1996)).

3. See G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts - Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1013-14 (1980) (describing enterprise criminality as comprising all types of organized criminal behavior from political corruption to white collar crime and Mafia activity).

4. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901, 84 Stat. 922 (1970); see *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498 (1985) (describing Racketeer Influenced Corrupt Organizations Act ("RICO") as new method of fighting crime); *Russello v. United States*, 464 U.S. 16, 26-29 (1983) (finding in RICO's legislative history intent to make broad assault on organized crime and its economic foundation); *United States v. Elliott*, 571 F.2d 880, 900 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1978) (stating RICO has displaced traditional methods of fighting organized criminal activity); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 666-85 (1987) (examining legislative history of RICO).

5. 18 U.S.C. § 1961(4). Congress defined a RICO enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.*; see Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 948-71 (1987) (criticizing broad definition of RICO enterprise); Blakey & Gettings *supra* note 3, at 1023-28 (describing new remedies in RICO for enterprise criminality); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 774-75 (1988) (describing RICO as attack on organizational structure of criminal groups).

at criminal groups,⁶ but at crimes committed against organizations or committed by means of an organization.⁷ Consequently, the RICO enterprise is a key component of a RICO prosecution, and individual liability for a RICO violation hinges on a defendant's affiliation with the enterprise.⁸ In a conspiracy, the conspiratorial agreement ties together the group of conspirators,⁹ but a racketeer associates with a RICO enterprise through a more flexible connection.¹⁰ In Italy and France, criminal associations, like conspiracies, are criminal groups, and like RICO enterprises, they involve an organization beyond mere agreement or common purpose.¹¹

In common law countries, conspiracy laws have been the government's traditional weapon against criminal groups.¹² A criminal agreement, however, is not an essential element of a RICO violation,¹³ and alleging a RICO violation may be more effective than conspiracy at reaching all the members of a crimi-

6. *Elliott*, 571 F.2d 900-02.

7. Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646, 674-77 (1989).

8. See David M. Ludwick, *Restricting RICO: Narrowing the Scope of Enterprise*, 2 CORNELL J.L. & PUB. POL'Y 381, 387 (1993) (describing enterprise as limit on application of RICO). Congress structured the statute to avoid constitutional problems with criminalizing membership in an organization. *Id.*

9. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 460-63 (1972) (describing conspiratorial agreement as all-important).

10. See James F. Holderman, *Reconciling RICO's Conspiracy and "Group" Enterprise Concepts with Traditional Conspiracy Doctrine*, 52 U. CIN. L. REV. 385 (1983) (discussing relation of RICO to conspiracy law); Note, *The RICO Nexus Requirement: A "Flexible" Linkage*, 83 MICH. L. REV. 571, 573-75 (1984) [hereinafter *RICO Nexus Requirement*] (describing necessary connection between racketeering activity and RICO enterprise).

11. See Marcel Culioli, *Association de Malfaiteurs*, in 1 RÉPERTOIRE DE DROIT PÉNAL ET DE PROCÉDURE PÉNALE 8 (Daloz, 2d ed. 1996) (discussing disappearance of structural requirements for criminal association and necessity for commencement of execution of target offense); Wienczyslaw J. Wagner, *Conspiracy in Civil Law Countries*, 42 J. CRIM. L. CRIM. & POL. SCI. 171, 172 (1951) (describing French criminal association as not comparable with common law conspiracy); 7 MANZINI, TRATTATO DI DIRITTO PENALE ITALIANO 193-95 (Gian Domenico Pisapia ed., 5th ed. 1983) (discussing structural requirements for Italian criminal association).

12. See LAFAVE & SCOTT, *supra* note 9, at 460 (describing conspiracy as sanction against group activity); Ian H. Dennis, *The Rationale of Criminal Conspiracy*, 93 LAW Q. REV. 39, 43 (1977) (discussing common law justifications for conspiracy laws); Note, *Federal Treatment of Multiple Conspiracies*, 57 COLUM. L. REV. 387, 387 (1957) (describing growing use of conspiracy indictments paralleling growth of organized crime).

13. *Elliott*, 571 F.2d at 902; Lynch, *supra* note 5, at 953-55. Conspiracies extend only as far as the conspiratorial agreement, while a RICO enterprise is a functional unit not limited by the need to show a particular agreement. *Elliott*, 571 F.2d at 902. A conspiratorial agreement to violate a substantive portion of RICO, however, limits a

nal organization.¹⁴ Through 18 U.S.C. § 1962(c), RICO applies to groups formed for criminal purposes, such as the Mafia,¹⁵ and to people who manipulate preexisting organizations, such as insurance companies,¹⁶ for criminal purposes.

The Supreme Court's decision in *Reves v. Ernst & Young*¹⁷ restricted liability under § 1962(c) to people who commit racketeering crimes while operating or managing a RICO enterprise.¹⁸ Under the operation or management test of *Reves*, the Supreme Court has limited the effective scope of the RICO enterprise and curtailed the broad liability envisioned by Congress.¹⁹ The Court's decision, however, has not entirely foreclosed a broad application of RICO liability or eliminated the potential liability of people on the periphery of RICO enterprises.²⁰

In Italy and France, criminal groups are prosecuted under laws prohibiting criminal associations.²¹ The Italian and French

RICO conspiracy. See Holderman, *supra* note 10, at 393-403 (describing courts applying traditional conspiracy notions to RICO conspiracy).

14. See *United States v. Castellano*, 610 F. Supp. 1359, 1396-409 (S.D.N.Y. 1985) (discussing RICO broadening requirements for joint criminal activity and limiting Rule 8(b) of Federal Rules of Criminal Procedure regarding joinder of parties); O'Neill, *supra* note 7, at 680-95 (discussing party joinder under RICO).

15. *E.g.*, *United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1645 (1994).

16. *E.g.*, *Aetna Casualty Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1558-60 (1st Cir. 1994).

17. 507 U.S. 170 (1993).

18. *Id.* at 185; Michael Vitiello, *More Noise from the Tower of Babel: Making "Sense" out of Reves v. Ernst & Young*, 56 OHIO ST. L.J. 1363, 1387-1411 (1995); Carrie J. DiSanto, Note, *Reves v. Ernst & Young: The Supreme Court's Enigmatic Attempt to Limit Outsider Liability Under 18 U.S.C. § 1962(c)*, 71 NOTRE DAME L. REV. 1059, 1068-70 (1996); Brian T. Camp, *Dual Construction of RICO: The Road Not Taken in Reves*, 51 WASH. & LEE L. REV. 61, 77-79, 93-95 (1994); Ira H. Raphaelson & Michelle D. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669, 686-99; Catherine M. Clarkin, Note, *Reves v. Ernst & Young: The Elimination of Professional Liability under RICO*, 43 CATH. U.L. REV. 1025, 1062-68 (1994). *Reves* was a civil suit, brought under civil provisions of RICO. *Reves*, 507 U.S. at 175-76. The civil and criminal substantive provisions are identical. 18 U.S.C. § 1962; see Blakey & Gettings, *supra* note 3, at 1013-21 (describing legislative history of RICO and private enforcement mechanisms); 115 CONG. REC. 9567 (1969) (statement of Sen. McClellan) (comparing RICO civil enforcement actions to antitrust laws).

19. See Raphaelson & Bernard, *supra* note 18, at 671, 698-99 (criticizing *Reves* restriction on RICO liability).

20. See Vitiello, *supra* note 18, at 1387-98 (describing lower courts' interpretations of *Reves*).

21. CODICE PENALE [C.P.] art. 416 (It.); CODE PÉNAL [C. PÉN.] art. 450-1 to 450-3 (Fr.). The criminal codes of many civil law countries have provisions against criminal

statutes criminalize participation in criminal organizations and are similar to RICO association-in-fact illicit enterprises.²² While, over time, France's criminal association laws have taken on many features of common law conspiracy,²³ Italy has retained a traditional definition of criminal association.²⁴ The Italian Supreme Court has recently expanded the reach of criminal association laws by allowing prosecutors to link the complicity statute²⁵ with the statute prohibiting Mafia association²⁶ and to prosecute people outside the criminal group as accomplices of the organization.²⁷

Part I of this Comment discusses the background of RICO by examining the history of common law conspiracy, the legislative background of RICO, and the evolution of the RICO enterprise through court decisions. Part I also examines laws in Italy and France prohibiting criminal associations. Part II analyzes *Reves v. Ernst & Young* and its test for determining participation in a RICO association-in-fact enterprise. Part III argues that the legislative history of RICO, the role RICO plays in federal criminal law, and the functional similarity of criminal association laws abroad demonstrate that peripheral associates should be liable as members of a RICO association-in-fact enterprise. The most effective and unambiguous method of interpreting RICO would require that membership in an association-in-fact be based on

associations. *E.g.*, PENAL CODE OF BELGIUM art. 322; PENAL CODE OF ETHIOPIA art. 472; STRAFGESETZBUCH art. 129 (F.R.G.); PENAL CODE OF MONACO arts. 241-44; PENAL CODE OF PORTUGAL art. 263; PENAL CODE OF TURKEY art. 313.

22. 18 U.S.C. § 1961(4). A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity." *Id.* An association-in-fact must have a structure distinct from the racketeering activity and must function as a continuing unit. *United States v. Turkette*, 452 U.S. 576, 583 (1981). An Italian criminal association must have at least three members, a structure sufficient to commit the target crimes, and must plan an open-ended series of crimes. 7 MANZINI, *supra* note 11, at 195-96. A French criminal association must consist of at least two members who form a group, agree to act together to commit one or more crimes, and commit at least one overt act in preparation for committing a target crime. André Vitu, *Participation à une Association de Malfaiteurs*, in 3 JURIS-CLASSEUR PÉNAL 5-6 (1996).

23. See Culioli, *supra* note 11 at 8 (describing French law basing criminal association on criminal agreement).

24. 7 MANZINI, *supra*, note 11, at 194-97.

25. C.P. 110 (It.).

26. C.P. 416bis (It.).

27. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sezione Unite Penali, in 1995 FORO IT. II, 422. In Italy, people who are not members of the Mafia can now be convicted of aiding and abetting the Mafia. *Id.*

the intent and actions of a participant rather than on a managerial role in an organizational hierarchy. The language of the RICO statute, the legislative history, and analogous provisions in foreign criminal codes call for a more expansive reading of RICO. This Comment concludes that applying an inclusive definition of RICO to people who participate in patterns of racketeering activity with the requisite *mens rea*, mental state, would best carry out Congress' intent to attack racketeering and criminal organizations.

I. RICO, CONSPIRACY AND CRIMINAL ASSOCIATION

A RICO enterprise is not confined by a conspiratorial agreement, for it can encompass a broad array of activities and include people beyond the scope of a single agreement.²⁸ Liability under RICO does not require that one join a group of criminals²⁹ as does a criminal association.³⁰ Liability for a RICO violation, instead, can extend to a person outside the enterprise who joins, manipulates, or preys upon the organization.³¹

A. U.S., Italian, and French Laws Against Criminal Groups

Both common law countries and civil law countries have laws that criminalize participation in a criminal group.³² Conspiracy is a product of Anglo-American common law and does not exist in Italy or France,³³ while RICO is a U.S. statute passed by Congress because of specific concerns about the threat of or-

28. *Elliott*, 571 F.2d at 902.

29. See O'Neill, *supra* note 7, at 654-78 (discussing roles of RICO enterprise). Under § 1962(c), an enterprise may be the victim of a racketeer. See, e.g., *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 189-90, 195 (9th Cir. 1987) (evidencing bank president conducting affairs of bank through pattern of racketeering). An enterprise may also be a group of racketeers. See, e.g., *United States v. Locascio*, 6 F.3d 924, 929-31 (convicting defendant John Gotti of running and conspiring to run Gambino Organized Crime Family of La Cosa Nostra).

30. See 7 MANZINI, *supra* note 11, at 195 (describing requirement that members voluntarily join Italian criminal association); Vitu, *supra* note 22, at 6-7 (describing act of joining French criminal association).

31. See O'Neill, *supra* note 7, at 673-78 (discussing roles of RICO enterprise).

32. See *supra* note 21 (listing civil law countries with laws prohibiting criminal groups). Common law countries have generally used conspiracy laws against criminal groups. See MODEL PENAL CODE § 5.03 Comment at 96-102 (Tent. Draft No. 10, 1960) (discussing rationales for conspiracy laws); L'FAVE & SCOTT, *supra* note 9, at 460 (describing conspiracy used against criminal groups);

33. See Wagner, *supra* note 11, at 171 (discussing absence of conspiracy laws in civil law countries).

ganized crime to the U.S. economy.³⁴ The original nineteenth century Italian and French laws against criminal associations applied to rural bandits, but have since undergone successive modifications.³⁵

In common-law countries, prosecutors have traditionally used conspiracy laws to attack criminal groups.³⁶ A conspiracy, however, is based on an agreement to commit a criminal act, rather than on an explicit prohibition against forming a criminal group.³⁷ The more intricate schemes of large criminal organizations were often too complex to be reduced to the agreement required for a conspiracy prosecution,³⁸ and the shortcomings of conspiracy led Congress to develop the broader notions of

34. *Sedima*, 473 U.S. at 498.

35. See 7 MANZINI *supra* note 11, at 191-98 (discussing history of Italian laws against criminal association); Culioli, *supra* note 11, at 4-7 (describing history of French laws against criminal association).

36. LAFAVE & SCOTT, *supra* note 9, at 460; James Alexander Burke & Sanford H. Kadish, *Conspiracy*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 231, 231 (Sanford H. Kadish ed., 1983); Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 277 (1948). Between 1914 and 1920, states and the federal Government enacted criminal syndicalism statutes aimed at subversive organizations. See ELDRIDGE FOSTER DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES 13-20 (1939) (surveying historical background of federal and state criminal syndicalism statutes); Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 1-30 (1991) (discussing history of statutes prohibiting membership in subversive organizations and their effect on American Communist Party); Martin Gendel, Comment, *Criminal Law: Criminal Syndicalism: Red Flag Law: History of Enforcement in California*, 19 CAL. L. REV. 64, 64-69 (1931) (discussing history and criticisms of California Criminal Syndicalism law); Comment, *Criminal Law: Criminal Syndicalist Act: Constitutional Law: Validity of the Act Under the Free Speech Clause*, 10 CAL. L. REV. 512, 512-18 (1922) (describing justifications for criminal syndicalism statutes); see, e.g., *Whitney v. California*, 274 U.S. 357, 371 (1927) (upholding California Criminal Syndicalism Act); *Burns v. United States*, 274 U.S. 328, 336 (1927) (affirming conviction for violation of California Criminal Syndicalism statute by International Workers of World delegate soliciting members in Yosemite National Park); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (overruling *Whitney* and striking down Ohio Criminal Syndicalism Statute).

In the Omnibus Crime Bill of 1994, Congress enhanced sentences for any street gang member convicted of certain enumerated felonies who had a prior conviction for certain enumerated crimes. 18 U.S.C. § 521 (1995); see David A. Anderson, Note, *Jail, Jail, The Gang's All Here: Senate Crime Bill Section 521, The Criminal Street Gang Provision*, 36 B.C. L. REV. 527, 544-50 (1995) (discussing constitutionality of federal laws against street gangs).

37. See MODEL PENAL CODE, *supra* note 32, at 96, 100 (describing foreign codes, unlike conspiracy, explicitly prohibiting formation of criminal groups).

38. *United States v. Griffin*, 660 F.2d 996, 999-1000 (4th Cir.), *cert. denied*, 454 U.S. 1156 (1981); *Elliott*, 571 F.2d at 900-03.

criminal combinations embodied in RICO.³⁹

1. Conspiracy

At common law, a conspiracy was an agreement with another person to commit a crime or unlawful act.⁴⁰ Criminal laws traditionally required that the accused commit the criminal act, *actus reus*, with the proper mental state, *mens rea*.⁴¹ In a conspiracy, a person commits the criminal act by forming the conspiratorial agreement.⁴² One must also have the corresponding *mens rea* and form the conspiratorial agreement intentionally, while intending to commit the target crime.⁴³ Criminal liability for conspiracy extends to everyone, including peripheral members of a group, who was a party to the conspiratorial agreement.⁴⁴

a. Types of Conspiracies

To illustrate the relationship of co-conspirators, prosecutors often use models to represent the structure of a criminal organization.⁴⁵ The models may link the participants as co-conspirators in a single, complex conspiracy,⁴⁶ or distinguish small con-

39. *Griffin*, 660 F.2d at 999-1000; *Elliott*, 571 F.2d at 902.

40. See *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 116-19 (1842) (describing history of conspiracy laws, and defining conspiracy as confederacy to commit unlawful act or lawful act for unlawful purpose); LAFAYE & SCOTT, *supra* note 9, at 460-63 (describing conspiratorial agreement extending to tacit understandings inferred from defendants' actions); Note, *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920, 922 (1959) [hereinafter *Developments*] (stating that agreement itself is criminal).

41. *Morissette v. United States*, 342 U.S. 246, 250-52 (1952); Matthew T. Fricker & Kelly Gilchrist, Comment, *United States v. Nofziger and the Revision of 18 U.S.C. § 207: The Need for a New Approach to the Mens Rea Requirements of Federal Criminal Law*, 65 NOTRE DAME L. REV. 803, 812-13 (1990).

42. *Burke & Kadish*, *supra* note 36, at 232-33; *Developments*, *supra* note 40, at 925-26. Under the plurality requirement, there must be at least two people who share the intent and form the agreement. LAFAYE & SCOTT, *supra* note 9, at 488-90. Under the unilateral approach, however, the criminal intent of one person is enough, and if the other co-conspirator is, for example, an undercover police officer and does not actually have the requisite intent, the lone defendant may nevertheless be convicted. *Id.*

43. *Developments*, *supra* note 40, at 925-26.

44. *Pinkerton v. United States*, 328 U.S. 640, 645 *reh'g denied*, 329 U.S. 818 (1946); see Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CALIF. L. REV. 1137, 1143-44 (1973) (criticizing *Pinkerton* doctrine making co-conspirators into accomplices).

45. LAFAYE & SCOTT, *supra* note 9, at 480-82.

46. *Id.* These figures, however, are not legal requirements, and a sprawling group with interdependent members can constitute a conspiracy even if it does not conform precisely to the wheel or chain models. *United States v. Perez*, 489 F.2d 51, 57-64 (5th Cir. 1974).

spiracies in overlapping criminal networks.⁴⁷ The two major models are based on wheels⁴⁸ and chains,⁴⁹ respectively.

In a wheel conspiracy,⁵⁰ a central person or group acts as a hub for peripheral members of the conspiracy who are arrayed as spokes around the central figure.⁵¹ To be one large conspiracy instead of a series of smaller conspiracies, the spokes must have a conspiratorial agreement that links the participants as a rim links the spokes of a wheel.⁵²

In *Kotteakos v. United States*,⁵³ a conspiracy case brought before the Supreme Court in 1946, the hub was Simon Brown, a broker who obtained fraudulent federal housing loans for 32 other people.⁵⁴ The Supreme Court determined that the other conspirators were peripheral spokes, linked only to Brown and not to each other.⁵⁵ Because there was no agreement linking the unconnected members and, therefore, no rim on the wheel, the conspiracy was incomplete.⁵⁶ Instead of a single conspiracy involving numerous coconspirators, there were several small, independent conspiracies, each of which included Brown as a member.⁵⁷

Chain conspiracies consist of interdependent parties whose

47. *Kotteakos v. United States*, 328 U.S. 750, 754-55 (1946).

48. *Kotteakos*, 328 U.S. at 754-55.

49. *Blumenthal v. United States*, 332 U.S. 539, 558 (1947).

50. See *Kotteakos*, 328 U.S. at 754-55 (describing requirement of single agreement as rim to join multiple conspirators).

51. LAFAYE & SCOTT, *supra* note 9, at 479-82.

52. *Id.* at 481.

53. 328 U.S. 750.

54. *Id.* at 753.

55. *Id.* at 755. The Court found, "[t]he proof . . . made out a case, not of a single conspiracy, but of several." *Id.* If the facts establish multiple conspiracies when the indictment charged a single, large conspiracy, the material variance with the indictment is reversible error if the defendants show that it affected their substantial rights. *Id.* at 755-56. If the Government indicts several defendants under multiple conspiracy counts and the indictment fails to allege facts sufficient to constitute a single conspiracy that would justify joint prosecution, the court must sever the trials. *United States v. Lane*, 584 F.2d 60, 62 (5th Cir. 1978). If, despite the insufficiency of the indictment, the court refuses to sever the trials, the defendants are entitled to a new trial regardless of whether or not they can show prejudice, because misjoinder under Rule 8(b) of the Federal Rules of Criminal Procedure is inherently prejudicial. *United States v. Sutherland*, 656 F.2d 1181, 1190 n.6 (5th Cir. 1981).

56. *Kotteakos*, 328 U.S. at 755. The Court found, "[t]he proof . . . made out a case, not of a single conspiracy, but of several." *Id.*

57. *Id.*

crimes require participation in a larger group.⁵⁸ In *Blumenthal v. United States*⁵⁹ the owner of a wholesale liquor agency conspired with two men who had agreements with bar owners to sell liquor at illegal prices.⁶⁰ The wholesalers knew that the conspiracy had to extend beyond the middleman, and the bar owners knew the middleman had to acquire the liquor from other conspirators.⁶¹ The nature of the conspiracy required that the parties know that the entire conspiracy was larger than the immediate agreements in which they were involved.⁶² The co-conspirators, therefore, had agreed to a single, large conspiracy.⁶³ In *Blumenthal* all the parties joined a single conspiracy made up of the interdependent members.⁶⁴

b. Accomplice Liability

In addition to liability for the conspiracy itself, prosecutors can hold conspirators liable for substantive offenses committed by co-conspirators in furtherance of the conspiracy.⁶⁵ A conspiracy may link all the members of a criminal organization to the crimes of the individual members, transforming co-conspirators into accomplices.⁶⁶ In addition, a person who is not a co-conspirator can aid and abet a conspiracy yet not become a party to the conspiratorial agreement.⁶⁷

58. See *United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds* 308 U.S. 287 (1939) (holding sufficient community of interest between narcotics smugglers in New York, distributors, and retailers in New York, Texas, and Louisiana to constitute single conspiracy); LAFAVE & SCOTT, *supra* note 9, at 480-81 (describing differences between conspiratorial chains and wheels).

59. 332 U.S. 539 (1947).

60. *Id.* at 542-46.

61. *Id.* at 554-59.

62. *Id.* at 559.

63. *Id.* The Court could infer an agreement to participate in the larger scheme because the defendants knew of the essential features and broad scope of the conspiracy. *Id.*

64. *Id.* Unlike a wheel conspiracy, every link in the chain was necessary, and "[b]y their separate agreements . . . [the conspirators] became parties to the larger common plan, joined together by their knowledge of its essential features and broad scope . . . and by their common single goal." *Id.* at 558.

65. *Pinkerton v. United States*, 328 U.S. 640, 644 (1946).

66. See *Developments, supra* note 40, at 998-99 (discussing *Pinkerton* and vicarious liability).

67. See LAFAVE & SCOTT, *supra* note 9, at 462-63 (describing aid to conspiracy as making achievement of criminal objective more probable); Cameron R. Williams, Comment, *Complicity in a Conspiracy as an Approach to Conspiratorial Liability*, 16 UCLA L. REV. 155, 158 (1965) (discussing relation of complicity theory to conspiracy); Susan W. Bren-

In *Pinkerton v. United States*,⁶⁸ the Supreme Court held that a member of a conspiracy is responsible for all the acts that the conspiracy planned, or for those that were foreseeable consequences of the conspiratorial agreement.⁶⁹ Under the *Pinkerton* doctrine, courts treat co-conspirators as accomplices.⁷⁰ Each accomplice is liable for all acts committed by any other co-conspirator in furtherance of the conspiracy, regardless of individual involvement in the substantive crimes.⁷¹ Walter and Daniel Pinkerton were bootleggers convicted of evading liquor taxes.⁷² In addition to the conspiracy conviction, Daniel Pinkerton was also convicted of substantive offenses in which he did not participate.⁷³ Justice Douglas, writing for the majority, described the conspiracy as a "partnership in crime,"⁷⁴ and held Daniel Pinkerton liable for actions taken by Walter Pinkerton, his co-conspira-

ner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 Mo. L. REV. 931 (1991) (discussing historical development of link between conspiracy and complicity). The accomplice is responsible for the crimes the primary party committed. *Id.* Because conspiracy does not merge into the substantive offense and is a crime in itself, a conspiracy charge added to the charge for the substantive offense may act as an aggravating punishment for group crimes. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 647 (1978).

68. 328 U.S. 640 (1946).

69. *Id.*

70. LAFAVE & SCOTT *supra* note 9, at 513.

71. *Id.* at 647. In drug conspiracy sentences under the Federal Sentencing Guidelines, a court calculates individual sentences based on the total volume of drugs sold. U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(2) (1996). Therefore, under the *Pinkerton* doctrine, a peripheral member of a drug conspiracy can be sentenced for the total volume of drugs sold during the course of the conspiracy. *See, e.g.*, *United States v. Blankenship*, 970 F.2d 283, 288 (7th Cir. 1992) (reversing conviction of conspirator who accepted \$100 for rental of trailer to cook drugs and was convicted of conspiracy to manufacture and distribute methamphetamine and sentenced to ten years without possibility of parole).

72. *Pinkerton v. United States*, 151 F.2d 499 (5th Cir. 1945), *aff'd*, 328 U.S. 640 (1946). In addition to the conspiracy conviction, Daniel Pinkerton was convicted on some of the substantive counts of unlawfully removing, depositing, and concealing whiskey. *Id.* The Fifth Circuit Court of Appeals inferred a conspiracy from the proximity of the two brothers' houses, the frequent association between the brothers, the numerous times courts had convicted both brothers of violating liquor laws, a confrontation in which Walter drew a gun on investigators and threatened to kill the sheriff searching Daniel's farm, and the occasions on which Daniel posted bond when Walter had been arrested on state charges in Fayette County, Alabama. *Id.*

73. *Id.* at 646-48; *see supra*, note 72 (discussing Daniel Pinkerton's substantive convictions). Daniel was incarcerated at the time Walter committed some of the substantive offenses. *Pinkerton*, 328 U.S. at 500.

74. *Pinkerton*, 328 U.S. at 644. Justice Douglas adapted Justice Holmes' statement in *United States v. Kissel*, "[a] conspiracy is a partnership in criminal purposes." 218 U.S. 601, 608 (1910).

tor.⁷⁵

While conspiracy is conclusive regarding complicity among co-conspirators,⁷⁶ accomplices who are outside the conspiratorial agreement may either aid and abet the conspiracy or become co-conspirators by their acts.⁷⁷ Commentators suggest that one cannot aid and abet a conspiracy because the essence of a conspiracy is the agreement and that by aiding a conspiracy, one becomes a party to the agreement and therefore a co-conspirator.⁷⁸ Only by aiding the formation of a conspiratorial agreement may one aid and abet a conspiracy.⁷⁹

In *United States v. Falcone*,⁸⁰ however, the Supreme Court implicitly acknowledged the possibility of aiding and abetting a conspiracy.⁸¹ The defendants in *Falcone* sold ingredients for bootleg liquor to distributors who supplied illicit distillers.⁸² The indictment charged the suppliers with being parties to the conspiracy among the distillers, but did not allege that the suppliers actually knew of the conspiracy.⁸³ Based on the insufficiency of the proof, the Supreme Court reversed the conviction of the suppliers for aiding and abetting a conspiracy, but nevertheless acknowledged that it was theoretically possible to aid and abet a conspiracy without becoming a co-conspirator.⁸⁴

*Direct Sales Co. v. United States*⁸⁵ represents another view of complicity⁸⁶ with a conspiracy.⁸⁷ Direct Sales Company, a mail order drug manufacturer and wholesaler, supplied John Victor Tate, a doctor in Calhoun Falls, South Carolina with vast

75. *Pinkerton*, 328 U.S. at 640-41; see *Pinkerton*, 151 F.2d at 499 (discussing Daniel Pinkerton's substantive convictions).

76. *Pinkerton*, 328 U.S. at 640-41.

77. Williams, *supra* note 67, at 158-66. Under 18 U.S.C. § 2, however, an aider and abettor is liable as a principal, and aiding and abetting a conspiracy subjects a defendant to the same punishment as a conspirator. *United States v. Falcone*, 311 U.S. 205, 208 (1940).

78. *Id.* at 159; *Direct Sales Co. v. United States*, 319 U.S. 703 (1943).

79. Developments, *supra* note 40, at 934.

80. 311 U.S. 205 (1940).

81. *Id.*; LAFAYE & SCOTT, *supra* note 9, at 462-63.

82. *Falcone*, 311 U.S. at 206-07.

83. *Id.*

84. *Id.* at 210-11.

85. 319 U.S. 703 (1943).

86. See BLACK'S LAW DICTIONARY 285 (6th ed. 1990) (defining complicity as "[a] state of being an accomplice; participation in guilt.>").

87. See Williams, *supra* note 67, at 156-61 (discussing differing approaches to complicity with conspiracy in *Falcone* and *Direct Sales*).

amounts of morphine sulfate.⁸⁸ The doctor and three others were charged with conspiring to violate the Harrison Narcotic Act.⁸⁹ The Government charged that Direct Sales Company must have known of a conspiracy involving Dr. Tate based on the enormous quantities of morphine that Direct Sales Company encouraged a rural doctor to buy.⁹⁰ Instead of charging Direct Sales Company with aiding and abetting Dr. Tate's conspiracy, prosecutors charged Direct Sales Company with belonging to a single, large conspiracy involving Direct Sales Company, Dr. Tate, and Dr. Tate's illicit distributors of morphine.⁹¹ The Supreme Court upheld the conviction of Direct Sales Company and distinguished *Falcone* based on the innocuous and legal bootlegging ingredients and because the circumstances of the sale in *Falcone* did not directly lead to the inference that suppliers knew of the bootlegging conspiracy among the purchasers.⁹² In *Direct Sales*, the restrictions on the sale of narcotics and the circumstances of the voluminous sales allowed the jury to infer that Direct Sales Company knew that Dr. Tate was disposing of the morphine illegally.⁹³ The circumstances of the sales also indicated that Direct Sales Company intended to participate in the

88. *United States v. Direct Sales Co.*, 44 F. Supp 623, 624 (W.D.S.C.), *aff'd*, 131 F.2d 835 (4th Cir. 1942), *aff'd*, 319 U.S. 703 (1943). Between December 1937 and January 1940, Direct Sales Co. shipped Dr. Tate 79,000 one-half grain tablets of morphine sulphate. *Direct Sales Co. v. United States*, 131 F.2d 835, 836 (4th Cir. 1942), *aff'd*, 319 U.S. 703 (1943). One-eighth grain or one-quarter grain were the usual doses for medical uses of morphine. *Direct Sales*, 319 U.S. at 707 n.5. An average physician purchased 200-400 one-quarter grain tablets a year. *Direct Sales*, 44 F.Supp. at 625-26. Doctors rarely used one-half grain tablets for legitimate medical purposes, but one-half grain tablets were the preferred dosage of addicts. *Id.* Addicts paid as much as \$25 per 100 one-half grain tablets, for which Direct Sales Co. charged less than two dollars. *Direct Sales*, 319 U.S. at 707-08.

89. *Direct Sales*, 319 U.S. at 704; *see*, Harrison Narcotic Act, Publ. L. No. 63-223, ch. 1, 38 Stat. 785, (1914) (later codified at 26 U.S.C. 691-708 (1928)), repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (requiring physicians to distribute drugs only in stamped package, distribute designated drugs only for legitimate medical purposes, sell drugs only on form provided by Commissioner of Internal Revenue, and distribute drugs only in pursuance of written prescription).

90. *Direct Sales*, 319 U.S. at 706-07. The business practices of Direct Sales Co. encouraged high-volume purchases of morphine. *Id.* Despite government warnings, Direct Sales Co. did not significantly change its sales techniques. *Id.*

91. *Id.* at 704-05.

92. *Id.* at 710-11.

93. *Id.* at 713.

crime and agreed to the criminal conspiracy.⁹⁴

Instead of basing accomplice liability or conspiratorial membership on an objective measure of the defendants' contribution to the conspiracy, the Supreme Court in *Falcone* turned to the inferred intent of the defendants, a subjective standard.⁹⁵ An objective standard would weigh the importance of the particular shipments of yeast and sugar to the distilling operation in *Falcone*.⁹⁶ Such a standard would be particularly difficult on legitimate businesses, because the ingredients were freely available in commerce and because imposing liability would compel merchants to evaluate the legal implications of their ordinary sales.⁹⁷ A subjective standard, on the other hand, bases liability on the extent to which the defendant has identified with the criminal activity, and treated the activity as his or her own.⁹⁸

c. Procedural Advantages of a Conspiracy Charge

By alleging a conspiracy, the prosecution can hold the conspiracy trial anywhere any overt act⁹⁹ in furtherance of the conspiracy took place¹⁰⁰ and can try the conspirators jointly at one trial.¹⁰¹ Alleging a conspiracy allows the prosecution to introduce co-conspirator statements that otherwise would be excluded as hearsay.¹⁰² Finally, courts give prosecutors wide latitude in presenting circumstantial evidence of the conspiracy be-

94. *Id.*

95. See FLETCHER, *supra* note 67, at 674-77 (discussing subjective standard for complicity and conspiracy, German jurisprudence, and *Falcone*).

96. *Id.*

97. *Id.*

98. See *United States v. Peoni*, 100 F.2d 401, 402 (1938) (requiring that accomplice "associate himself in some way with the venture, that he participate in it as something he wishes to bring about, that he seek by his action to make it succeed."); *United States v. Kasvin*, 757 F.2d 887, 892 (7th Cir. 1985) (holding that defendant was not member of marijuana distribution conspiracy, but was guilty as aider and abettor because by being conspiracy's largest regular customer he had interest in its financial success).

99. See LAFAYE & SCOTT, *supra* note 9, at 476-78 (describing overt act as act done by any conspirator showing that the conspiracy is still at work). At common law, a conspiracy was complete at the time of the agreement, and no overt act was required. *Id.*

100. See *Hyde v. United States*, 225 U.S. 347 (1912) (holding that, in illegal scheme based in California to obtain government lands in California, conspirators' overt acts at General Land Office in Washington, D.C. made venue proper for conspiracy trial in District of Columbia).

101. LAFAYE & SCOTT, *supra* note 9, at 458-59.

102. *Id.* As long as prosecutors show a conspiracy in fact, co-conspirator statements are admissible, regardless of whether the indictment includes a specific conspiracy count. JOHN WILLIAM STRONG, MCCORMICK ON EVIDENCE § 259 (4th ed. 1992).

cause police would be unlikely to have actual proof, such as a recording of an explicit conspiratorial agreement.¹⁰³

d. Conspiracy and Guilt by Association

Prosecutors alleging a conspiracy gain numerous procedural advantages that handicap the defense.¹⁰⁴ Based on an agreement for which there is little direct evidence,¹⁰⁵ a conspiracy trial subjects a defendant to joint trial with his or her co-conspirators.¹⁰⁶ Therefore, the defendant may have never visited the state in which the trial is held, may never have met the people with whom he or she is tried and whose hearsay statements are used at trial, and may be convicted of substantive offenses in which he or she did not participate.¹⁰⁷ In large conspiracy prosecutions, the volume of evidence introduced and the evidentiary leeway given to the Government create the possibility of significant prejudice to defendants.¹⁰⁸

e. Rationales for Conspiracy

Underlying conspiracy laws, there are two primary rationales.¹⁰⁹ First, conspiracy laws allow the Government to intervene at an early stage in the preparation of criminal activity.¹¹⁰ Secondly, conspiracy laws allow prosecutors to attack an entire criminal group and to carry out a joint prosecution of the mem-

103. *See* *Blumenthal v. United States*, 332 U.S. 539, 557 (1947) (discussing reason for latitude in proving conspiratorial agreement). The procedural advantages of conspiracy charges, and the vagueness of the conspiracy doctrine have been the basis of general criticism of the use of conspiracy. *Krulewitch, v. United States*, 336 U.S. 440, 445 (1949) (Jackson, J., concurring); *LAFAVE & SCOTT, supra* note 9, at 455-59.

104. *Johnson, supra* note 44, at 1139-40.

105. *See supra* note 103 and accompanying text (discussing use of circumstantial evidence to prove conspiratorial agreement).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See* MODEL PENAL CODE, *supra* note 32, at 96-102 (discussing rationales for conspiracy); *LAFAVE & SCOTT, supra* note 9, at 459-60 (discussing inchoate and group rationales); *see generally*, *Dennis, supra* note 12, at 44-63 (discussing rationales for conspiracy laws).

110. *LAFAVE & SCOTT, supra* note 9, at 459. Conspiracy is complete at the time of the agreement. *Id.* In jurisdictions that require an overt act, a conspiracy is complete when a conspirator commits the first overt act in pursuance of the conspiracy. *Id.* at 476-78. Conviction for attempt requires the defendant commit an act that goes beyond mere preparation of a crime. *Id.*

bers.¹¹¹

Like solicitation¹¹² and attempt,¹¹³ conspiracy is an inchoate crime.¹¹⁴ At common law, the crime of conspiracy is complete as soon as the agreement is formed,¹¹⁵ even if the conspirators are far from likely to succeed in the target crime.¹¹⁶ The law treats the agreement as an initial step towards the commission of a crime.¹¹⁷ The agreement is evidence that the conspirators were committed to carrying out the crime, and presented sufficient danger to justify immediate intervention.¹¹⁸

In addition to its inchoate aspect,¹¹⁹ conspiracy law also attacks the formation of criminal groups.¹²⁰ The conspiratorial agreement that binds the conspirators may compel them to commit crimes which, without pressure from co-conspirators, they might have abandoned.¹²¹ The formation of criminal groups presents the potential for continuous criminal activity¹²² and the commission of complex crimes that a single person could not have committed.¹²³ Furthermore, a criminal group can engage in division of labor and more efficiently allocate resources to in-

111. Dennis, *supra* note 12, at 48-53.

112. LAFAYE & SCOTT, *supra* note 9, at 459. Solicitation requires that a person, with the intent that another commit a crime, entice, advise, incite, order, or otherwise encourage the other to commit a crime. *Id.* at 414. The target crime, however, does not have to be committed. *Id.*

113. *Id.* at 459. The crime of attempt consists of acting in a way that goes beyond preparation to commit a crime, while intending to commit a crime. *Id.* at 423.

114. See BLACK'S LAW DICTIONARY 761 (6th ed. 1990) (defining inchoate crime as "an incipient crime which generally leads to another crime").

115. *State v. Loser*, 132 Iowa 419, 422, 104 N.W. 337, 338 (1905).

116. *Hyde v. United States*, 225 U.S. 347, 387 (1911).

117. LAFAYE & SCOTT, *supra* note 9, at 459-60.

118. *Id.*

119. See *supra* note 114 (defining inchoate crime).

120. MODEL PENAL CODE, *supra* note 32, at 96-102; LAFAYE & SCOTT, *supra* note 9, at 459-60.

121. *Developments*, *supra* note 40, at 924.

122. *Id.* at 924-25.

123. *Id.* at 923-25. "[C]ollective action toward an antisocial end involves a greater risk to society than individual action towards the same end." *Id.* at 923-24; Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276, 283-4 (1948) [hereinafter *Conspiracy Dilemma*]. Some commentators have questioned the inherent dangerousness of criminal groups on the grounds that large groups are more likely to have informers, and conspirators are as likely to dishearten each other as they are to give encouragement. Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959); Dennis, *supra* note 12, at 49.

crease the efficiency of the group's criminal activity.¹²⁴

Finally, conspiracies are partnerships in crime.¹²⁵ The members bind themselves to become criminals, creating an illicit substitute for the socially productive obligations shared by other members of a society.¹²⁶ A criminal group with its own obligations set in opposition to the rest of society is inherently subversive, regardless of the conspiracy's target offense.¹²⁷

2. Statutes & Criminal Groups

RICO is the product of congressional concern with enterprise criminality and the spread of organized crime.¹²⁸ A person violates RICO by committing certain enumerated crimes either to an enterprise, by means of an enterprise, or as a member of an enterprise.¹²⁹ The structure of the RICO statute allows enhanced sanctions for enterprise criminals who use organizations for racketeering activity.¹³⁰

a. RICO & Its Supreme Court Interpretations

By 1969, successive congressional investigations had revealed the resilience, size, and diverse business interests of organized crime.¹³¹ The investigations concluded that piecemeal

124. *Developments*, *supra* note 40, at 924.

125. *Pinkerton*, 328 U.S. at 644; *Kissel*, 208 U.S. at 608; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 254-55 (1940).

126. *Dennis*, *supra* note 12, at 52. Upon becoming a member of the Mafia, one's primary allegiance shifts to the criminal organization. *Lynch*, *supra* note 5, at 959-60. Conspiracy prosecutions may satisfy public apprehension about the existence of criminal partnerships in society. *Dennis*, *supra* note 12, at 50-51.

127. *Dennis*, *supra* note 12, at 50-51. Commentators have noted that the political rhetoric of the Cold War described Communist groups and the Mafia in similar terms. *Lynch supra* note 4, at 668 n.35.

128. *Blakey & Gettings*, *supra* note 3, at 1013-14.

129. *See O'Neill*, *supra* note 7, at 674-77 (describing relation of enterprise to perpetrator).

130. *Goldsmith*, *supra* note 5, at 774-75.

131. *See SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, THIRD INTERIM REPORT, S. REP. NO. 307, 82d Cong., 1st Sess. 171 (1951) (listing fifty areas of organized crime infiltration); 116 CONG. REC. 585, 591 (1970) (statement of Sen. McClellan) (discussing need for organizational attack because individual convictions were inadequate); 115 CONG. REC. 9567 (1969) (statement of Senator McClellan). According to Senator McClellan, "constant references have been made to the frustration resulting when the only consequence of a conviction is that organized crime and its infiltrated organizations are run by a new leader, and the organizations which are the real threat are not affected." *Id.* The Senate, in passing the OCCA, observed, "organized crime continues to grow . . . because of the sanctions and reme-*

convictions had not destroyed the structure of large criminal organizations.¹³² In complex criminal enterprises, where disparate people performed seemingly unconnected acts, there was often no single conspiratorial agreement to bind members of the group.¹³³ RICO enabled prosecutors to try all the central members of a criminal organization and the peripheral associates of the group at one trial, exposing the full scope of the organization to the jury.¹³⁴

i. Legislative History of RICO

The ideas incorporated in RICO emerged from the analyses and recommendations of a series of congressional investigations into organized crime.¹³⁵ Criminal organizations had invested racketeering profits into legitimate businesses,¹³⁶ and Congress

dies available to the Government are unnecessarily limited in scope and impact." 116 CONG. REC. 276 (1970).

132. COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* (1967), reprinted in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: ORGANIZED CRIME 7-10* (1967) [hereinafter *TASK FORCE REPORT*].

133. *Griffin*, 660 F.2d at 999-1000; *Elliott*, 571 F.2d at 902; Lynch, *supra* note 5, at 949-54.

134. Lynch, *supra* note 5, at 921-24; see *Castellano*, 610 F. Supp at 1396-97 (discussing how RICO broadens requirements for joint criminal activity and limits force of Rule 8(b) of Federal Rules of Criminal Procedure regarding joinder of parties.); O'Neill, *supra* note 7, 680-95 (discussing party joinder with RICO). At the same time it enacted RICO, Congress created the Continuing Criminal Enterprise statute ("CCE"). 21 U.S.C. § 848 (1995). CCE is part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. Pub. L. No. 91-513, 84 Stat. 1236 (1970). Known as the drug kingpin statute, CCE punishes managers and leaders of drug gangs with lengthy mandatory prison sentences. 21 U.S.C. § 848; see Kenneth G. Schuler, Note, *Continuing Criminal Enterprise, Conspiracy, and the Multiple Punishment Doctrine*, 91 MICH. L. REV. 2220, 2242-57 (1993) (arguing conviction for conspiracy and CCE violates double jeopardy clause of Fifth Amendment). Like RICO, the CCE statute focused on the structured criminal organization. *United States v. Rogers*, 89 F.3d 1326, 1335-36 (1996). Unlike RICO, CCE applies only to the chiefs of drug rings, and not to all the participants. *Garrett v. United States*, 471 U.S. 773, 781 (1985). CCE defendants must supervise at least five other people in the drug ring, and are subject to enhanced penalties. 21 U.S.C. §§ 848.

135. See Blakey & Gettings, *supra* note 3, at 1014-21 (discussing antecedents of RICO); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-81 (1982) (describing legislative history of RICO in detail); Lynch, *supra* note 4, at 664-80 (viewing legislative history of RICO as overbroad attack on Mafia).

136. See SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, *THIRD INTERIM REPORT*, S. REP. NO. 307, 82d Cong., 1st Sess. 171 (1951) (listing fifty areas of organized crime infiltration).

viewed with concern the corruption that accompanied criminal infiltration of a growing number of areas of the national economy.¹³⁷ When RICO was before Congress, investigations and scholarly reports indicated that the complexity and business interests of organized crime resisted simple classification.¹³⁸ Often racketeering crimes overlapped with conventional white-collar crime, such as mail fraud and securities fraud.¹³⁹ Furthermore, the growing sophistication of organized crime required the participation of specialists outside the core group of criminals.¹⁴⁰

In 1951, the Special Committee to Investigate Organized Crime in Interstate Commerce¹⁴¹ ("Kefauver Committee"), chaired by Senator Kefauver, investigated the infiltration of legitimate businesses by the Mafia.¹⁴² The Kefauver Committee reports described organized crime as "mobs," "rackets," or "syndicates" that had survived from prohibition and had diversified into bookmaking, loan sharking, prostitution, and narcotics.¹⁴³ The wealthy gangs had gained respectability and sufficient political protection to impede prosecution of their leaders.¹⁴⁴ The Kefauver Committee, described the gangs as forming an underworld national government held together by the Mafia.¹⁴⁵ By in-

137. *Id.* at 5; 115 CONG. REC. 5874-75 (remarks of Senator McClellan) (1969).

138. 116 CONG. REC. 35,204 (1970) (remarks of Rep. Richard Poff); TASK FORCE REPORT, *supra* note 132, at 4-5; SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, THIRD INTERIM REPORT, S. REP. NO. 307, 82d Cong., 1st Sess. 170-71 (1951).

139. 116 CONG. REC. 18,940 (remarks of Sen. McClellan); TASK FORCE REPORT, *supra* note 132, at 4-5.

140. TASK FORCE REPORT, *supra* note 132, at 4, 10.

141. SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, FINAL REPORT, S. REP. NO. 725, 82d Cong., 1st Sess. (1951).

142. SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, SECOND INTERIM REPORT, S. REP. NO. 141, 82d Cong., 1st Sess. (1951). Racketeers were using illicit profits to buy legitimate businesses. *Id.*

143. *See* S. REP. NO. 307, *supra* note 138, at 1-2 (describing development of organized criminal gangs).

144. *Id.* at 2. The committee attributed the immunity of "leading hoodlums" to the "fix:"

The fix is not always the direct payment of money to law-enforcement officials The fix may also come about through the acquisition of political power by contributions to political organizations or otherwise, by creating economic ties with apparently respectable and reputable businessmen and lawyers, and by buying public good will through charitable contributions and press relations.

Id.

145. *Id.*; S. REP. NO. 141, *supra* note 142, at 4.

timidating its associates,¹⁴⁶ the Mafia maintained control over organized crime in the United States.¹⁴⁷ The Mafia code of silence¹⁴⁸ hindered investigators from discovering the internal structure of the Mafia, and, as a result, Government reports focused on the effects of organized crime rather than on the internal structure of the criminal organizations.¹⁴⁹

In 1965, the investigations of Senator John McClellan publicized the internal structure of the Mafia.¹⁵⁰ Senator McClellan had headed a series of committees that had investigated the role of organized crime in labor unions, gambling, and narcotics distribution.¹⁵¹ In 1965, the testimony of Joseph Valachi, a former member of the Mafia, provided vivid descriptions of Mafia practices¹⁵² and explained, for the first time, the hierarchical structure of a Mafia family.¹⁵³ The McClellan Committee, before which Valachi testified, noted that the structure described by Valachi allowed mob leaders to insulate themselves from the crimes committed by subordinates on behalf of the organization.¹⁵⁴ Intermediaries in an organizational hierarchy protected the leaders from direct conspiratorial agreements with those who committed the substantive crimes.¹⁵⁵

In 1965, President Johnson created the President's Commis-

146. S. REP. NO. 307, *supra* note 138, at 1.

147. *Id.* at 2.

148. DONALD R. CRESSEY, THE FUNCTIONS AND STRUCTURE OF CRIMINAL SYNDICATES, in TASK FORCE REPORT, *supra* note 132, at 26, 41-50, 55. Under the code of silence, a Mafia member would refuse to discuss his criminal associates when questioned by the police. *Id.* at 55.

149. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOV'T OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 72, 89th Cong., 1st Sess. 1 (1965). Joseph Valachi was the first Mafia member to provide public testimony about the structure and operations of the Mafia. *Id.* at 1.

150. V.S. NAVASKY, KENNEDY JUSTICE 31-32 (1971).

151. See SENATE SELECT COMM. ON IMPROPER ACTIVITIES IN THE LABOR OR MANAGEMENT FIELD, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958), S. REP. NO. 621, 86th Cong., 1st Sess. (1959), S. REP. NO. 1189, 86th Cong., 2d Sess. (1960); PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOV'T OPERATIONS, GAMBLING AND ORGANIZED CRIME, S. REP. NO. 1310, 87th Cong., 2d Sess. (1962); *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 88th Cong., 1st Sess. (1963); PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE SENATE COMM. ON GOV'T OPERATIONS, ORGANIZED CRIME AND ILLICIT TRAFFIC IN NARCOTICS, S. REP. NO. 72, 89th Cong., 1st Sess. (1965); Blakey & Gettings, *supra* note 3, at 1014-15.

152. S. REP. NO. 72, *supra* note 149, at 12.

153. *Id.* at 5-18.

154. *Id.* at 7-8.

155. 116 CONG. REP. 586 (1970) (remarks of Sen. McClellan).

sion on Law Enforcement and Administration of Justice¹⁵⁶ ("Katzenbach Commission"), headed by Attorney General Nicholas deB. Katzenbach. The Katzenbach Commission summarized many of the observations of the Kefauver Committee and the McClellan Committee.¹⁵⁷ The Katzenbach Commission called for the implementation of laws that focused on the structural element which was the distinctive feature of organized crime.¹⁵⁸

The Katzenbach Commission's report described the complex structure of organized crime and its relationship to legitimate businesses.¹⁵⁹ The Katzenbach Commission Report also presented a detailed description of the Mafia hierarchy.¹⁶⁰ The Katzenbach Commission noted that as the criminal organizations became more sophisticated, they required the help of people with business and financial expertise.¹⁶¹ These new experts, the Katzenbach Commission predicted, would force a restructuring of traditional organized crime, as their expertise became more important to criminal organizations than the traditional types of racketeering that had formerly been the object of organized crime.¹⁶²

Appended to the findings of the Katzenbach Commission

156. Exec. Order No. 11,236 (July 23, 1965).

157. TASK FORCE REPORT, *supra* note 132, at 1-3, 11-12.

158. *Id.* The Task Force Report concluded that the strength and power of the mob derived from its organizational structure. *Id.* at 7.

159. *Id.* at 1-10.

160. TASK FORCE REPORT, *supra* note 132, at 7-10. The boss had an adviser, a "consigliere," and below them were an underboss, lieutenants, and soldiers. *Id.* Outside the formal hierarchy were various associates who worked for the organization. *Id.* at 4, 10. In 1931, Salvatore Maranzano created the formal structure of the New York Mafia families. S. REP. NO. 72, *supra* note 149, at 12-13. Maranzano claimed he organized the Mafia based on the structure of Julius Caesar's armies. 116 CONG. REC. 598 (statement of Sen. McClellan) (providing text of TIME article of August 22, 1969, describing organized crime in United States); GAY TALESE, HONOR THY FATHER 206-07 (1971). In the Roman Army, Julius Caesar supplemented his organized Roman Troops with auxiliary forces, *auxiliares*. E.g., III EIGHT BOOKS OF CAESAR'S GALLIC WAR 25 (William Rainey Harper & Herbert Cushing Tolman eds., 1981). The *auxiliares* were not organized as the Roman troops and were not formally integrated into the Roman Army. MICHAEL GRANT, THE ARMY OF THE CAESARS 56-57 (1974). Later, with the rise of the professional army, the distinction disappeared between the native Roman Legions and the *auxiliares* on the periphery of the Legions. G.L. CHEESMAN, THE AUXILIA OF THE ROMAN IMPERIAL ARMY 20 (Ares Publishers 1975) (1914).

161. TASK FORCE REPORT, *supra* note 132, at 4-10.

162. DONALD R. CRESSEY, THE FUNCTIONS AND STRUCTURE OF CRIMINAL SYNDICATES, in TASK FORCE REPORT, *supra* note 132, at 26, 51. Narcotics trafficking, loansharking and gambling were activities of traditional organized crime. *Id.*

was Donald R. Cressey's¹⁶³ analysis of the structure of organized crime.¹⁶⁴ Cressey described organized crime through an intricate examination of the Mafia's structure.¹⁶⁵ Cressey noted that it was not illegal for a group to organize a division of labor to commit crimes, as long as the group did not violate conspiracy laws by planning specific crimes.¹⁶⁶

Cressey called for further study to understand organized crime so that the Government could attack it at the organizational level.¹⁶⁷ Overall, the Katzenbach Commission's recommendations did not call for new substantive laws to attack criminal organizations.¹⁶⁸ The recommendations concentrated instead on the need for new investigative tools for law enforcement and for enforcement of existing laws.¹⁶⁹

In 1965, Senator McClellan introduced a bill criminalizing membership in the Mafia.¹⁷⁰ The bill, however, did not make it

163. *Id.* at 25. Cressey was a Professor of Sociology at the University of California at Santa Barbara. *Id.*

164. *Id.* at 25-60.

165. *Id.* at 31-56.

166. *Id.* Cressey noted the insulation that protected organized crime bosses: Except when conspiracy statutes are violated, it is not against the criminal law for an individual or group of individuals to rationally plan, establish, develop, and administer a division of labor for the perpetration of crime This is more than a "problem of definition." It is a fact of life which permits directors of criminal business organizations to remain immune from arrest, prosecution, and imprisonment unless they themselves violate specific criminal laws such as those prohibiting the sale of narcotics. It is the problem of organized crime.

Id. at 57.

167. *Id.* at 60.

168. *Id.* at 16-24; see Lynch, *supra* note 4, at 667 n.25 (listing Katzenbach Commission recommendations adopted into congressional legislation).

169. TASK FORCE REPORT, *supra* note 132, at 16-24.

170. S. 2187, 89th Cong., 1st Sess. § 2(a) (1965), 111 CONG. REC. 14, 680 (1965).

Senator McClellan proposed:

Whoever . . . knowingly and willfully becomes or remains a member of (1) the Mafia, or (2) any other organization having for one of its purposes the use of any interstate commerce facility in the commission of acts which are in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering, with knowledge of the purpose of such organization, shall be guilty of a felony

Hearings on S. 2187 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 89th Cong., 2d. Sess. 29 (1966). The Attorney General, Nicholas deB. Katzenbach testified that a law proscribing membership would present too many constitutional problems. *Id.* at 28, 32. He stated:

S.2187 raises a number of constitutional questions of such substance that, at

past the committee level.¹⁷¹ In 1969, Senator Roman Hruska introduced the Criminal Activities Profits Act¹⁷² directed at money laundering.¹⁷³ That same year, Senator McClellan also introduced a bill that included many of the Katzenbach Commission's recommendations for fighting organized crime.¹⁷⁴ Finally, the Senators jointly introduced a bill¹⁷⁵ which, with minor amendments, became RICO, Title IX of the OCCA.¹⁷⁶

In Congress, opponents of RICO criticized it for being overbroad¹⁷⁷ and having applications beyond traditional organized crime.¹⁷⁸ Senator McClellan responded that addressing the problem required a comprehensive solution and not piecemeal legislation.¹⁷⁹ The result of the amendments was an expansive approach to enterprise criminality.¹⁸⁰

the very least, its effectiveness is very likely to be impaired by prolonged litigation.

These questions relate primarily to the due process clause of the fifth amendment and the scope of the privilege against self-incrimination. Conceivably, first amendment problems might also be raised, since that amendment relates to freedom of association in nonpolitical as well as political organizations.

Id.

171. See Goldsmith, *supra* note 5, at 783 (discussing problems with S.2187). Crimes that punish mere membership in organizations may violate the First Amendment. *Scales v. United States*, 367 U.S. 203, 222-30 (1961). Prosecutions under a statute penalizing membership in a criminal association must prove the member was aware of the criminal activity and intended to further the criminal activity. *Healy v. James*, 408 U.S. 169, 186 (1972).

172. S. 1623, 91st Cong., 1st Sess. (1969). Senator Roman Hruska had introduced a succession of bills addressing the problem of organized crime. *E.g.*, S. 2048, 90th Cong., 1st Sess. (1967); S. 2049, 90th Cong., 1st Sess. (1967).

173. S. 1623, 91st Cong., 1st Sess. (1969).

174. S. 30, 91st Cong., 1st Sess., 115 CONG. REC. 769 (1969).

175. S. 1861, 91st Cong., 1st Sess. (1969).

176. Blakey, *supra* note 135, at 249-80; Lynch, *supra* note 4, at 676-77.

177. 116 CONG. REC. 35,213. The American Civil Liberties Union objected to the "overly broad and ambiguous provisions." *Id.* Earlier, Attorney General Robert Kennedy had expressed his impatience with demands for a precise definition of organized crime by exclaiming, "don't define it, do something about it." NAVASKY, *supra*, note 150, at 52.

178. 116 CONG. REC. 35,213 (1970); Organized Crime Control, *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 538, 543-44 (1970).

179. 116 CONG. REC. 18,913-14 (1970) (remarks of Senator McClellan).

180. *United States v. Turkette*, 452 U.S. 576, 590 (1981). The resulting statute "authorized the imposition of enhanced criminal penalties and new civil sanctions to provide new legal remedies for all types of organized criminal behavior, that is, enterprise criminality - from simple political corruption to sophisticated white-collar schemes to traditional Mafia-type endeavors." Blakey & Gettings, *supra* note 3, at 1013-14; *see G.*

ii. The RICO Statute

Congress incorporated RICO into the OCCA as a measure to protect businesses from the depredations of racketeers.¹⁸¹ RICO attacks not only infiltrating racketeers but also organizations that are instruments for carrying out racketeering schemes.¹⁸² RICO provides the legal and conceptual framework to link disparate individuals and events into a coherent picture of a diversified criminal operation.¹⁸³

The congressional investigations into organized crime, and the legislative history of RICO reveal the Government's concern not only with the members of criminal organizations who are formally initiated into the Mafia, but also with those who are on the periphery of the organization and aid its infiltration of legitimate businesses and its corruption of business and government.¹⁸⁴ To prosecute a criminal organization as a conspiracy, the Government must prove that an agreement linked the defendants.¹⁸⁵ By creating layers of intermediaries, the head of a criminal organization insulates himself from any direct agreements with the people who actually are carrying out the crimes.¹⁸⁶ Without proof of an agreement, the heads of criminal

Robert Blakey & Thomas A. Perry, *An Analysis of Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God - Is This the End of RICO?"* 43 VAND. L. REV. 851, 860-68 (1990) (discussing persistent misconceptions about RICO). Although the initial congressional debates focussed on the Mafia, "Senator McClellan had always viewed 'organized crime' in terms broader than the Mafia alone. He therefore refrained from drafting RICO in such limited terms." Goldsmith, *supra* note 5, at 787.

181. See, 115 CONG. REC. 9567 (1969) (remarks of Senator McClellan) (calling for direct attack on organized criminals to protect legitimate businesses); S. REP. NO. 91-617, 79 (1969) (calling for attack on economic base of organized crime).

182. 116 CONG. REC. 591, 18,939 (1970) (remarks of Sen. McClellan).

183. See *Elliott*, 571 F.2d at 902-03 (describing RICO's application to sprawling criminal networks); Michael Goldsmith, *Judicial Immunity for White Collar Crime: The Ironic Demise of Civil RICO*, 30 HARV. J. ON LEGIS. 1, 27 (1993) (describing Congress' intent to use RICO to attack many complex criminal problems).

184. TASK FORCE REPORT, *supra* note 132, at 4, 8, 51; Blakey, *supra* note 135, at 341 & 341-42 n.223.

185. LAFAYE & SCOTT *supra* note 9, at 470.

186. 115 CONG. REC. 5872 (1969) (statement of Sen. McClellan). In *United States v. Aviles*, the Government convicted Vito Genovese, head of the Genovese crime family, of conspiracy to import and distribute narcotics although Genovese never handled narcotics or received money directly. 274 F.2d 179 (2d Cir. 1960). The jury inferred from Genovese's statements and his meetings with co-conspirators that he had an interest in the success of the narcotics conspiracy. *Id.*

C.J. Hawkins, the central defendant in the *Elliott* RICO enterprise, characterized the requirement that accomplice testimony have independent corroboration with the

organizations are difficult to reach through conspiracy prosecutions.¹⁸⁷ One of the uses of the RICO enterprise is the creation of a substantive crime that links parties and crimes too remote to be connected by a conspiratorial agreement.¹⁸⁸ Furthermore, within the organization, the hierarchical structure provides continuity as membership changes.¹⁸⁹ If a boss is removed, someone else can take his or her position.¹⁹⁰ RICO, however, attacks the structure of the organization.¹⁹¹ The RICO statute also incorporates an inchoate conspiracy offense for those who conspire to commit substantive RICO offenses.¹⁹²

To establish a RICO violation, prosecutors must prove the existence of a RICO enterprise¹⁹³ and a pattern¹⁹⁴ of racketeering activity.¹⁹⁵ The enterprise may fulfill different roles in a

expression "one on one ain't worth a shit." *Elliott*, 571 F.2d at 895. Hawkins's statement was an accurate interpretation of state law in Georgia. See, *Harrison v. State*, 384 S.E.2d 643, 645 (Ga. 1989) (holding that independent corroborating evidence must support accomplice testimony to sustain felony conviction). Hawkins's interpretation did not, however, account for recent Congressional statutes such as RICO that have federalized broad areas of state law. See *Lynch*, *supra* note 4, at 713-717 (criticizing RICO for usurping state penal law); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 230-58 (describing use of commerce clause by federal government to intrude on state police powers) (1984); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1162-74 (1995) (describing federal criminal law competing with state criminal law, instead of complementing it). In federal court, where Hawkins was tried, accomplice testimony does not require corroboration. *Elliott*, 571 F.2d at 895 n.13.

187. 115 CONG. REC. 5872 (1969) (statement of Sen. McClellan); TASK FORCE REPORT, *supra* note 132, at 57.

188. *Griffin*, 660 F.2d at 999-1000.

189. 115 CONG. REC. 5872 (1969) (statement of Sen. McClellan); 116 CONG. REC. 36,296 (1969) (statement of Sen. Dole).

190. 115 CONG. REC. 5872 (1969) (statement of Sen. McClellan); 116 CONG. REC. 36,296 (1969) (statement of Sen. Dole).

191. See *supra* note 5 and accompanying text (describing RICO as attack on structure of criminal organizations).

192. 18 U.S.C. § 1962(d).

193. 18 U.S.C. § 1961(4). A RICO enterprise is "any individual, partnership, corporation, association, or other legal entity and any union or group of individuals associated in fact although not a legal entity." *Id.* The enterprise must engage in, or its activities affect, interstate or foreign commerce. 18 U.S.C. § 1962(a)-(c).

194. 18 U.S.C. § 1961(5). A pattern of racketeering is defined as "at least two acts of racketeering activity . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.* There must also be continuity and relationship between the acts in the pattern. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243 (1989).

195. 18 U.S.C. § 1961(1). Racketeering activity is defined as:

(A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled sub-

RICO prosecution.¹⁹⁶ The enterprise may be the object that the racketeers seek to control through racketeering or through the wealth amassed by racketeering.¹⁹⁷ The enterprise may be the victim, plundered by racketeers.¹⁹⁸ The enterprise may be the instrument of racketeers who use the enterprise to victimize others.¹⁹⁹ Finally, the enterprise may be the perpetrator of the racketeering.²⁰⁰ The RICO statute prohibits any person from using income from a pattern of racketeering activity to acquire an interest in an enterprise,²⁰¹ gain an interest in an enterprise through a pattern of racketeering activity,²⁰² conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity,²⁰³ or conspire to participate in any of the substantive RICO offenses.²⁰⁴

The statute defines racketeering activity as a pattern²⁰⁵ of specific crimes.²⁰⁶ In a RICO indictment, the predicate acts are

stance or listed chemical . . . 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

Id.

196. O'Neill, *supra* note 7, at 673-78.

197. Blakey, *supra* note 135, at 308-23.

198. *Id.*

199. *Id.*; National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994).

200. Blakey, *supra* note 135, at 308-23.

201. 18 U.S.C. § 1962(a).

202. 18 U.S.C. § 1962(b).

203. 18 U.S.C. § 1962(c).

204. 18 U.S.C. § 1962(d).

205. 18 U.S.C. § 1961(5). The statute requires that the "pattern of racketeering activity" include "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity." *Id.*

206. 18 U.S.C. § 1962(c). Section 1961(1) provides that "racketeering activity" is: (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in § 102 of the Controlled Substances Act [21 USCS § 802]), 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: § 201 (relating to bribery) . . . §§ 471, 472, and 473 (relating to counterfeiting) . . . § 664 (relating to embezzlement from pension and welfare funds), §§ 891-894 (relating to extortionate credit transactions) . . . § 1341 (relating to mail fraud), § 1343 (relating to wire fraud), § 1344 (relating to financial institution fraud), §§ 1461-1465 (relating to obscene matter), § 1503 (relating to obstruction of justice) . . . § 1512 (relating to tampering with a witness, victim, or an informant) . . . § 1952 (relating to racketeering), § 1953 (relating to interstate trans-

the underlying acts of racketeering.²⁰⁷ The predicate acts include many state law crimes, such as murder and arson, and many white-collar crimes, such as mail fraud.²⁰⁸ The adaptability of organized crime required laws of sufficient breadth to attack criminal participation in numerous areas.²⁰⁹ The breadth of RICO also allows it to be effective in areas beyond traditional organized crime.²¹⁰

In addition to its criminal components, RICO contains provisions for private enforcement by civil suits.²¹¹ The substantive provisions and the conceptual framework that courts establish for RICO enterprises are the same for criminal prosecutions and civil suits.²¹² Providers of professional services such as lawyers and accountants are particularly concerned with the civil RICO

portation of wagering paraphernalia) . . . § 1956 (relating to the laundering of monetary instruments) . . . § 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), §§ 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children) . . . §§ 2314 and 2315 (relating to interstate transportation of stolen property) . . . §§ 2341-2346 (relating to trafficking in contraband cigarettes), §§ 2421-24 (relating to white slave traffic), (C) an act which is indictable under title 29, United States Code, § 186 (dealing with restrictions on payments and loans to labor organizations) or § 501(c) (relating to embezzlement from union funds) . . . (D) any offense involving fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in § 102 of the Controlled Substances Act [21 USCS § 802]), punishable under any law of the United States

18 U.S.C. § 1961(1). The Private Securities Litigation Reform Act of 1995 added a provision to the RICO civil remedies statute stating:

[N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of § 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c) (1996).

207. *H.J. Inc.*, 492 U.S. at 237-38.

208. 18 U.S.C. § 1961(1).

209. 116 CONG. REC. 18,940 (1970) (statement of Sen. McClellan).

210. Goldsmith, *supra* note 183, at 6-7.

211. 18 U.S.C. § 1964.

212. 18 U.S.C. § 1962. *See Moss v. Morgan Stanley, Inc.*, 553 F. Supp. 1347, 1362 (S.D.N.Y.), *aff'd*, 719 F.2d 5 (2d Cir. 1983), *cert. denied sub nom. Moss v. Newman*, 465 U.S. 1025 (1984) (holding that preponderance of evidence standard of civil RICO does not relate to elements of predicate crimes, but to burden plaintiff bears in showing elements).

provisions.²¹³ Activity that in the past would have given rise to a commercial dispute may now give rise to a RICO suit with the prospect of treble damages.²¹⁴ As a consequence, courts have created barriers to RICO suits through narrow interpretations of the statute.²¹⁵

Congress, however, intentionally worded RICO broadly, and added a liberal construction clause to the statute.²¹⁶ Congress also designed the statute to apply to business crime and street crime.²¹⁷ The broad phrasing of the statute was a response to the danger and growth of enterprise criminality and the adaptability of organized crime.²¹⁸

iii. RICO and the Supreme Court

In four cases preceding *Reves*,²¹⁹ the Supreme Court interpreted the RICO statute.²²⁰ The Supreme Court rejected narrow interpretations of RICO espoused by the lower courts and, with the exception of *Reves*, has heeded the liberal construction clause appended to the statute.²²¹

The Supreme Court directly addressed the question of association-in-fact enterprises in *United States v. Turkette*.²²² The

213. See Catherine M. Clarkin, *Reves v. Ernst & Young: The Elimination of Professional Liability under RICO*, 43 CATH U.L. REV. 1025, 1028-31 (1994) (describing effect of civil RICO suits on outside professionals).

214. *Id.* at 1027-29. See *Sedima* 473 U.S. at 504 (Marshall, J., dissenting) (describing federalization of civil litigation through RICO).

215. See Goldsmith, *supra* note 183, at 18-38 (listing judicially imposed restrictions on civil RICO); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 HARV. L. REV. 1101, 1105-21 (1982) (listing judicial restrictions on civil RICO and concluding only Congress should restrict reach of RICO).

216. Pub. L. No. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947 (1970). The liberal construction clause provides: "[t]he provisions of this title . . . shall be liberally construed to effectuate its remedial purposes." *Id.*

217. See Blakey & Gettings, *supra* note 3, at 1013-14 (discussing broad applicability of RICO to all forms of enterprise criminality).

218. See *supra* notes 150, 192 and accompanying text (discussing justifications for RICO's breadth).

219. 507 U.S. 170.

220. *Turkette*, 452 U.S. at 576; *Russello*, 464 U.S. at 16; *Sedima*, 473 U.S. at 479; *H.J.*, 492 U.S. at 229. A commentator has suggested that, before *Reves*, the Supreme Court heard ten cases that heavily influence RICO interpretation. J. Todd Benson, Note, *Reves v. Ernst & Young: Is RICO Corrupt?*, 54 LA. L. REV. 1685, 1686 (1994).

221. See Vitiello, *supra* note 18, at 1365 (describing past broad readings of RICO by Supreme Court). In *Reves*, the Court found the language unambiguous and so did not have to resort to the liberal construction clause. *Reves* 507 U.S. at 183-84.

222. 452 U.S. at 576.

Court found that the RICO provision for association-in-fact enterprises applies to legal and illegal enterprises.²²³ The respondent argued that RICO was meant to protect legitimate businesses from organized crime and that RICO enterprises should, therefore, be limited to both legitimate businesses.²²⁴ The Supreme Court held that Congress intended to create new tools to fight organized crime and that restricting associations-in-fact to legitimate businesses would limit the usefulness of RICO in attacking purely criminal groups.²²⁵ The Court defined a RICO association-in-fact as a group of people associated for a course of continuing activity.²²⁶ Proof of an association-in-fact must show an ongoing organization distinct from racketeering activity, and evidence that it functions as a continuing unit.²²⁷

The Supreme Court in *Russello v. United States*²²⁸ found that interests subject to forfeiture for a RICO violation include all profits and proceeds from a racketeering activity, not just the interest the defendant has in the RICO enterprise.²²⁹ In *Sedima, S.P.R.L. v. Imrex Co.*,²³⁰ the Supreme Court rejected the Second Circuit requirement that the defendant be criminally convicted of racketeering before a civil plaintiff can assert a RICO claim.²³¹ The Court also rejected the requirement that the plaintiff show a special racketeering injury distinct from the injury caused by the predicate acts.²³²

In *H.J. Inc. v. Northwestern Bell Telephone Co.*,²³³ the Supreme Court sought to define the point at which a series of predicate acts becomes a pattern of racketeering activity.²³⁴ When custom-

223. *Id.* at 580-81.

224. *Id.* at 579-80.

225. *Id.* at 586-87, 593.

226. *Turkette*, 452 U.S. at 583.

227. *Id.*

228. 464 U.S. 16 (1983).

229. *Id.* at 22.

230. 473 U.S. 479 (1985).

231. *Id.* at 493.

232. *Id.* at 495.

233. 492 U.S. at 229.

234. *Id.* The RICO statute defines the pattern requirement as "at least two acts of racketeering activity." 18 U.S.C. § 1961(5). Commentators have remarked on the role of the pattern requirement. See Blakey & Gettings, *supra* note 3, at 1029-31 (describing basic elements of pattern); David W. Gartenstein & Joseph F. Warganz, Note, *RICO's "Pattern" Requirement: Void for Vagueness?*, 90 COLUM. L. REV. 489, 517-27 (1990) (discussing constitutionality of broad pattern requirement); Joseph E. Bauerschmidt, Note, "Mother of Mercy — Is This The End of RICO?" — Justice Scalia Invites Constitutional Void-for-

ers of a telephone company brought a civil RICO suit alleging that the company bribed members of the public utilities commission that set phone rates, the phone company customers claimed that the U.S. Court of Appeals for the Eighth Circuit required a restrictive reading of the pattern requirement.²³⁵ Under the Eighth Circuit test,²³⁶ a claim of racketeering activity required proof of multiple criminal schemes, not simply one criminal plan requiring a number of predicate acts.²³⁷

In *H.J. Inc.*, the Supreme Court found the Eighth Circuit's rule too restrictive.²³⁸ Noting that the RICO statute did not define a RICO pattern, the Court looked to the plain meaning of the word pattern²³⁹ and to the legislative history of RICO.²⁴⁰ The Court ruled that to constitute a pattern there must be continuity and relationship between the predicate acts.²⁴¹ A prosecutor must prove that a relationship exists between racketeering

Vagueness Challenge to RICO "Pattern", 65 NOTRE DAME L. REV. 1106, 1124-25 (1990) (applying void-for-vagueness analysis to RICO pattern requirement); Michael Goldsmith, *RICO and "Pattern: The Search for "Continuity Plus Relationship"*, 73 CORNELL L. REV. 971, 971-72 (1988) (describing critical importance of pattern requirement to RICO violation); Barry Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 209-19 (1980) (analyzing different approaches to pattern requirement).

235. *H.J. Inc.*, 492 U.S. at 234-35.

236. *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986).

237. *Id.* The Eighth Circuit Court of Appeals found that to constitute a RICO enterprise, defendants would have to commit the two-predicate-act minimum in at least two separate schemes. *Id.* at 257.

238. *H.J. Inc.*, 492 U.S. at 236-37. The Supreme Court stated that it was unwilling to limit the RICO pattern requirement by imposing a rigid definition of a pattern. *Id.* The Court stated:

In our view, Congress had a more natural and commonsense approach to RICO's pattern element in mind, intending a more stringent requirement than proof simply of two predicates, but also envisioning a concept of sufficient breadth that it might encompass multiple predicates within a single scheme that were related and that amounted to, or threatened the likelihood of, continued criminal activity.

Id.

239. *Id.* at 238. The Court stated, "[i]n normal usage, the word 'pattern' here would be taken to require more than just a multiplicity of racketeering predicates." *Id.*

240. *Id.* at 238-39.

241. *Id.* at 239. The Supreme Court found, "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* (citing 18 U.S.C. § 3575(e)). Critics have pointed out the vagueness of this standard. *Id.* at 251-56 (Scalia, J. concurring); Jed S. Rakoff, *The Unconstitutionality of RICO*, N.Y.L.J., Jan. 11, 1990, at 3, col.2; see Gartenstein & Warganz, *supra* note 234, at 526 (suggesting that Congress, not the courts, should narrow pattern requirement).

acts by establishing that the acts are similar to each other.²⁴² According to *H.J. Inc.*, prosecutors must prove continuity by showing repeated conduct within a discrete period of time or the threat that the conduct will continue.²⁴³ In a concurring opinion, Justice Scalia observed that the continuity and relationship test is not clear enough for a statute with criminal applications,²⁴⁴ and the entire statute may be void for vagueness.²⁴⁵

Although the RICO statute contains provisions for RICO association-in-fact enterprises and RICO conspiracy, the two are conceptually distinct.²⁴⁶ Traditional conspiracy law limits RICO conspiracies to agreements to violate the substantive RICO provisions.²⁴⁷ As in the *Kotteakos* conspiracy,²⁴⁸ the RICO conspiracy requires an agreement linking individual members.²⁴⁹ There is, however, no such limitation on the RICO enterprise.²⁵⁰ RICO association-in-fact enterprises extend beyond a single agreement or common objective²⁵¹ to embrace the diverse crimes of a criminal enterprise.²⁵² Under *Turkette*, the RICO enterprise must be distinct from the pattern of racketeering,²⁵³ and the members of the enterprise must form a unit for a continuing course of conduct.²⁵⁴

Under § 1962(c), a defendant may be an employee of an enterprise, or merely an outsider associated with the enterprise.²⁵⁵ As an employee or close associate, the individual is an

242. *H.J. Inc.*, 492 U.S. at 240 (citing 18 U.S.C. § 3575(e)). The Court found, "criminal conduct forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.*

243. *Id.* at 241-42.

244. *Id.* at 255 (Scalia, J., concurring).

245. *Id.* at 255-56.

246. See Lynch, *supra* note 5, at 952-53 (distinguishing participation in RICO association-in-fact enterprise from conspiracy to participate in a RICO enterprise).

247. *Id.*; United States v. Sutherland, 656 F.2d 1181, 1189-94 (5th Cir. 1981).

248. 328 U.S. 750 (1946).

249. *Id.*

250. *Elliott*, 571 F.2d at 900; see Lynch, *supra* note 5, at 945-55 (commenting unfavorably upon breadth of RICO enterprise).

251. *Elliott*, 571 F.2d at 902.

252. *Id.* at 901-02; *Griffin*, 660 F.2d at 999-1000.

253. *Turkette*, 452 U.S. at 583.

254. *Id.*

255. See *Reves*, 507 U.S. at 184-85 (distinguishing insider employees from outsiders who have no official position in enterprise).

insider of the enterprise, such as a Mafia foot soldier.²⁵⁶ As an outsider, the person is associated with an enterprise in which he does not have a formal position,²⁵⁷ such as an accountant auditing a corrupt business. To satisfy the requirement that a person be associated with an enterprise, there must be a person-enterprise nexus connecting the racketeer to the organization.²⁵⁸ Under § 1962(c), there must also be a nexus between the pattern of racketeering activity and the enterprise, as the person must participate in the conduct of the enterprise's affairs, and the participation must be through racketeering activity.²⁵⁹ *Reves* limits this racketeering-enterprise nexus to people who operate or manage the enterprise.²⁶⁰

Section 1962(c) states that it applies to a person associated with an enterprise.²⁶¹ In certain circumstances, this precludes businesses from being held liable under RICO.²⁶² A majority of circuits follow the person-enterprise rule, which prevents the same individual or entity from being both the person and enterprise under § 1962(c).²⁶³ RICO liability runs to the person, and under the person-enterprise rule, the two must be distinct.²⁶⁴ Circuits that follow the person-enterprise rule do not allow a person or entity to be employed or associate with itself.²⁶⁵ The rule requires that individuals, rather than corporations, be held liable for racketeering, unless a corporation associates with an-

256. *Id.*

257. *Id.*

258. Tarlow, *supra* note 234, at 228-34; *see*, United States v. Yonan, 623 F. Supp. 881 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 800 F.2d 164 (7th Cir. 1986), *cert denied*, 479 U.S. 1055 (1987) (discussing association requirement).

259. 18 U.S.C. § 1965(c). *See* Melissa Harrison, *Nexus: The Next Test of RICO's Text*, 70 DENV. U.L. REV. 69, 69-70 & n.7 (1992) (discussing § 1962(c) nexus requirement and distinguishing nexus with organized crime, nexus of racketeering with interstate commerce, nexus of person to enterprise, and nexus of racketeering to enterprise); *RICO Nexus Requirement*, *supra* note 10, at 573-75 (describing racketeering-enterprise nexus).

260. *Reves*, 507 U.S. at 183.

261. 18 U.S.C. § 1962(c). The statute requires that the person that commits the racketeering acts be "employed by or associate with" the enterprise. *Id.*

262. *See* Goldsmith, *supra* note 183, at 24-37 (discussing person-enterprise doctrine).

263. *Id.* The Eleventh Circuit allows the person and the enterprise to be identical. United States v. Hartley, 678 F.2d 961, 988 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

264. Goldsmith, *supra* 183, at 24-37.

265. *E.g.* Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985).

other enterprise.²⁶⁶ The rule often serves to immunize corporations from RICO suits under § 1962(c).²⁶⁷

Since *H.J. Inc.*, the courts of appeal have diverged in their interpretations of the pattern requirement.²⁶⁸ Some circuits have concentrated on the continuity prong, and looked to the number of acts committed within a particular span of time²⁶⁹ or to the threat of continued criminal activity.²⁷⁰ Although courts no longer require proof of multiple schemes,²⁷¹ some have required separate patterns for each victim.²⁷² Other circuits apply a multi-factor test to determine if there is a pattern.²⁷³

Courts must determine the appropriate *mens rea* for a RICO violation, because Congress did not include a *mens rea* term in the RICO statute.²⁷⁴ Many of the underlying offenses, such as

266. See Goldsmith, *supra* note 183, at 24-28 (discussing history of person-enterprise doctrine).

267. See *id.* at 27-28 (describing person-enterprise rule immunizing white-collar defendants sued under RICO).

268. See *Racketeer Influenced and Corrupt Organizations*, 33 AM. CRIM. L. REV. 929, 934-39 (1996) (describing varying tests for pattern).

269. See, e.g., *GICC Capital Corp. v. Technology Fin. Group, Inc.*, 67 F.3d 463, 469 (2d Cir. 1995), *cert denied*, 116 S. Ct. 2547 (1996) (holding that racketeering activity must occur over at least one year or present threat of future criminal activity); *Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 593 (11th Cir. 1992) (holding six-month to one-year period insufficient to create pattern).

270. *Sun Sav. & Loan*, 825 F.2d at 194.

271. *H.J. Inc.*, 492 U.S. at 241. The Court stated that a requirement that the defendants engage in multiple schemes or prey upon multiple victims "appears nowhere in the language of or legislative history of the Act." *Id.*

272. *Vemco, Inc. v. Camardella*, 23 F.3d 129, 135 (6th Cir.), *cert. denied*, 115 S. Ct. 579 (1994); *United Textiles, Inc. v. Anheuser-Busch Cos.*, 911 F.2d 1261, 1266-68 (7th Cir. 1990).

273. See *Banks v. Wolk*, 918 F.2d 418, 420-22 (3d Cir. 1990) (applying multifactor test to both continuity and relatedness prongs); *Brandenburg v. Seider*, 859 F.2d 1179, 1185 (4th Cir. 1988) (accounting for number of victims, number of schemes, number of predicate acts, length of time, and potential for more criminal activity); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986) (enumerating variety of factors).

274. See *Morissette v. United States*, 342 U.S. 246, 251-61 (1952) (describing history of *mens rea* in Anglo-American criminal law, and distinguishing common law crimes requiring criminal intent, from regulatory offenses that do not require *mens rea* element if none is specified); Fricker & Gilchrist, *supra* note 41, at 820 (describing lack of clear distinction between regulatory and common law offenses). In *United States v. X-Citement Video*, the Supreme Court held that in federal statutes lacking an explicit *mens rea* term, one is implied if the statute criminalizes otherwise innocent conduct. 115 S. Ct. 464, 469 (1994). Jurisdictional facts that augment the penalty for an offense committed intentionally, such as an intentional assault committed on someone who happened to be a federal officer, do not require intent. *Id.* at 469 n.3. The Supreme Court found that prior decisions had held that severe penalties in the statute were significant in determining if there should be an implicit requirement of criminal intent. *Id.*

robbery or arson, require that a defendant have criminal intent.²⁷⁵ Some courts contend that the intent to commit predicate acts is sufficient intent for conviction under RICO.²⁷⁶ Other courts require that a defendant know of the RICO enterprise and engage in the pattern of racketeering that was related to the affairs of enterprise or that affected the affairs of the enterprise.²⁷⁷

B. *Civil Law approach to Criminal Association*

Italy and France are civil law countries in which legislative enactments, not judicial decisions, are the primary source of law.²⁷⁸ The penal codes of both Italy and France contain provisions prohibiting criminal associations.²⁷⁹ The Italian code also contains a specific prohibition on membership in a Mafia association.²⁸⁰ The French law prohibiting criminal associations resembles common law conspiracy,²⁸¹ but retains the essential features of traditional criminal association.²⁸²

Conspiracy is a product of the common law.²⁸³ Civil law

275. 18 U.S.C. § 1961(1). In some circuits, until 1984, a violation of 18 U.S.C. § 186, a RICO predicate act under 18 U.S.C. § 1961(1), did not require proof of a *mens rea* element. *United States v. Scotto*, 641 F.2d 47, 55 (2d Cir.), *cert. denied*, 452 U.S. 961 (1981). Defendants have argued that RICO convictions without proof of *mens rea* is patently unfair. *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir.), *cert. denied*, 449 U.S. 833 (1980); *Scotto*, 641 F.2d at 55-56; *United States v. Romano*, 684 F.2d 1057, 1065-66 (2d Cir. 1982).

276. *Scotto*, 641 F.2d at 56; *Boylan*, 620 F.2d 361-62. *Scotto* and the line of cases that follow it are of questionable value since *Reves* implicitly overruled them. *United States v. Viola*, 35 F.3d 37, 40-41 (2d Cir. 1994).

277. *Castellano*, 610 F.Supp. at 1395; *see Lynch, supra* note 5, at 954 n.149 (arguing that convicting defendants without establishing awareness of enterprise strips enterprise element of any meaning).

278. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 23 (2d ed. 1985).

279. CODICE PENALE [C.P.] art. 416 (It.); CODE PÉNAL [C. PÉN.] art. 450-1 (Fr.).

280. C.P. art. 416*bis* (It.).

281. *See Culioli, supra* note 11, at 8 (describing abandonment of requirement that criminal association be hierarchical and permanent, and new requirement that group be based on agreement).

282. *See Wagner, supra* note 11 at 171 (discussing basis of French criminal association statute).

283. *See Wagner, supra* note 11, at 171 (discussing civil law countries and conspiracy). The absence of conspiracy statutes in civil law countries became an obstacle to the prosecutors of the Nazi leaders at Nuremberg. B.F. SMITH, *REACHING JUDGMENT AT NUREMBERG* 51 (1977).

During much of the discussion, the Russians and French seemed unable to grasp all the implications of [conspiracy]; when they finally did grasp it, they

countries punish criminal groups directly by prohibiting the formation of criminal associations.²⁸⁴ Common law conspiracy depends upon the formation of a conspiratorial agreement,²⁸⁵ not the criminal group that the agreement creates.²⁸⁶ The penal codes of France²⁸⁷ and Italy²⁸⁸ directly attack the formation of the criminal groups, rather than the criminal agreement that underlies the group.²⁸⁹

In civil law countries, such as Italy and France, codified legislation is the primary source of law.²⁹⁰ In theory, judges interpret and apply the rules set out in codes.²⁹¹ Strict adherence to the separation of powers in civil law countries means that only the legislature has the right to make new law.²⁹² Consequently, judicial decisions in civil law countries do not create new law as they do in common law countries.²⁹³ In practice, however, legal codes require the judiciary to fill in gaps left by legislators.²⁹⁴ While deferring to the law-making authority of the legislative

were genuinely shocked. The French viewed it entirely as a barbarous legal anachronism unworthy of modern law, while the Soviets seem to have shaken their heads in wonderment - a reaction, some cynics may believe, prompted by envy.

Id.

284. *Krulewitch*, 336 U.S. at 450 (Jackson, J. concurring); Wagner, *supra* note 11, at 171; *see generally*, ELISABETTA GRANDE, *ACCORDO CRIMINOSO E CONSPIRACY* (1993) (arguing that common law conspiracy and Italian criminal association are different in theory but similar in practice).

285. *See supra* notes 40-44 and accompanying text (discussing agreement as basis of conspiracy).

286. *Developments, supra* note 40, at 934.

287. C. PÉN. art. 450-1 (Fr.).

288. C.P. art. 416 (It.).

289. MODEL PENAL CODE § 5.03 comment at 100-01 (Tent. Draft No. 10, 1960); 7 MANZINI *supra* note 11, at 193-96; "Association de Malfaiteurs" in *RÉPERTOIRE DE DROIT PÉNAL ET DE PROCÉDURE PÉNALE, supra* note 11, at 8.

290. *See* MERRYMAN, *supra* note 278, at 23 (stating that sources of law in civil law countries are statutes, regulations, and custom).

291. *Id.* at 22; *but see* ALAN WATSON, *THE MAKING OF CIVIL LAW* 3 (1981) (arguing essential difference between common law and civil law systems is Roman heritage, not codification).

292. MERRYMAN, *supra* note 278, at 22.

293. *Id.*, at 46-47. There may, however, be continuity between judicial decisions that, although not binding on judges, indicates the interpretation appellate courts will be least likely to reverse. *Id.* at 47. Prior decisions may be persuasive, but are not binding. MAURICE SHELTON AMOS & FREDERICK PARKER WALTON, *INTRODUCTION TO FRENCH LAW* 6-8 (1935).

294. *See* Edward A. Tomlinson, *Tort Liability in France for the Act of Things: A Study of Judicial Lawmaking*, 48 *LA. L. REV.* 1299, 1305-13 (1988) (discussing judiciary acting to complete unfinished aspects of codes in civil law countries).

branch, the legal interpretations of courts in civil law countries may have the practical effect of creating new law.²⁹⁵

1. Italian Criminal Association Law

Italy prohibits groups organized for the purpose of committing crimes.²⁹⁶ It also prohibits groups such as the Mafia that use intimidation to secure contracts and payoffs.²⁹⁷ Recently, the Corte di Cassazione, the Italian Supreme Court, has allowed prosecutors to charge people outside the Mafia as accomplices, even if the Mafia has not accepted the accomplices as members.²⁹⁸

Article 416 of the Italian Penal Code makes it a crime, punishable by one to five years in prison, for three or more people to associate for the purpose of engaging in criminal activity.²⁹⁹ Article 416 took effect when the current Italian Penal Code was promulgated in 1931, but the provisions against criminal groups derive from Roman law.³⁰⁰ In 1981, the Italian Legislature ad-

295. *Id.*

296. C.P. art. 416 (It.).

297. C.P. art. 416*bis* (It.).

298. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, in 1995 FORO IT. II, 422.

299. C.P. art. 416 (It.).

Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni.

Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni.

Id.

[When three or more people associate for the purpose of committing a number of crimes, those that promote, form or organize the association are punished, for this alone, by imprisonment for from three to ten years.

For simply participating in the association, the punishment is imprisonment for from one to five years.] (Translation by Comment author).

300. 7 MANZINI, *supra* note 11, at 192 n.3. From the time of the Roman Republic, and particularly under the Roman Empire, Roman law punished certain criminal groups considered a danger to the state. *Id.*; 1 THEODOR MOMMSEN, RÖMISCHES STRAFRECHT 662-63 (1899). *Latrones*, thieves, was a general term that applied to common thieves, bands of thieves, seditious organizations, and pretenders to the imperial crown. RAMSAY MACMULLEN, ENEMIES OF THE ROMAN ORDER, Appendix B, 255-68; Ramsay MacMullen, *The Roman Concept Robber-Pretender*, 10 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE 223 (1963); see G.E.M. DE STE. CROIX, THE CLASS STRUGGLE IN THE ANCIENT GREEK WORLD, 318 (1981) (discussing brigands and social revolutionaries). Despite chronic problems with criminal groups, Roman law never developed a distinct legal category for the crime of criminal association. 7 MANZINI, *supra* note 11, at 192, n.3. Medieval commentators placed complicity, conspiracy, and criminal associa-

ded a provision extending the sanctions of article 416 to Mafia associations, or groups that operate similarly to the Mafia.³⁰¹

Throughout Italian history, the Italian countryside has suffered from chronic and widespread brigandage, armed robberies by rural bandits.³⁰² The number of brigands grew during periods when political regimes were unstable or unusually corrupt.³⁰³ Many of the criminal organizations now operating in Italian cities are the modern heirs to armed gangs that existed in the countryside for centuries.³⁰⁴

Although Italy was a unified kingdom after 1861,³⁰⁵ there was no national penal code until 1889.³⁰⁶ In the interim period,

tion under the rubric of *societas sceleris*, association of evildoers. Rosario Li Vecchi, *Mafia, Politica, Pentitismo, Tangentopoli e Loro Trattamento Processuale e Penale*, 1994 RIVISTA PENALE 1188, 1188.

301. Law n.646 of 13 September 1982, 9 Racc. Uff. 2537 (1982) (It.).

302. See JOHN A. DAVIS, CONFLICT AND CONTROL: LAW AND ORDER IN NINETEENTH-CENTURY ITALY 67-80 (1988) (describing relation of brigandage to social problems); DENIS MACK SMITH, ITALY: A MODERN HISTORY 69-73, 82-83 (2d ed. 1969) (discussing governmental mismanagement and chronic brigandage in south of Italy following reunification); E.J. HOBBSAWM, PRIMITIVE REBELS: STUDIES IN ARCHAIC FORMS OF SOCIAL MOVEMENT IN THE 19TH AND 20TH CENTURIES 13-57 (Frederick A. Praeger 2d ed. 1963) (linking Mafia and Italian brigandage to traditions of rebellion); 7 MANZINI, *supra* note 11, at 211 n.1 (describing periods of increased brigandage and use of law of criminal association). Under medieval law in the Italian Peninsula, communities could banish, *bandire*, criminals, declare them bandits with the status of outlaws, and put them beyond the protection of the law. DAVIS, *supra* at 73. Outlawry in England was a similar legal practice. See SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 49 (2d ed. 1932) (describing outlaws declared outside king's protection and liable to be killed on sight). In medieval Italy, banditry was a status, not a crime, but if bandits joined together, their mere association was the crime of brigandage. DAVIS *supra* at 72-75. As the state centralized police powers, relieving the rural aristocracy of enforcing criminal laws, the state came to treat brigandage as a more serious offence. *Id.* at 73-75.

303. See HOBBSAWM, *supra* note 302, at 13-25 (discussing relationship of bandits as avengers of impoverished peasants); SMITH, *supra* note 302, at 70-71 (describing uprising in reaction to political mismanagement).

304. See ALEXANDER STILLE, EXCELLENT CADAVERS: THE MAFIA AND THE DEATH OF THE FIRST ITALIAN REPUBLIC 14-22 (1995) (describing Mafia's history and influence over growth of Palermo); HOBBSAWM *supra* note 302, at 40-44 (discussing origins of Mafia).

305. SMITH *supra* note 302, at 5-6, 27-28. The separate regions of the Italian Peninsula, except for Rome and Venice, became a united Kingdom of Italy in 1861 under King Vittorio Emanuele II. *Id.*

306. Giuliano Vassalli, *Codice Penale*, in 7 ENCICLOPEDIA DEL DIRITTO 261, 264-65 (Giuffr  ed., 1960). Between 1861 and 1889, a modified Tuscan penal code applied to Tuscany, and the Sardo-Italian penal code applied to the rest of Italy. *Id.* at 264. The major obstacle to a unitary code was the death penalty, which Tuscany had abolished as incompatible with independence and liberty, but which still existed in other parts of the country and was used against brigands in the South. *Id.* The Sardo-Italian Penal

Tuscany had its own penal code.³⁰⁷ The Tuscan Code of 1853 punished associations of three or more people who joined together to commit thievery, extortion, piracy, swindles, maritime embezzlement, or fraud.³⁰⁸ The Sardo-Italian Code of 1859 governed the rest of Italy.³⁰⁹ The Sardo-Italian Code criminalized belonging to an *associazione di malfattori*, an association of evildoers, composed of five or more people whose aim was to commit crimes against people or property and to divide the spoils of their crimes.³¹⁰ The national penal code of 1889, the Zanardelli Code,³¹¹ created the crime of *associazione per delinquere*, criminal association.³¹² The Rocco³¹³ code of 1931,³¹⁴ expanded the crime of criminal association that the Zanardelli code estab-

Code imposed decapitation for attempts on the sacred person of the king, attempts on the royal family, corruption of a judge, false testimony leading to an execution, or certain enumerated types of homicide. C.P. art. 14 (1859) (It.) (Vincenzo Consentino ed., 1879).

307. Vassalli, *supra* note 306, at 264.

308. 7 MANZINI, *supra* note 11, at 192.

309. Vassalli, *supra* note 306, at 264.

310. C.P. arts. 426-30 (1859) (It.).

311. Vassalli, *supra* note 306, at 266. In 1883, Giuseppe Zanardelli, the Italian Minister of Justice, was instrumental in completing the new penal code. *Id.*

312. C.P. art. 248 (1889) (It.) (Emilio Camous and Giovanni Luschi eds., 1895).

Quando cinque o più persone si associano per commettere delitti contro l'amministrazione della giustizia, o la fede pubblica, o l'incolumità pubblica, o il buon costume e l'ordine delle famiglie, o contro la persona o la proprietà, ciascuna di esse è punita, per il solo fatto dell'associazione, con la reclusione da uno a cinque anni.

Se gli associati scorrono le campagne o le pubbliche vie, e se due o più di essi portino armi o le tengano in luogo di deposito, la pena è della reclusione da tre a dieci anni.

Se vi siano promotori o capi dell'associazione, la pena per essi è della reclusione da tre a otto anni, nel caso indicato nella prima parte del presente articolo, e da cinque a dodici anni, nel caso indicato nel precedente capoverso.

Id.

[When five or more people associate together to commit crimes against the administration of justice, or the public trust, or public safety, or the well-being and order of the family, or against persons or property, each of the members is punished, for the fact of having associated, by imprisonment for one to five years.

If the associates overrun the countryside or the public roadways, and if two or more of them are armed or have a cache of arms, the punishment is imprisonment for three to ten years.

If they are organizers or leaders of the association, the punishment is from three to eight years for acts under paragraph one of this article, and from five to twelve years for acts under paragraph two of this article.](translation by Comment author).

lished.³¹⁵

Unlike the legal systems of common law countries, under Italian law, the government cannot convict a person for merely agreeing to commit a crime.³¹⁶ The focus of article 416, therefore, is on the creation of an independent organization, not on the agreement alone.³¹⁷ There is no specific structural requirement for the criminal association³¹⁸ under Italian law, as long as there is a permanent³¹⁹ group of at least three people dedicated

313. Vassalli, *supra* note 306, at 271-72. Italian Minister of Justice Alfredo Rocco oversaw the creation of the new code. *Id.*

314. *Id.* at 272. On July 1, 1931, the Rocco Code took effect. *Id.*

315. 7 MANZINI *supra* note 11, at 192.

Quando tre o più persone si associano allo scopo di commettere più delitti, coloro che promuovono o costituiscono od organizzano l'associazione sono puniti, per ciò solo, con la reclusione da tre a sette anni.

Per il solo fatto di partecipare all'associazione, la pena è della reclusione da uno a cinque anni.

.....

Se gli associati scendono in armi le campagne o le pubbliche vie si applica la reclusione da cinque a quindici anni.

La pena è aumentata se il numero degli associati è di dieci o più.

Id.

[When three or more people unite to commit a number of crimes, those that encourage or create or organize the association are punished, for this alone, with imprisonment from three to seven years.

For having merely belonged to the association, the punishment is imprisonment from one to five years.

.....

If the associates are armed and overrun the countryside or the public roadways, imprisonment from five to fifteen years is to be given.

The punishment is increased if there are more than ten associates.] (Translation by Comment author).

C.P. art. 416 (It.).

316. C.P. art. 115 (It.). "Salvo che la legge disponga altrimenti, qualora due o più persone si accordino allo scopo di commettere un reato, e questo non sia commesso, nessuna di esse è punibile per il solo fatto dell'accordo." *Id.* [Unless otherwise specified by statute, if two or more persons agree to commit a crime but the crime remains unexecuted, no one may be punished for merely the agreement.] (translation by Comment author).

317. 7 MANZINI, *supra* note 11, at 197. Article 416, in conjunction with the laws against attempt, may be useful in punishing inchoate crimes by allowing the police to intervene early enough to prevent the association from committing the target offenses. *See GRANDE, supra* note 284, at 190-209 (describing legal basis for early police intervention).

318. Laura Borroni, *Tendenze Evolutive della Giurisprudenza in Tema di Mafia*, 1990 GIURISPRUDENZA COSTITUZIONALE 3367, 3373 (1990).

319. 7 MANZINI, *supra* note 11, at 195.

to committing an open-ended series of crimes.³²⁰ The criminal organization needs only a rudimentary structure, sufficient to commit the target crimes.³²¹ Formal organizations, such as corporations, may be criminal associations if their members decide as a group to commit crimes.³²²

Each member of the criminal association must join the organization voluntarily.³²³ The members must agree to pursue the shared criminal goal of the group.³²⁴ The members must intend to engage in a continuous course of criminal conduct,³²⁵ for if they plan only a fixed number of crimes or commit isolated criminal acts, they are guilty as accomplices, not as members of the criminal association.³²⁶

In 1982, the Italian Legislature added the crime of *associazione tipo mafioso*, Mafia association,³²⁷ to the penal code as article 416*bis*.³²⁸ Under article 416*bis*, members of a Mafia association

320. *Id.* at 195; CODICE PENALE ANNOTATO CON LA DOTTRINA E LA GIURISPRUDENZA art. 416-17 (Antonio S. Agrò et al. eds., 1984) (It.).

321. 7 MANZINI, *supra* note 11, at 195.

322. *See id.*, at 197 (noting teleological aspect of organization is irrelevant because intent to commit crimes supercedes original purpose of organization).

323. *Id.* at 195.

324. *Id.*

325. *Id.* at 194.

326. *Id.* at 195, 202.

327. Law n.646 of 13 September 1982, 9 Racc. Uff. 2537 (1982) (It.).

328. C.P. art. 416*bis* (It.).

Chiunque fa parte di un'associazione di tipo mafioso formata da tre o più persone, è punito con la reclusione da tre a sei anni. . . . L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgono della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sè o per altri. . . . Le disposizioni del presente articolo si applicano anche alla camorra e alle altre associazioni, comunque localmente denominate, che valendosi della forza intimidatrice del vincolo associativo perseguono scopi corrispondenti a quelli delle associazioni di tipo mafioso.

Id.

[Whoever belongs to a Mafia association comprised of three or more people, is punished by imprisonment for three to six years. . . . An association is a Mafia association when those that belong to it use the power of intimidation of the associative bond, and the power of oppression, and the code of silence that comes from the bond in order to commit crimes, to acquire by direct or indirect means the management or at least the control over economic activity, permits, authorizations, bids, and public contracts or to gain unjust favors or profits for oneself or others. . . . The provisions of this article also apply to the Camorra and other associations, regardless of their local titles, that use the

can be sentenced to serve three to six years in prison for forming a criminal association and carrying out crimes by methods that are considered characteristic of the Mafia,³²⁹ such as the use of intimidation to acquire government contracts.³³⁰ Prior to the addition of article 416*bis*, prosecutors in Italy, like U.S. prosecutors, had been hindered from prosecuting Mafia leaders by, among other things, the Mafia organizational hierarchy that insulated bosses from the subordinates that committed street crimes.³³¹ Under 416*bis*, a group of three or more people that uses intimidation to commit crimes, or gain control over businesses or public contracts may be a Mafia association.³³²

In 1994, the Corte di Cassazione,³³³ in an en banc decision,³³⁴ allowed prosecutors to link the Mafia-association statute with the complicity statute.³³⁵ Carmine Alfieri, the chief of the Neapolitan Camorra criminal organization, protected the members of his gang from criminal convictions by bribing local judges.³³⁶

Alfieri's assistant, Carmine Grasso, became a government

force of intimidation of the associative bond to follow the same goals as a Mafia association.] (Translation by Comment author).

Id.

329. C.P. art. 416*bis* (It.).

330. *Id.* Article 416*bis* also introduces asset forfeiture into Italian law, borrowing from RICO. Giovanni Tessitore, *La Nuove Legge Antimafia e il Precedente <<Modello>> Americano: Spunti Comparativistici*, 1984 RIV. IT. DI DIRITTO E PROCEDURA PENALE 1038 (1984).

331. Giuseppe Di Lello Finuoli, *Associazione di tipo mafioso (art. 416 bis c.p.) e problema probatorio*, 1984 FORO IT. Parte V-1, 246, 246. Under 416*bis* the loose structural element of the traditional *associazione per delinquere* combined with the sociological specifications describing the Mafia to allow prosecutors to bring enormous *maxiprocessi*, maxi-trials, of hundreds of defendants tried simultaneously. See Stille, *supra* note 304, at 174-89 (describing original maxi-trial of 475 defendants).

332. C.P. art. 416*bis* (It.).

333. See Santo F. Russo, Comment, *In Re Extradition of Khaled Mohammed El Jassem: The Demise of the Political Offense Provision in U.S.-Italian Relations*, 16 FORDHAM INT'L L.J. 1253, 1257 n.15 (1993) (describing system of Italian Criminal Courts).

334. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sez. Unite, in 1995 FORO IT. II, 422. There are eight sections of the Corte di Cassazione that deal with civil matters and six that deal with criminal matters. Ottavio Campanella, *The Italian Legal Profession*, 19 J. LEGAL PROF. 59, 79 (1995). Five judges sit in each section. *Id.* In a *sezioni unite* session, 11 judges, sitting en banc preside over the matter. *Id.*

335. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sez. Unite, in 1995 FORO IT. II, 422.

336. *Due arrestati dopo le accuse del pentito Galasso - Coinvolti parlamentari, avvocati e un giornalista; Camorra, é tempesta sui magistrati*, IL SOLE 24 ORE, Mar. 8, 1994, available in LEXIS, World Library, Stampa File.

witness and accused Vito Masi, a judge on the Naples Court of Appeals of having accepted bribes from the Camorra.³³⁷ Grasso dealt with Judge Masi through Giuseppe Demitry, a Socialist Deputy in the Italian National Assembly.³³⁸ Grasso claimed that Demitry was an intermediary, who helped to "adjust" criminal trials of Camorra members.³³⁹

Under Italian law, criminal association laws, such as articles 416 and 416*bis* are group crimes, *reati plurisoggettivi*.³⁴⁰ Group crimes, such as criminal association, duelling, and adultery, by their nature, cannot be committed by one person.³⁴¹ Crimes that are not, by their nature, group crimes, such as murder, may nevertheless be committed by accomplices acting as a group.³⁴² Under Italian law, accomplices are held liable as principals in the commission of a crime.³⁴³ Complicity, therefore, creates group liability for crimes that are not inherently group crimes, but that, in particular instances, may be committed by a group.³⁴⁴

Prosecutors, however, charged Demitry as an accomplice to a Mafia organization.³⁴⁵ In earlier decisions, sections of the Corte di Cassazione had held that a defendant could not be complicit with a criminal association,³⁴⁶ because aiding the association, with the intent to help it commit crimes, made one a member of the association.³⁴⁷ The Court had held that one could join in a group crime, and, for example, be a member of a criminal association, but one could not be complicit in a group crime.³⁴⁸ Prosecutors, however, linked the complicity statute³⁴⁹

337. *Id.*

338. *Id.*

339. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sezione Unite Penali, in 1995 FORO IT. II, 422.

340. *Id.* at 426.

341. Raul Alberto Frosali, *Concorso di Persone nel Reato*, 3 NOVISSIMO DIGESTO ITALIANO 1018, 1037-38 (Antonio Azara & Ernesto Eula eds., 1964).

342. *Id.*

343. C.P. art. 110 (It.).

344. Frosali, *supra* note 341, at 1019.

345. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sezione Unite Penali, in 1995 FORO IT. II, 423.

346. *Id.* at 426.

347. *Id.*; Judgment of 30 June 1994, Corte di Cassazione, in 1995 RIVISTA PENALE 1114, 1116.

348. Judgment of 5 October 1994, Corte di Cassazione, Sez. Unite, in 1995 FORO IT. II, 422.

349. C.P. art. 110 (It.).

with the Mafia association statute in order to hold defendants liable as outside associates of the Mafia who were liable under the doctrine of external complicity.³⁵⁰ The Corte di Cassazione found that criminal organizations sometimes require the assistance of outsiders, who do not intend to join the organization and are not treated as members, but may nevertheless perform an isolated act, vital to the existence of the organization.³⁵¹ The doctrine of external complicity imposes the penalties for Mafia membership on outsiders who aid and abet the Mafia.³⁵²

2. French Criminal Association Law

The Napoleonic Penal Code of 1811³⁵³ contained the first French law proscribing organized criminal groups.³⁵⁴ The law applied only to criminal organizations with a formal structure and did not reach loosely organized criminal groups.³⁵⁵ When the laws against complicity, attempt, and criminal association proved ineffective against anarchist groups in the late nineteenth century,³⁵⁶ the French Parliament revised the Penal Code to remove the structural requirements from the law, and based

350. Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sez. Unite, *in* 1995 *FORO IT.* II, 422, 423. External complicity refers to aid from an accomplice who is outside the association. *Id.*

351. *Id.* The Court found:

Il concorrente eventuale è . . . per definizione, colui che non vuole far parte della associazione e che l'associazione non chiama a "far parte," ma, al quale si rivolge sia, ad esempio, per colmare temporanei vuoti in un determinato ruolo, sia, soprattutto - e il caso, come quello di specie, dell'"aggiustamento" di un processo risponde a questa logica - nel momento in cui la "fisiologia" dell'associazione entra in fibrillazione, attraversa una fase patologica, che, per essere superata, esige il contributo temporaneo, limitato, di un esterno.

Id.

[The adventitious accomplice is . . . by definition, one who does not want to belong to the association and whom the association does not ask to "join in," but rather to supply a temporary need in a particular role, but above all — in the matter at hand, the "adjusting" of a case falls into this category — when the "physiology" of the association goes into fibrillation during a pathological period. To overcome it, the association requires a temporary, limited contribution from an outsider] (translation by Comment author).

Id.

352. *Id.*; Francesco Palazzo, *La législation italienne contre la criminalité organisée*, 1995 *REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉ* 711, 714.

353. Loi du 12 Fév. 1810, 11 *Bulletin des Lois* n. 277*bis* at 1 (1810).

354. C. PÉN. ANNOTÉ 930 (Émile Garçon 1952) (Fr.).

355. *Id.* at 931.

356. *Id.*

the criminal group primarily on the criminal agreement.³⁵⁷ Under the French Penal Code of 1994,³⁵⁸ the French Parliament expanded the number of target offenses³⁵⁹ of criminal associations, but the basic structure of the statute remained unchanged.³⁶⁰

After the French Revolution,³⁶¹ Napoleon suppressed the brigandage that had arisen in the French countryside.³⁶² The Penal Code of 1811 contained provisions against hierarchically organized criminal groups.³⁶³ Articles 265-68 of the 1811 Penal Code applied to criminal groups in which there were chiefs and subordinates, and in which the brigands organized the division of their spoils.³⁶⁴ The statute had provisions for aiders and abet-

357. C. PÉN. ANNOTÉ (Émile Garçon 1952) arts. 265-68 (Fr.); Culioli, *supra* note 11, at 5.

358. Loi n.92-1336 of 16 Dec. 1992, art. 373, J.O. at 17586, 23 Dec. 1992, modified by loi n.93-913 of 19 July 1993, J.O. at 10199, 20 Jull. 1993.

359. C. PÉN. art. 450-1 (Fr.).

360. Vitu, *supra* note 22, at 6.

361. C. PÉN. ANNOTÉ arts. 265-68 (Émile Garçon 1952) (Fr.); GEORGES LEFEBVRE, NAPOLEON: FROM 18 BRUMAIRE TO TILSIT 1799-1807 127-30 (Henry F. Stockhold trans., 5th ed. 1969) (1965).

362. C. PÉN. ANNOTÉ arts. 265-68 (Émile Garçon 1952) (Fr.); LEFEBVRE, *supra*, note 361, at 127-30.

363. Culioli, *supra* note 11, at 4. The most famous of these bands of brigands were the "chauffeurs." C. PÉN. ANNOTÉ arts. 265-68 (Émile Garçon 1952) (Fr.); GEORGES LEFEBVRE, *supra* note 361, at 127-30; see "Chauffeurs," 3 GRAND DICTIONNAIRE UNIVERSEL DU XIXE SIÈCLE 1100 (Larousse, 1982) (describing "chauffeurs" as bandits who forced their victims' feet into hot stoves to compel the victims to divulge the hiding places of valuables).

364. C. PÉN. arts. 265-68 (1811) (Fr.). Articles 265-68 state:

Art. 265: "Toute association de malfaiteurs envers les personnes ou les propriétés est un crime contre la paix publique."

Art. 266: "Ce crime existe par le seul fait d'organisation de bandes ou de correspondance entre elles et leurs chefs ou commandants, ou de conventions tendant à rendre compte ou à faire distribution ou partage du produit des méfaits."

Art. 267: "Quand ce crime n'aurait été accompagné ni suivi d'aucun autre, les auteurs, directeurs de l'association, et les commandants en chef ou en sous-ordre de ces bandes, seront punis des travaux forcés à temps."

Art. 268: "Seront punis de la réclusion tous autres individus chargés d'un service quelconque dans ces bandes, et ceux qui auront sciemment et volontairement fourni aux bandes ou à leurs divisions, des armes, munitions, instruments du crime, logement, retraite ou lieu de réunion."

Id.

[Art. 265: Every association of those who would commit crimes against persons or property is a crime against the public peace.

Art. 266: The crime is complete when the group is organized, or there is correspondence between the groups and their leaders or commanders, or by gath-

ters who freely and knowingly provided the criminal association with weapons or lodging.³⁶⁵

In 1893, in response to a series of anarchist attacks,³⁶⁶ the French Parliament revised the statute prohibiting criminal associations.³⁶⁷ The old statute requiring that criminal associations have chiefs and subordinates was inapplicable to anarchist

erings to settle accounts or to distribute or divide the gains from their misdeeds.

Art. 267: When no one else has joined or followed in the crime, the principals, the directors of the association, and the commanders in chief or those of lower rank, shall be punished by forced labor.

Art. 268: All other individuals who provided any service whatsoever to the gangs, and those who freely and knowingly provided the gangs or their divisions with arms, munitions, instruments of crimes, lodgings, hiding places, or meeting places, shall be incarcerated.] (translation by Comment author).

Courts found that the statute implicitly required that the group be large, fairly permanent, hierarchically organized, and composed of people with a criminal past. Vitu, *supra* note 22, at 5-6.

365. C. PÉN. art. 268 (1811) (Fr.).

366. 1 C. PÉN. ANNOTÉ arts. 265-68 (Garçon 1952) (Fr.); MAURICE GARÇON, HISTOIRE DE LA JUSTICE SOUS LA III^E RÉPUBLIQUE 221-263 (Arthème Fayard 1957); PETER KROPÓTKIN, MEMOIRS OF A REVOLUTIONIST 283-89 (James Allen Rogers ed., Anchor Books 1962); JOAN UNGERSMA HALPERIN, FÉLIX FÉNÉON, AESTHETE AND ARTIST IN FIN-DE-SIÈCLE PARIS 241-78 (1988). Anarchists defended the attacks as "propaganda by deed," a means of raising public awareness of the anarchists' determined opposition to the oppressive social structure. JAMES JOLL, THE ANARCHISTS 121 (Universal Library 1972) (1964). Under the Sardo-Italian Penal Code of 1859, anarchist groups committing political crimes could not be prosecuted under Article 426, which punished only ordinary, non-political criminal associations. RICHARD HOSTETTER, THE ITALIAN SOCIALIST MOVEMENT I: ORIGINS (1860-1882) 405 n.79 (1958). Other anarchist attacks of that era included the 1878 bombing of the funeral parade in Florence of King Victor Emmanuel II of Italy, an 1886 attack on the Paris stock exchange by Charles Gallo, who flung sulfuric acid at the brokers then fired several shots from a revolver, an 1893 bombing of the French Chamber of Deputies by Auguste Vaillant, the 1894 murder of French President Sadie Carnot, a crime spree by François-Claudius Ravachol, and several notorious bombings by Emile Henry. JOLL, *supra*, at 123-45. In the United States, popular opinion attributed to anarchists the Haymarket riot, the attempted assassination of Coal Magnate Henry Frick, and the assassination of U.S. President William McKinley by Polish immigrant Leon Czolgosz. *E.g.*, *Dennis v. United States* 341 U.S. 494, 562-64 (1951) (Jackson, J., concurring). Santo Jeronimon Caserio killed French President Sadie Carnot in Lyons. HISTOIRE DE LA JUSTICE SOUS LA III^E RÉPUBLIQUE, *supra*, at 235-36. Caserio ran up to the presidential carriage, leaned in, and shouted "vive l'anarchie" as he stabbed Carnot. *Id.* Carnot had recently refused to commute the captial sentence of Auguste Vaillant, who had bombed the French Chamber of Deputies but caused only property damage. HALPERIN, *supra*, at 273.

367. Law of 13 Dec. 1893, IV D.P. IV 9 (1894) (Fr.). The National Assembly also modified articles of the Penal Code dealing with detonating explosives, incitement to violence, storing explosives, and anarchist propaganda. Vitu, *supra* note 22, at 4. The French left dubbed these the *lois scélérates*, wicked laws. *Id.*; HISTOIRE DE LA JUSTICE SOUS LA III^E RÉPUBLIQUE, *supra* note 366, at 232, 263.

groups, which strategically and philosophically opposed organizational hierarchies.³⁶⁸ The revised articles 265-68 eliminated the requirement that a criminal association have a formal structure.³⁶⁹ Under the revised articles, an agreement to commit serious crimes³⁷⁰ could create a criminal association whose members could be sentenced to hard labor.³⁷¹ The law no longer required a specified number of members, a hierarchy, or a division of spoils,³⁷² but it retained the earlier provision extending liability to aiders and abettors.³⁷³ In 1981, the Parliament added a requirement that the defendants must commit at least one overt act in furtherance of the criminal association.³⁷⁴

368. 1 C. PÉN. ANNOTÉ arts. 265-68 (Garçon 1952) (Fr.); 1 TRAITÉ DE DROIT CRIMINEL, DROIT PÉNAL SPÉCIAL, 178 (Roger Merle & André Vitu eds., 4th ed. 1981).

369. 1 C. PÉN. ANNOTÉ arts. 265-68 (Garçon 1952) (Fr.); Culioli, *supra* note 11, at 5. In 1894, the Government tried to prosecute as an *association de malfaiteurs*, a mixed group of defendants, some the government accused of violent crimes, others were artists and intellectuals who had publicly encouraged anarchists. HISTOIRE DE LA JUSTICE SOUS LA III^E RÉPUBLIQUE, *supra* note 366, at 238-42; HALPERIN, *supra* note 366, at 279-94. The press called the trial the *Procès de Trente*, because the prosecution had chosen to test the new statute against *association de malfaiteurs* by charging thirty defendants. HALPERIN, *supra* at 285-86. The *Procès de Trente* ended with the acquittal of those who had merely advocated anarchy and the conviction of those who had been accused of other substantive offenses. HISTOIRE DE LA JUSTICE SOUS LA TROISIÈME RÉPUBLIQUE, *supra* note 366, at 242. Critics viewed the trial as an unwarranted extension of the new crime of *association de malfaiteurs*. *Id.* at 239-42.

370. C. PÉN. art. 265 (Fr.). In the French legal system, the term *crime* applies to charges serious enough to warrant a full judicial proceeding before a *Cours d'Assis* composed of three professional judges and nine lay jurors. Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 142-43 (1983). A three-judge tribunal judges *délits*, less serious crimes. *Id.* at 142-44. For the final category of legal violations, *contraventions*, a single judge in the *tribunal de police* may impose a fine. *Id.* at 142-45.

371. C. PÉN. art. 265 (1893) (Fr.). "Toute association formée, quelle que soit sa durée ou le nombre de ses membres, toute entente établie dans le but de préparer ou de commettre des crimes contre les personnes ou les propriétés, constituent un crime contre la paix publique." *Id.* [Every association, regardless of the number of its members, every understanding made with the goal preparing to commit or committing crimes against people or property, is a crime against the public peace.] (translation by Comment author). Courts rejected prosecutors' attempts to use the new law against journalists who praised the anarchists' attacks on bourgeois culture. HISTOIRE DE LA JUSTICE SOUS LA III^E RÉPUBLIQUE, *supra* note 366, at 242. Membership required more than encouragement and ideological support. *Id.* at 238-42; JOLL, *supra* note 366, at 132-33.

372. 1 C. PÉN. ANNOTÉ arts. 265-68 (Garçon 1952) (Fr.).

373. C. PÉN. art. 267 (Fr.).

374. Law n.81-82 of 2 February 1981, 1981 B.L.D. 86 (Fr.). The French National Assembly, in revising Articles 265-68, expanded the number of target offenses to include enumerated *délits correctionnels*, in addition to the more serious *crimes*, and made

On March 1, 1994, a revised French Penal Code went into effect.³⁷⁵ The current Code provisions against criminal association, articles 450-1 to 450-3, expand the number of target offenses to include *délits*³⁷⁶ punishable by 10 years in prison.³⁷⁷ The new Code also dispenses with the complicity provisions for the criminal association statute, as it promulgated a general complicity provision applicable to the entire Penal Code.³⁷⁸

Under French law, a person who assists in the commission of a crime may be liable as an accomplice.³⁷⁹ An accomplice acts before or during the commission of the crime to assist the principal, who commits the crime.³⁸⁰ The accomplice must know that the principal intends to violate the law, and must intend to participate in the violation.³⁸¹ Complicity is distinct from other group crimes committed by a mob, an insurrection, or a criminal association.³⁸² Criminal association, for example, is a crime independent of the target offenses.³⁸³ A defendant can be com-

the offense of *association de malfaiteurs* either a *crime* or a *délit* based on the severity of the target offense. *Id.*; TRAITÉ DE DROIT CRIMINEL, *supra* note 368, at 179-82. In 1983, the Parliament again restricted the target offenses to *crimes*. Law n.83-466 of 10 June 1983, 1983 J.O. 11 Juin, 1755 (Fr.). Three years later, it reinstated the changes made in 1981. Law n.86-1019 of 9 September 1986, 1986 J.O. 10 Sept., 10,954 (Fr.).

375. Loi n.92-1336 of 16 Dec. 1992, art. 373, J.O. at 17,586, 23 Dec. 1992 (Fr.), modified by loi n.93-913 of 19 July 1993, J.O. at 10,199, 20 Jull. 1993 (Fr.).

376. *See Tomlinson, supra* note 370, at 144 (describing *délits* as less-serious offences than *crimes*).

377. C. PÉN. art. 401-1 (Fr.).

378. Culioli, *supra* note 11, at 16-17. The general complicity provisions in Articles 121-6 and 121-7 hold accomplices liable as the principal, unless the specific statute states otherwise. C. PÉN. art. 121-6.

379. C. PÉN. art. 121-7 (Fr.).

380. *Id.* The Code defines accomplices as:

Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation.

Est également complice la personne qui, par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre.

Id.

[A person is an accomplice to a *crime* or *délit* if they knowingly, by help or assistance, aided the preparation or commission of a crime.

A person is also an accomplice if by gift, promise, threat, order, or abuse of power or authority provoked a violation of the law, or gave instructions for such a violation] (translation by Comment author).

381. Philip Salvage, *Complicité*, in 1 JURIS-CLASSEUR PÉNAL 15-16 (1996).

382. *Id.* at 3. Underlying a mob, for example, is a sudden, collective impulse without prior intent to violate the law. *Id.*

383. *Id.*

plicit in a series of crimes with the same people, but unless he or she joins a criminal group, the person is not guilty of criminal association.³⁸⁴

II. *REVES v. ERNST & YOUNG*

In *Reves v. Ernst & Young*, the Supreme Court limited liability under § 1962(c) to people who operate or manage a RICO enterprise.³⁸⁵ The decision attempted to distinguish degrees of involvement by outside professionals in enterprises for which they provide professional services.³⁸⁶ The result, however, has been to compel plaintiffs to modify their tactics to achieve the result *Reves* was intended to prevent.³⁸⁷

A. History

In *Reves v. Ernst & Young*,³⁸⁸ the trustee in bankruptcy of a Farmer's Cooperative (the "Co-op") brought a civil suit for securities fraud and RICO violations against forty individuals and entities, including Arthur Young & Co.³⁸⁹ In January 1980, the Co-op general manager, Jack White, obtained loans from the Co-op to finance construction of a gasohol plant³⁹⁰ for his company, White Flame Fuels, Inc. ("White Flame").³⁹¹ In September 1980, Jack White and the Co-op's accountant were indicted on charges of tax fraud.³⁹² A consent decree³⁹³ relieved White of his debts

384. *Id.* The time when the criminal association is discovered determines the nature of the accomplice's offense. Vitu, *supra* note 22, at 10. If the defendant aided the formation of the association, but did not join it, the defendant is complicit in the crime of criminal association. *Id.* If the defendant also aids the criminal association to commit a target offense, the defendant is complicit in the attempt or the commission of the target offense, in addition to the crime of criminal association. *Id.*

385. 507 U.S. 170 (1993).

386. *Id.* at 184-85.

387. See DiSanto, *supra* note 18, at 1063 (noting the ways *Reves* can be circumvented).

388. *Reves*, 507 U.S. at 170.

389. *Id.* at 175. The original accounting firm was Russell Brown and Company, which merged with Arthur Young and Company, later becoming Ernst & Young. *Id.* at 173.

390. *Id.* at 173. Gasohol is a motor fuel formed by blending nine parts gasoline with one part grain alcohol. Greater Rockford Energy and Technology Corp. v. Shell Oil Co., 998 F.2d 391, 393 (7th Cir. 1993), *reh'g denied*, 1993 U.S. App. Lexis 22560.

391. *Reves*, 507 U.S. at 172-73.

392. *Id.* at 173.

393. See BLACK'S LAW DICTIONARY 410-11 (6th ed. 1990) (defining consent decree as "not properly a judicial sentence; but is in the nature of a solemn contract or agree-

to the Co-op and established the Co-op's ownership of the gasohol company from February 1980.³⁹⁴

In January 1981, Jack White and the Co-op accountant were convicted of tax fraud.³⁹⁵ At the criminal trial, Harry Erwin, the managing partner of Russell Brown and Company testified on Jack White's behalf.³⁹⁶ After the trial, Jack White's lawyer contacted Russell Brown to discuss retaining the firm to audit the Co-op.³⁹⁷ Later that year, after members of Russell Brown had met with Jack White and the Co-op's office manager, the Co-op hired Russell Brown to perform the Co-op's 1981 audit.³⁹⁸

The valuation of the White Flame gasohol plant became a key element of the audit, for if the plant was valued at less than \$1.5 million, the Co-op would be insolvent.³⁹⁹ On April 22, 1982, Arthur Young presented the 1981 audit to the Co-op board.⁴⁰⁰ The audit treated White Flame as if the Co-op had owned the plant since construction began in 1979, despite the consent decree establishing ownership by the Co-op beginning in 1980.⁴⁰¹ For accounting purposes, White Flame was valued at its fixed-asset value of \$4.5 million.⁴⁰² Arthur Young did not tell the Co-op board that the valuation assumed that the Co-op had always owned the gasohol plant and that without that assumption, the accountants would have given the plant its fair market value of \$444,000 to \$1.5 million, which would have left the Co-op insolvent.⁴⁰³

At the 1982 Co-op annual meeting, Harry Erwin, now of Arthur Young, presented condensed financial statements that gave the Co-op a net worth of over \$2.6 million.⁴⁰⁴ The condensed

ment between the parties, made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights upon the real facts of the case.").

394. *Reves*, 507 U.S. at 173.

395. See *United States v. White*, 671 F.2d 1126 (8th Cir. 1982) (affirming convictions for conspiring to defraud U.S. Government by impeding collection of taxes, and for filing false and fraudulent tax returns for Co-op).

396. *Arthur Young v. Reves*, 937 F.2d 1310, 1316 (8th Cir. 1991).

397. *Id.*

398. *Id.*

399. *Reves*, 507 U.S. at 174.

400. *Id.* at 174.

401. *Id.*

402. *Id.*

403. *Reves*, 507 U.S. at 174.

404. *Arthur Young*, 937 F.2d at 1318.

financial statements failed to disclose the information about the financial health of White Flame that had been in the full audit.⁴⁰⁵ In response to questions from the audience, Erwin explained only that White Flame had lost approximately \$1.2 million, and did not discuss the details of the White Flame valuation.⁴⁰⁶

Arthur Young also performed the 1982 audit, which again showed a positive net worth for the Co-op based on the \$4.5 million value of the gasohol plant.⁴⁰⁷ Again, doubts about White Flame's financial health were in a footnote in the audit that Arthur Young omitted from the condensed financial statements distributed at the Co-op annual meeting.⁴⁰⁸ In February 1984, there was a run on the demand notes that the Co-op had issued, and the Co-op was unable to secure further financing.⁴⁰⁹ The Co-op filed for bankruptcy, freezing the demand notes in the bankruptcy estate.⁴¹⁰

On behalf of the noteholders and the Co-op, the trustees in bankruptcy brought suit against forty individuals and entities including Arthur Young on state and federal securities fraud claims and on a RICO claim.⁴¹¹ The District Court certified a class of noteholders as plaintiffs.⁴¹² The plaintiffs settled with all defendants except Arthur Young.⁴¹³ The District Court granted summary judgment for Arthur Young on the RICO claim, and the Eighth Circuit Court of Appeals affirmed.⁴¹⁴ The District Court found that Arthur Young did not operate or manage the Co-op, and therefore was not liable under § 1962(c) for participating in the conduct of the Co-op's affairs through a pattern of racketeering.⁴¹⁵

405. *Id.* at 1318-19. Note 9 of the audit expressed Arthur Young's doubt that investment in White Flame could be recovered. *Id.*

406. *Id.* at 1319. The facts of the White Flame valuation were in the full financial statement, which Erwin had not brought to the meeting. *Id.*

407. *Reves*, 507 U.S. at 175.

408. *Id.*

409. *Id.*

410. *Id.*

411. *Reves*, 507 U.S. at 175.

412. *Id.*

413. *Id.*

414. *Arthur Young*, 937 F.2d at 1323-24.

415. *Reves*, 507 U.S. at 176-77. The District Court applied the operation or management test and granted summary judgment in favor of Arthur Young. *Id.*

B. *The Operation or Management Test*

At issue in *Reves* was what degree of participation made one liable under § 1962(c) as a member of an association-in-fact RICO enterprise.⁴¹⁶ Associates of a RICO enterprise are liable as members of a RICO association-in-fact enterprise based on their conduct or participation in the affairs of the enterprise.⁴¹⁷ *Reves* defined the periphery of participation in an association-in-fact.⁴¹⁸ The Supreme Court affirmed the decision of the Eighth Circuit Court of Appeals.⁴¹⁹ Like the Court of Appeals and the District Court, the Supreme Court applied the Eighth Circuit test of *Bennett v. Berg*⁴²⁰ limiting RICO liability to those who have a hand in the "operation or management" of the enterprise.⁴²¹

1. Majority View

In interpreting § 1962(c), the Supreme Court first looked to the statutory language.⁴²² The Court's interpretation hinged on the phrase in the statute that limits liability to those who participate in the conduct of an enterprise's affairs.⁴²³ The Court found that the word conduct indicates a degree of direction in the affairs of the enterprise.⁴²⁴ The Court found that because the word conduct appears twice,⁴²⁵ one of the terms would be superfluous if it did not imply some degree of direction.⁴²⁶ Therefore, participating in the conduct of an enterprise's affairs is narrower than simply participating in the affairs of the enterprise.⁴²⁷

The Court found that defining participation was more prob-

416. *Id.* at 172.

417. 18 U.S.C. 1962(c) (1996).

418. *Reves*, 507 U.S. at 170. Those beyond the periphery, whether outsiders, who belong to another organization, or insignificant insiders, are not liable under 18 U.S.C. § 1962(c) because they do not operate or manage the enterprise. *Id.* at 176-77, 179.

419. *Id.* at 170.

420. *Bennett v. Berg*, 710 F.2d 1361, 1364 (8th Cir 1983).

421. *Reves*, 507 U.S. at 176-177, 179.

422. *Reves*, 507 U.S. at 177.

423. *Id.*

424. *Id.* at 177-78. The Court found that in defining the word conduct, "in the context of the phrase 'to conduct . . . [an] enterprise's affairs,' the word indicates some degree of direction." *Id.* at 178.

425. 18 U.S.C. § 1962(c). The statute prohibits conducting or participating, directly or indirectly, in the conduct of the enterprise's affairs. *Id.*

426. *Reves*, 507 U.S. at 178.

427. *Id.* at 178-79.

lematic,⁴²⁸ but if conduct of an enterprise's affairs implies directing the affairs, participation in the conduct of the enterprise's affairs meant that one participated in the direction of the enterprise.⁴²⁹ The Court found that by extending liability to direct or indirect participation, RICO reaches both insiders and outsiders, if they direct the enterprise's affairs.⁴³⁰

The Court also looked to the legislative history of RICO to support the operations or management test.⁴³¹ Members of Congress, during the floor debates, distinguished § 1962(c) from § 1962(a) and (b) by describing the association-in-fact prohibition in § 1962(c) as preventing the operation of an enterprise.⁴³² Congress, the Court stated, extended the list of predicate acts to many crimes that were not necessarily characteristic of organized crime, but limited RICO through other requirements, including § 1962.⁴³³

The Court rejected the claim that the liberal construction clause in RICO required the Court to apply the statute broadly.⁴³⁴ The Supreme Court explained that the liberal construction clause was a reminder that courts should not frustrate Congress' intent, not a license to apply the statute to unintended ends.⁴³⁵ The liberal construction clause was meant to resolve ambiguity in favor of a broad construction, but as the Court found the language of 1962(c) to be unambiguous, there was no need to resort to the liberal construction clause.⁴³⁶

The Court observed that the operation or management test does not limit liability to those in the upper ranks of an enterprise.⁴³⁷ Under *Reves*, even a lower-echelon member of an enterprise can be held to operate it.⁴³⁸ Outsiders can operate the enterprise if they are associated closely with it, for example,

428. *Id.* at 178.

429. *Id.* at 179. The Court stated that to participate is narrower than aiding and abetting, and that "to participate . . . the conduct of . . . affairs' must be narrower than 'to participate in affairs' or Congress' repetition of the word 'conduct' could serve no purpose." *Id.* at 178-79.

430. *Reves*, 507 U.S. at 179.

431. *Id.* at 179-83.

432. *Id.* at 182.

433. *Id.* at 183.

434. *Reves*, 507 U.S. at 183-84.

435. *Id.*

436. *Id.*

437. *Id.* at 184.

438. *Id.*; see *United States v. Oreto*, 87 F.3d 739, 750-51 (1st Cir. 1994), *cert. denied*,

through bribery.⁴³⁹ The Court, however, limited the liability of outsiders by finding that Congress addressed § 1962(a) and (b) specifically to outsiders.⁴⁴⁰ Section 1962(c) had a more limited reach.⁴⁴¹ Nevertheless, outsiders who associate themselves closely enough with the enterprise can be liable if they operate or manage the enterprise.⁴⁴²

2. Dissent

Justice Souter, joined by Justice White, dissented from the majority opinion.⁴⁴³ While Justice Souter agreed with the method the majority used to analyze the statutory language, he found that the word “conduct” was broader than the majority acknowledged.⁴⁴⁴ Justice Souter observed that the statute was written to reach those who are merely associated with an enterprise in which they participated indirectly.⁴⁴⁵ The word conduct, Justice Souter noted, is more inclusive than the majority’s interpretation, and extends to those who merely carry out an activity.⁴⁴⁶ Justice Souter found the language of § 1962(c) to be ambiguous and looked to the liberal construction clause to resolve questions in favor of a more inclusive reading.⁴⁴⁷

Justice Souter also found that the actions of Arthur Young met even the operation or management test of the majority.⁴⁴⁸ He noted that Arthur Young took on managerial responsibilities when it created the financial statements it was hired to audit and chose a value to assign to the White Flame gasohol plant.⁴⁴⁹ Justice Souter viewed Arthur Young’s actions as impermissibly en-

115 S. Ct. 1161 (1995) (holding that implementing orders helpful to enterprise meets *Reves* test).

439. *Reves*, 507 U.S. at 184.

440. *Id.* at 185.

441. *Id.*

442. *Id.*

443. *Reves*, 507 U.S. at 186 (Souter, J., dissenting).

444. *Id.* at 188.

445. *Id.* at 187-88.

446. *Id.* Justice Souter found, “it is hard to imagine how the ‘operation or management’ test would leave the statute with the capacity to reach the indirect participation of someone merely associated with an an enterprise. . . . [T]his contextual examination shows ‘conduct’ to have a long arm, unlimited by any requirement to prove that the activity includes an element of direction.” *Id.* at 188.

447. *Reves*, 507 U.S. at 189.

448. *Id.* at 189-95.

449. *Id.* at 189-90.

croaching on management responsibilities, and, therefore, meeting the operation or management test for participation in a RICO association-in-fact.⁴⁵⁰

3. Problems

Reves resolved the growing disagreement over the scope of § 1962(c), but recent cases have resurrected the dispute in different forms.⁴⁵¹ The operation or management test called for defendants to play a managerial role in the enterprise, but the breadth of the word "operation" undermines the certainty of the test.⁴⁵² The Supreme Court intended the "operation or management" test of *Reves* to be a simple rule for courts to apply.⁴⁵³ The effect, however, has been to create uncertainty in the courts about the degree of participation required of a defendant to meet the operation or management standard,⁴⁵⁴ whether the operation or management test applies to criminal as well as to civil RICO,⁴⁵⁵ and what importance courts should give to alternate theories of participation.⁴⁵⁶

a. Extent of Liability

In *United States v. Oreto*, members of a loan sharking ring were convicted under 1962(c) and (d).⁴⁵⁷ The First Circuit Court of Appeals interpreted *Reves* to apply specifically to "outsider" liability.⁴⁵⁸ The appellants in *Oreto* were subordinate members of the ring, "insiders," and the court upheld their convictions on the theory that implementing decisions that are helpful to the enterprise is sufficient conduct under 1962(c).⁴⁵⁹

In *Aetna Casualty Surety Co. v. P & B Autobody*,⁴⁶⁰ the First Circuit Court of Appeals found that body shop owners directed

450. *Id.* at 189-95.

451. See DiSanto, *supra* note 18, at 1079-88 (describing inconsistent application of *Reves*).

452. Vitiello, *supra* note 18, at 1397, 1400.

453. *Reves*, 507 U.S. at 179.

454. Vitiello, *supra* note 18, at 1367.

455. See Camp, *supra* note 18, at 87-92 (arguing for narrow reading of civil RICO and broad reading of criminal RICO).

456. See Vitiello, *supra* note 18, at 1387-98 (discussing *Reves* in lower courts).

457. 37 F.3d 739 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1161 (1995).

458. *Id.*

459. *Id.* at 750.

460. 43 F.3d 1546 (1st Cir. 1994).

the affairs of Aetna by filing fraudulent auto repair claims.⁴⁶¹ Defendant auto body shops and their owners colluded with corrupt Aetna insurance adjusters to submit false appraisals to Aetna.⁴⁶² Aetna alleged that Aetna was itself a RICO enterprise under § 1962(c), and that the defendants directed Aetna's affairs.⁴⁶³ The defendants, who were associated with the enterprise through the autos insured by Aetna that they purportedly repaired, exerted sufficient direction over the insurance claims process to meet the *Reves* standard.⁴⁶⁴

In *United States v. Viola*,⁴⁶⁵ the Second Circuit Court of Appeals reversed the conviction of a member of a gang that dealt in stolen property because the appellant, Formisano, merely followed orders and was not in a position to operate or manage the enterprise.⁴⁶⁶ Anthony Viola ran an enterprise near the Brooklyn waterfront that dealt in narcotics and stolen property.⁴⁶⁷ Michael Formisano was an employee of Viola's whose conviction under §§ 1962(c) and (d) was based solely on two errands he ran for Viola, transporting stolen beer and lamps to buyers.⁴⁶⁸ The Second Circuit Court of Appeals found that there was insufficient evidence to show that Formisano had sufficient discretionary authority to operate or manage the enterprise, and that his knowledge of the enterprise was too limited to convict him of RICO conspiracy.⁴⁶⁹

b. Recasting the Enterprise

Although the Supreme Court limited liability to those who operate or manage an association-in-fact enterprise,⁴⁷⁰ the RICO enterprise may often accommodate different structures in which participants may be either marginal outsiders or key operators and managers.⁴⁷¹ In *DeWit v. Firststar*,⁴⁷² the trial court dismissed

461. *Id.* at 1552.

462. *Id.* at 1552.

463. *Id.*

464. *Id.* at 1559-60.

465. 35 F.3d 37 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1270 (1995).

466. *Id.* at 43.

467. *Id.* at 39.

468. *Id.* at 43.

469. *Id.* at 43-45.

470. *Reves*, 507 U.S. at 185.

471. See Daniel R. Fischel & Alan O. Sykes, *Civil RICO after Reves: An Economic Commentary*, 1993 SUP. CT. REV. 157, 193-94 (pointing out that *Reves* plaintiff could have

the initial suit,⁴⁷³ on the grounds that the defendants had not, as *Reves* requires, managed or operated the RICO enterprise.⁴⁷⁴ In their amended complaint, the plaintiffs alleged that the enterprise consisted of a shifting group composed of banks, a bank holding company, and constituent banks.⁴⁷⁵ The court held that the new enterprise met the *Reves* test, although the underlying facts had not changed.⁴⁷⁶

c. Aiding and Abetting under *Reves*

An aider and abetter of a federal crime, one who acts with the intent to facilitate the offense committed by the principal, is liable as a principal.⁴⁷⁷ The RICO enterprise that Congress originally envisioned had numerous associates peripherally involved in its affairs.⁴⁷⁸ While they might not reach the level of managers, they nevertheless are essential to the enterprise and aid it from the outside.⁴⁷⁹ The federal aiding and abetting statute allows them to be convicted for their role in helping the RICO enterprise.⁴⁸⁰

met operation or management test by alleging association-in-fact enterprise consisting of Arthur Young, Jack White, and Co-op, directed by Arthur Young).

472. 904 F. Supp. 1476 (N.D. Iowa 1995).

473. *De Wit v. Firststar Corp.*, 879 F. Supp. 947 (N.D. Iowa 1995).

474. *Id.* at 966.

475. *DeWit*, 904 F. Supp. at 1516.

476. *Id.* at 1516-19.

477. 18 U.S.C. § 2. An aider and abetter of a federal crime is liable as a principle. *Id.* One can aid and abet a § 1962(c) RICO violation by aiding and abetting the commission of two predicate acts. *Peto-Tech Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1356-57 (3d Cir. 1987)

478. TASK FORCE REPORT, *supra* note 132, at 4, 8-10, 51.

479. *Id.* at 51.

480. *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 270 (3d Cir. 1995); see, Judith L. Rosenthal, Comment, *Aiding and Abetting Liability for Civil Violations of RICO*, 61 TEMP. L.Q. 1481, 1506-07 (1988) (arguing for criminal, not civil standards for RICO aiding and abetting, but only for § 1962(a)). In 1994, however, the Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver* held that a private plaintiff cannot impose civil liability for aiding and abetting a violation of § 10(b) of the Securities Exchange Act of 1934. 511 U.S. 164, 191 (1994). The Court in *Central Bank of Denver* found that the civil remedies for breach of the securities laws did not include aiding and abetting. Criminal prosecution could invoke 18 U.S.C. § 2, but the civil enforcement provisions could not. Commentators and several recent court decisions have found that the principles of *Central Bank of Denver* limit aiding and abetting liability for civil suits under RICO. *In Re Lake State Commodities*, 936 F. Supp. 1461, 1475 (N.D. Ill. 1996); Department of Economic Development v. Arthur Andersen & Co., 924 F. Supp. 449, 477 (S.D.N.Y. 1996); Taurie M. Zeitzer, Note, *In Central Bank's Wake, RICO's Voice Still Resonates: Are Civil Aiding and Abetting Claims Still Tenable*, 29 COLUM.

d. RICO Conspiracy

Section 1962(d) makes it unlawful for a person to conspire to violate §§ 1962(a), (b) or (c).⁴⁸¹ Section 1962(d) follows traditional conspiracy doctrine and prohibits the formation of an agreement to violate the substantive sections of § 1962,⁴⁸² regardless of whether any substantive violations were committed.⁴⁸³ By alleging a RICO conspiracy, prosecutors can bypass the limitations of *Reves*.⁴⁸⁴ Despite the fact that a conspiratorial agreement is often narrower than a RICO enterprise, by alleging a RICO conspiracy, prosecutors can reach non-managerial associates of the enterprise who would escape liability under the *Reves* test.⁴⁸⁵ The penalties for a RICO conspiracy conviction are the same as for conviction for a substantive RICO violation.⁴⁸⁶

III. COMPARISON

Reves v. Ernst & Young, by limiting RICO liability under § 1962(c) to those who operate or manage the RICO enterprise, creates an anomalous limitation on the broad liability Congress envisioned.⁴⁸⁷ As a result, civil plaintiffs have crafted RICO complaints to avoid the limitations *Reves* created.⁴⁸⁸ In addition, *Reves* has led courts to emphasize the distinction between insiders, who are integral to the enterprise, and outsiders, who merely provide, for example, professional services.⁴⁸⁹ French and Italian criminal association laws provide examples of laws directed at group criminality that recognize liability for attenu-

J.L. & Soc. PROBS. 551 (1996); Carrie E. Goodwin, Note, *Central Bank v. First Interstate Bank: Not Just the End of Aiding and Abetting Under Section 10(B)*, 52 WASH. & LEE L. REV. 1387, 1427-30 (1995); Jed S. Rakoff, *Aiding and Abetting Under Civil RICO*, N.Y.L.J., May 12, 1994, at 3. There is a split in the circuits, and aiding and abetting a 1962(c) violation is still a tenable theory. *Jaguar Cars Inc.*, 46 F.3d at 270-71.

481. 18 U.S.C. § 1962(d).

482. *United States v. Neapolitan*, 791 F.2d 489, 492 (7th Cir.), cert. denied, 479 U.S. 940 (1986).

483. *Sutherland*, 656 F.2d at 1186-87.

484. See DiSanto, *supra* note 18, at 1064 (observing common law crimes allow plaintiffs to avoid *Reves* problems).

485. *Id.*

486. 18 U.S.C. §§ 1963-64.

487. See *supra* notes 451-80 and accompanying text (discussing result of *Reves*).

488. See *supra* notes 470-86 and accompanying text (discussing methods of avoiding *Reves* limitations).

489. See Clarkin, *supra* note 213, at 1030-31, 1066-69 (discussing outside professionals and RICO liability).

ated connections to the central criminal group.⁴⁹⁰ As U.S. federal law has interpreted conspiracy broadly, and held peripheral figures liable for the crimes of the entire conspiratorial group, courts should apply the expansive concepts of RICO to white-collar criminals engaged in racketeering.

Under § 1962(d), a person can be liable for engaging in a conspiracy to violate RICO's substantive provisions.⁴⁹¹ Peripheral associates of an association-in-fact, particularly outside professionals, may be aware of the racketeering scheme, provide critical assistance, and yet not be parties to a conspiratorial agreement that would fall under § 1962(d). After *Reves*, plaintiffs must recast the enterprise to bring the peripheral associates into the center of a broader enterprise, or allege that the outsiders aided and abetted the violation of § 1962(c).⁴⁹² *Reves*, however, has accentuated the distinction between insiders, who belong to an organization, and outsiders, who have an occasional relationship with the main group.⁴⁹³ The text of § 1962(c), however, provides for liability for those who participated directly or indirectly in the enterprise's affairs, extending liability to peripheral associates.⁴⁹⁴

Courts, however, should inquire specifically if the peripheral associates have the requisite *mens rea* for § 1962(c) liability.⁴⁹⁵ The defendants must commit a pattern of predicate acts that affect or are related to the affairs of an enterprise.⁴⁹⁶ The defendant must know of the enterprise and commit the predicate acts intentionally.⁴⁹⁷

The French Penal Code holds peripheral associates liable as

490. See *supra* notes 345-52 (discussing extension of outsider liability for Mafia association in Italy); *supra* notes 361-84 (discussing French criminal association law and complicity).

491. 18 U.S.C. § 1962(d).

492. See *supra* notes 451-80 and accompanying text (discussing methods of bypassing *Reves* obstacles).

493. See *Oreto*, 37 F.3d at 750 (describing *Reves* as case about outsiders, not insiders).

494. 18 U.S.C. § 1962(c).

495. See notes 274-77 and accompanying text (discussing RICO *mens rea* requirements).

496. See *supra* notes 255-59 and accompanying text (discussing nexus agreement).

497. See *supra* note 277 and accompanying text (discussing *mens rea* and RICO enterprise).

aiders and abettors of criminal associations.⁴⁹⁸ Like an illicit RICO association-in-fact, a French criminal association is a distinct group engaged in criminal conduct.⁴⁹⁹ Similarly, a criminal association in Italy must be a permanent group dedicated to carrying out a continuous course of criminal activity.⁵⁰⁰ Like Anglo-American conspiracy, the French and Italian statutes envision the criminal group as an organization composed of criminals that agree to the goals of the group.⁵⁰¹ Consequently, the French and Italian statutes also contain provisions that extend liability to accomplices who aid the group but are not accepted as members.⁵⁰² The threshold of acceptance into a common law conspiracy is lower, however, because the conspiratorial agreement is the only structural requirement,⁵⁰³ and the agreement does not require mutual acceptance by the new co-conspirator and the criminal group.⁵⁰⁴

Under § 1962(c), however, RICO applies not only to insiders who belong to criminal groups, but also to criminals who manipulate legitimate organizations from the outside.⁵⁰⁵ Many of the complexities of RICO interpretation arise from the flexible link the statute allows between the racketeering activity and the enterprise.⁵⁰⁶ Criminal association laws do not have this

498. See *supra* notes 378-384 (discussing complicity with French criminal association).

499. See O'Neill, *supra* note 7, at 660-64 (discussing requirements for association-in-fact RICO enterprises); Vitu, *supra* note 22, at 6 (discussing requirements for French criminal association).

500. See *supra* notes 323-26 and accompanying text (discussing membership in Italian criminal association).

501. See *supra* notes 40-98 and accompanying text (discussing types of conspiratorial groups); 7 MANZINI *supra* note 11, at 194-96 (describing adherence of members to Italian criminal association); Judgment of 5 October 1994 (Demitry), Corte di Cassazione, Sez. Unite, in 1995 FORO IT. II, 422, 435-36 (discussing membership in Italian criminal association); Vitu, *supra* note 22, at 6 (describing elements of French criminal association).

502. See *supra* notes 378-84 and accompanying text (discussing extension of outsider liability for Mafia association in Italy); *supra* notes 361-84 and accompanying text (discussing complicity with French criminal association).

503. See *supra* notes 40-93 and accompanying text (discussing limits of conspiratorial liability).

504. See *supra* notes 42-44 and accompanying text (discussing conspiratorial agreement as link between conspirators).

505. See O'Neill, *supra* note 7, at 674-77 (discussing relationship of racketeer to enterprise).

506. See *supra* notes 258-60 and accompanying text (discussing nexus requirement).

nexus requirement, and the criminal group is the organization through which the crimes are committed.⁵⁰⁷ Instead of a nexus requirement, the Italian and French statutes extend criminal liability outside the boundaries of the criminal association to accomplices who aid the group.⁵⁰⁸

Congress designed RICO to reach peripheral members of criminal groups, and did not explicitly limit RICO liability to the chiefs or managers of a criminal organization.⁵⁰⁹ Congress also made defendants liable if they manipulated legitimate organizations, that is, if they committed a pattern of racketeering acts in connection with the affairs of a legitimate organization.⁵¹⁰ The formal distinction made by courts between outsiders and insiders should not obscure the importance of the connection between the racketeering and the enterprise, which Congress required as the link to RICO liability.⁵¹¹ An accountant outside a corrupt business, aiding the fraud of the business, should be liable under the federal RICO statute, as an outsider helping to corrupt a Neapolitan judge is liable under articles 110 and 416*bis* of the Italian Penal Code.

The breadth of Anglo-American conspiracy law has extended liability to peripheral members of criminal conspiracies.⁵¹² Indeed, despite the low threshold for conspiratorial liability, the law allows people to aid and abet a conspiracy, blurring the line between insiders and outsiders.⁵¹³ As in conspiracies, the degree of involvement and the *mens rea* of the defendant, rather than a formal relationship to an enterprise, should control RICO liability under § 1962(c).

507. 7 MANZINI *supra* note 11, at 194-96 (describing membership requirements in Italian criminal association); Vitu, *supra* note 22, at 6 (describing membership French criminal association).

508. See *supra* notes 345-52 and accompanying text (discussing complicity with Italian criminal association); *supra* notes 361-78 (discussing complicity with French criminal association).

509. See *supra* note 184 and accompanying text (discussing Congress' concern with peripheral members of racketeering enterprises); DiSanto, *supra* note 18, at 1088-89 (noting that while CCE specifically targets leaders of narcotics enterprises, RICO, passed by same Congress, did not).

510. 18 U.S.C. § 1962.

511. See Clarkin, *supra* note 213, at 1030-31, 1066-69 (discussing outsiders and RICO liability).

512. See *supra* notes 40-98 (discussing breadth of conspiratorial liability).

513. See *supra* notes 80-98 (discussing complicity with conspiracy).

CONCLUSION

If RICO is to be applied consistently in the manner in which it was designed, liability under § 1962(c) should not be limited by the imposition of a hierarchical requirement and the *Reves* test. Italian and French law link accomplice liability to their criminal association laws. Similarly, liability for participation in the affairs of a RICO association-in-fact enterprise should extend beyond those who operate or manage the affairs of the enterprise.