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

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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).


at criminal groups, but at crimes committed against organizations or committed by means of an organization. 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. In a conspiracy, the conspiratorial agreement ties together the group of conspirators, but a racketeer associates with a RICO enterprise through a more flexible connection. 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.

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

9. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 460-68 (1972) (describing conspiratorial agreement as all-important).
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. Through 18 U.S.C. § 1962(c), RICO applies to groups formed for criminal purposes, such as the Mafia, and to people who manipulate preexisting organizations, such as insurance companies, for criminal purposes.

The Supreme Court's decision in *Reves v. Ernst & Young* restricted liability under § 1962(c) to people who commit racketeering crimes while operating or managing a RICO enterprise. 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. 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.

In Italy and France, criminal groups are prosecuted under laws prohibiting criminal associations. See Holderman, *supra* note 10, at 393-403 (describing courts applying traditional conspiracy notions to RICO conspiracy).

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


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

21. **CODICE PENALE** [C.P.] art. 416 (It.); **CODE PENAL** [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. While, over time, France's criminal association laws have taken on many features of common law conspiracy, Italy has retained a traditional definition of criminal association. The Italian Supreme Court has recently expanded the reach of criminal association laws by allowing prosecutors to link the complicity statute with the statute prohibiting Mafia association and to prosecute people outside the criminal group as accomplices of the organization.

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 PENAL 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. Liability under RICO does not require that one join a group of criminals as does a criminal association. Liability for a RICO violation, instead, can extend to a person outside the enterprise who joins, manipulates, or preys upon the organization.

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. Conspiracy is a product of Anglo-American common law and does not exist in Italy or France, 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 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); LaFAVE & SCOTT, supra note 9, at 460 (describing conspiracy used against criminal groups);
31. See supra note 7, at 195 (discussing requirement that members voluntarily join Italian criminal association); Vitu, supra note 22, at 6-7 (describing act of joining French criminal association).
32. See O’Neill, supra note 7, at 673-78 (discussing roles of RICO enterprise).
33. See Wagner, supra note 11, at 171 (discussing absence of conspiracy laws in civil law countries).
organized crime to the U.S. economy. The original nineteenth century Italian and French laws against criminal associations applied to rural bandits, but have since undergone successive modifications.

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


37. See MODEL PENAL CODE, supra note 92, at 96, 100 (describing foreign codes, unlike conspiracy, explicitly prohibiting formation of criminal groups).
criminal combinations embodied in RICO.  

1. Conspiracy

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

a. Types of Conspiracies

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

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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); *LaFave & Scott*, supra note 9, at 460-65 (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).
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. *LaFave & 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.*
45. *LaFave & 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. The two major models are based on wheels and chains, respectively.

In a wheel conspiracy, a central person or group acts as a hub for peripheral members of the conspiracy who are arrayed as spokes around the central figure. 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.

In Kotteakos v. United States, 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. The Supreme Court determined that the other conspirators were peripheral spokes, linked only to Brown and not to each other. Because there was no agreement linking the unconnected members and, therefore, no rim on the wheel, the conspiracy was incomplete. Instead of a single conspiracy involving numerous coconspirators, there were several small, independent conspiracies, each of which included Brown as a member.

Chain conspiracies consist of interdependent parties whose

50. See Kotteakos, 328 U.S. at 754-55 (describing requirement of single agreement as rim to join multiple conspirators).
51. LaFave & 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. In *Blumenthal v. United States* the owner of a wholesale liquor agency conspired with two men who had agreements with bar owners to sell liquor at illegal prices. 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. 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. The co-conspirators, therefore, had agreed to a single, large conspiracy. In *Blumenthal* all the parties joined a single conspiracy made up of the interdependent members.

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. A conspiracy may link all the members of a criminal organization to the crimes of the individual members, transforming co-conspirators into accomplices. 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.
In *Pinkerton v. United States*, 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. Under the *Pinkerton* doctrine, courts treat co-conspirators as accomplices. 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. Walter and Daniel Pinkerton were bootleggers convicted of evading liquor taxes. In addition to the conspiracy conviction, Daniel Pinkerton was also convicted of substantive offenses in which he did not participate. Justice Douglas, writing for the majority, described the conspiracy as a “partnership in crime,” and held Daniel Pinkerton liable for actions taken by Walter Pinkerton, his co-conspirator. 

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68. 328 U.S. 640 (1946).
69. Id.
70. 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.

While conspiracy is conclusive regarding complicity among co-conspirators, accomplices who are outside the conspiratorial agreement may either aid and abet the conspiracy or become co-conspirators by their acts. 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. Only by aiding the formation of a conspiratorial agreement may one aid and abet a conspiracy.

In *United States v. Falcone*, however, the Supreme Court implicitly acknowledged the possibility of aiding and abetting a conspiracy. The defendants in *Falcone* sold ingredients for bootleg liquor to distributors who supplied illicit distillers. 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. 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.

*Direct Sales Co. v. United States* represents another view of complicity with a conspiracy. Direct Sales Company, a mail order drug manufacturer and wholesaler, supplied John Victor Tate, a doctor in Calhoun Falls, South Carolina with vast quantities of...
amounts of morphine sulfate. The doctor and three others were charged with conspiring to violate the Harrison Narcotic Act. 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. 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. 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. 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. The circumstances of the sales also indicated that Direct Sales Company intended to participate in the

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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.


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 LaFave & 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.
101. LaFave & 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.\textsuperscript{103}

d. Conspiracy and Guilt by Association

Prosecutors alleging a conspiracy gain numerous procedural advantages that handicap the defense.\textsuperscript{104} Based on an agreement for which there is little direct evidence,\textsuperscript{105} a conspiracy trial subjects a defendant to joint trial with his or her co-conspirators.\textsuperscript{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.\textsuperscript{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.\textsuperscript{108}

e. Rationales for Conspiracy

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

\textsuperscript{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.

\textsuperscript{104} Johnson, supra note 44, at 1159-40.

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

\textsuperscript{106} Id.

\textsuperscript{107} Id.

\textsuperscript{108} Id.

\textsuperscript{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).

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

In addition to its inchoate aspect, conspiracy law also attacks the formation of criminal groups. The conspiratorial agreement that binds the conspirators may compel them to commit crimes which, without pressure from co-conspirators, they might have abandoned. The formation of criminal groups presents the potential for continuous criminal activity and the commission of complex crimes that a single person could not have committed. 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. LaFave & 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").
117. LaFave & 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; LaFave & Scott, supra note 9, at 459-60.
121. Developments, supra note 40, at 924.
122. Id. at 924-25.
123. Id. at 925-26. "[C]ollective action toward an antisocial end involves a greater risk to society than individual action towards the same end." Id. at 925-24; 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.\textsuperscript{124}

Finally, conspiracies are partnerships in crime.\textsuperscript{125} The members bind themselves to become criminals, creating an illicit substitute for the socially productive obligations shared by other members of a society.\textsuperscript{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.\textsuperscript{127}

2. Statutes & Criminal Groups

RICO is the product of congressional concern with enterprise criminality and the spread of organized crime.\textsuperscript{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.\textsuperscript{129} The structure of the RICO statute allows enhanced sanctions for enterprise criminals who use organizations for racketeering activity.\textsuperscript{130}

a. RICO & Its Supreme Court Interpretations

By 1969, successive congressional investigations had revealed the resilience, size, and diverse business interests of organized crime.\textsuperscript{131} The investigations concluded that piecemeal
convictions had not destroyed the structure of large criminal organizations. In complex criminal enterprises, where disparate people performed seemingly unconnected acts, there was often no single conspiratorial agreement to bind members of the group. 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.

### 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. Criminal organizations had invested racketeering profits into legitimate businesses, and Congress

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


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

In 1951, the Special Committee to Investigate Organized Crime in Interstate Commerce\textsuperscript{141} ("Kefauver Committee"), chaired by Senator Kefauver, investigated the infiltration of legitimate businesses by the Mafia.\textsuperscript{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.\textsuperscript{143} The wealthy gangs had gained respectability and sufficient political protection to impede prosecution of their leaders.\textsuperscript{144} The Kefauver Committee, described the gangs as forming an underworld national government held together by the Mafia.\textsuperscript{145} By in-

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\textsuperscript{137} Id. at 5; 115 CONG. REC. 5874-75 (remarks of Senator McClellan) (1969).
\textsuperscript{139} 116 CONG. REC. 18,940 (remarks of Sen. McClellan); TASK FORCE REPORT, supra note 132, at 4-5.
\textsuperscript{140} TASK FORCE REPORT, supra note 132, at 4, 10.
\textsuperscript{141} SENATE SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, FINAL REPORT, S. REP. No. 725, 82d Cong., 1st Sess. (1951).
\textsuperscript{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. \textit{Id.}
\textsuperscript{143} See S. REP. No. 307, supra note 138, at 1-2 (describing development of organized criminal gangs).
\textsuperscript{144} Id. at 2. The committee attributed the immunity of "leading hoodlums" to the "fix:"
\textit{The fix is not always the direct payment of money to law-enforcement officials \ldots 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.}
\textit{Id.}
\textsuperscript{145} Id.; S. REP. No. 141, supra note 142, at 4.
\end{flushright}
timidating its associates, the Mafia maintained control over organized crime in the United States. The Mafia code of silence 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.

In 1965, the investigations of Senator John McClellan publicized the internal structure of the Mafia. Senator McClellan had headed a series of committees that had investigated the role of organized crime in labor unions, gambling, and narcotics distribution. In 1965, the testimony of Joseph Valachi, a former member of the Mafia, provided vivid descriptions of Mafia practices and explained, for the first time, the hierarchical structure of a Mafia family. 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. Intermediaries in an organizational hierarchy protected the leaders from direct conspiratorial agreements with those who committed the substantive crimes.

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

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.
152. S. REP. NO. 72, supra note 149, at 12.
153. Id. at 5-18.
154. Id. at 7-8.
sion on Law Enforcement and Administration of Justice\textsuperscript{156} ("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.\textsuperscript{157} The Katzenbach Commission called for the implementation of laws that focused on the structural element which was the distinctive feature of organized crime.\textsuperscript{158}

The Katzenbach Commission's report described the complex structure of organized crime and its relationship to legitimate businesses.\textsuperscript{159} The Katzenbach Commission Report also presented a detailed description of the Mafia hierarchy.\textsuperscript{160} The Katzenbach Commission noted that as the criminal organizations became more sophisticated, they required the help of people with business and financial expertise.\textsuperscript{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.\textsuperscript{162}

Appended to the findings of the Katzenbach Commission

\textsuperscript{156} Exec. Order No. 11,236 (July 23, 1965).
\textsuperscript{157} Task Force Report, supra note 132, at 1-3, 11-12.
\textsuperscript{158} Id. The Task Force Report concluded that the strength and power of the mob derived from its organizational structure. Id. at 7.
\textsuperscript{159} Id. at 1-10.
\textsuperscript{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.
\textsuperscript{161} Id. at 4-10.
\textsuperscript{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's analysis of the structure of organized crime. Cressey described organized crime through an intricate examination of the Mafia's structure. 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.

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

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

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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).
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.\textsuperscript{171} In 1969, Senator Roman Hruska introduced the Criminal Activities Profits Act\textsuperscript{172} directed at money laundering.\textsuperscript{173} That same year, Senator McClellan also introduced a bill that included many of the Katzenbach Commission’s recommendations for fighting organized crime.\textsuperscript{174} Finally, the Senators jointly introduced a bill\textsuperscript{175} which, with minor amendments, became RICO, Title IX of the OCCA.\textsuperscript{176}

In Congress, opponents of RICO criticized it for being overbroad\textsuperscript{177} and having applications beyond traditional organized crime.\textsuperscript{178} Senator McClellan responded that addressing the problem required a comprehensive solution and not piecemeal legislation.\textsuperscript{179} The result of the amendments was an expansive approach to enterprise criminality.\textsuperscript{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.

\textit{Id.}


177. 116 \textit{CONG. REC.} 35,213. The American Civil Liberties Union objected to the “overly broad and ambiguous provisions.” \textit{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.” \textit{Navasky, supra}, note 150, at 52.


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, \textit{supra} note 3, at 1013-14; \textit{see G.
ii. The RICO Statute

Congress incorporated RICO into the OCCA as a measure to protect businesses from the depredations of racketeers.\textsuperscript{181} RICO attacks not only infiltrating racketeers but also organizations that are instruments for carrying out racketeering schemes.\textsuperscript{182} RICO provides the legal and conceptual framework to link disparate individuals and events into a coherent picture of a diversified criminal operation.\textsuperscript{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.\textsuperscript{184} To prosecute a criminal organization as a conspiracy, the Government must prove that an agreement linked the defendants.\textsuperscript{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.\textsuperscript{186} Without proof of an agreement, the heads of criminal...
organizations are difficult to reach through conspiracy prosecutions. 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. Furthermore, within the organization, the hierarchical structure provides continuity as membership changes. If a boss is removed, someone else can take his or her position. RICO, however, attacks the structure of the organization. The RICO statute also incorporates an inchoate conspiracy offense for those who conspire to commit substantive RICO offenses.

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

The statute defines racketeering activity as a pattern\textsuperscript{205} of specific crimes.\textsuperscript{206} In a RICO indictment, the predicate acts are

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\item Section 1961(1) provides that “racketeering activity” is:
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\item 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-
\end{itemize}

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

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

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.


provisions. 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. As a consequence, courts have created barriers to RICO suits through narrow interpretations of the statute.

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

iii. RICO and the Supreme Court

In four cases preceding Reves, the Supreme Court interpreted the RICO statute. 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.

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


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).


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).


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. 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. 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. The Court defined a RICO association-in-fact as a group of people associated for a course of continuing activity. Proof of an association-in-fact must show an ongoing organization distinct from racketeering activity, and evidence that it functions as a continuing unit.

The Supreme Court in Russello v. United States 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. In Sedima, S.P.R.L. v. Imrex Co., 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. The Court also rejected the requirement that the plaintiff show a special racketeering injury distinct from the injury caused by the predicate acts.

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

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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 296-37. 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.\textsuperscript{242} According to \textit{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.\textsuperscript{243} In a concurring opinion, Justice Scalia observed that the continuity and relationship test is not clear enough for a statute with criminal applications,\textsuperscript{244} and the entire statute may be void for vagueness.\textsuperscript{245}

Although the RICO statute contains provisions for RICO association-in-fact enterprises and RICO conspiracy, the two are conceptually distinct.\textsuperscript{246} Traditional conspiracy law limits RICO conspiracies to agreements to violate the substantive RICO provisions.\textsuperscript{247} As in the \textit{Kotteakos} conspiracy,\textsuperscript{248} the RICO conspiracy requires an agreement linking individual members.\textsuperscript{249} There is, however, no such limitation on the RICO enterprise.\textsuperscript{250} RICO association-in-fact enterprises extend beyond a single agreement or common objective\textsuperscript{251} to embrace the diverse crimes of a criminal enterprise.\textsuperscript{252} Under \textit{Turkette}, the RICO enterprise must be distinct from the pattern of racketeering,\textsuperscript{253} and the members of the enterprise must form a unit for a continuing course of conduct.\textsuperscript{254}

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

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\item \textsuperscript{242} \textit{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." \textit{Id.}
\item \textsuperscript{243} \textit{Id.} at 241-42.
\item \textsuperscript{244} \textit{Id.} at 255 (Scalia, J., concurring).
\item \textsuperscript{245} \textit{Id.} at 255-56.
\item \textsuperscript{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).
\item \textsuperscript{247} \textit{Id.; United States v. Sutherland}, 656 F.2d 1181, 1189-94 (5th Cir. 1981).
\item \textsuperscript{248} 328 U.S. 750 (1946).
\item \textsuperscript{249} \textit{Id.}
\item \textsuperscript{250} \textit{Elliott}, 571 F.2d at 900; see Lynch, supra note 5, at 945-55 (commenting unfavorably upon breadth of RICO enterprise).
\item \textsuperscript{251} \textit{Elliott}, 571 F.2d at 902.
\item \textsuperscript{252} \textit{Id.} at 901-02; \textit{Griffin}, 660 F.2d at 999-1000.
\item \textsuperscript{253} \textit{Turkette}, 452 U.S. at 583.
\item \textsuperscript{254} \textit{Id.}
\item \textsuperscript{255} See \textit{Reves}, 507 U.S. at 184-85 (distinguishing insider employees from outsiders who have no official position in enterprise).
\end{itemize}
insider of the enterprise, such as a Mafia foot soldier. As an outsider, the person is associated with an enterprise in which he does not have a formal position, 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. 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. Reves limits this racketeering-enterprise nexus to people who operate or manage the enterprise.

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

256. Id.
257. Id.
259. 18 U.S.C. § 1965(c). See Melissa Harrison, Nexus: The Next Test of RICO’s Text, 70 Deny. 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).
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).
other enterprise.\textsuperscript{266} The rule often serves to immunize corporations from RICO suits under § 1962(c).\textsuperscript{267}

Since \textit{H.J. Inc.}, the courts of appeal have diverged in their interpretations of the pattern requirement.\textsuperscript{268} Some circuits have concentrated on the continuity prong, and looked to the number of acts committed within a particular span of time\textsuperscript{269} or to the threat of continued criminal activity.\textsuperscript{270} Although courts no longer require proof of multiple schemes,\textsuperscript{271} some have required separate patterns for each victim.\textsuperscript{272} Other circuits apply a multi-factor test to determine if there is a pattern.\textsuperscript{273}

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

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  \item 266. See Goldsmith, \textit{supra} note 188, at 24-28 (discussing history of person-enterprise doctrine).
  \item 267. See id. at 27-28 (describing person-enterprise rule immunizing white-collar defendants sued under RICO).
  \item 269. See, e.g., GICC Capital Corp. v. Technology Fin. Group, Inc., 67 F.3d 463, 469 (2d Cir. 1995), \textit{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).
  \item 270. \textit{Sun Sav. & Loan}, 825 F.2d at 194.
  \item 271. \textit{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.” \textit{Id.}
  \item 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).
  \item 274. See Morissette v. United States, 342 U.S. 246, 251-61 (1952) (describing history of \textit{mens rea} in Anglo-American criminal law, and distinguishing common law crimes requiring criminal intent, from regulatory offenses that do not require \textit{mens rea} element if none is specified); Fricker & Gilchrist, \textit{supra} note 41, at 820 (describing lack of clear distinction between regulatory and common law offenses). In \textit{United States v. X-Citement Video}, the Supreme Court held that in federal statutes lacking an explicit \textit{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. \textit{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. \textit{Id.}
robbery or arson, require that a defendant have criminal intent. Some courts contend that the intent to commit predicate acts is sufficient intent for conviction under RICO. 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.

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. The penal codes of both Italy and France contain provisions prohibiting criminal associations. The Italian code also contains a specific prohibition on membership in a Mafia association. The French law prohibiting criminal associations resembles common law conspiracy, but retains the essential features of traditional criminal association.

Conspiracy is a product of the common law. Civil law

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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, 95 F.3d 37, 40-41 (2d Cir. 1994).

277. Castellano, 810 F.Supp. at 1995; see Lynch, supra note 5, at 954 n.149 (arguing that convicting defendants without establishing awareness of enterprise strips enterprise element of any meaning).


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

280. C.P. art. 416bis (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.\textsuperscript{284} Common law conspiracy depends upon the formation of a conspiratorial agreement,\textsuperscript{285} not the criminal group that the agreement creates.\textsuperscript{286} The penal codes of France\textsuperscript{287} and Italy\textsuperscript{288} directly attack the formation of the criminal groups, rather than the criminal agreement that underlies the group.\textsuperscript{289}

In civil law countries, such as Italy and France, codified legislation is the primary source of law.\textsuperscript{290} In theory, judges interpret and apply the rules set out in codes.\textsuperscript{291} Strict adherence to the separation of powers in civil law countries means that only the legislature has the right to make new law.\textsuperscript{292} Consequently, judicial decisions in civil law countries do not create new law as they do in common law countries.\textsuperscript{293} In practice, however, legal codes require the judiciary to fill in gaps left by legislators.\textsuperscript{294} While deferring to the law-making authority of the legislative
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. 416bis (It.).
299. C.p. art. 416 (It.).
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, ROMISCHES 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 McMULLEN, 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.\textsuperscript{301}

Throughout Italian history, the Italian countryside has suffered from chronic and widespread brigandage, armed robberies by rural bandits.\textsuperscript{302} The number of brigands grew during periods when political regimes were unstable or unusually corrupt.\textsuperscript{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.\textsuperscript{304}

Although Italy was a unified kingdom after 1861,\textsuperscript{305} there was no national penal code until 1889.\textsuperscript{306} In the interim period,
Tuscany had its own penal code.\textsuperscript{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.\textsuperscript{308} The Sardo-Italian Code of 1859 governed the rest of Italy.\textsuperscript{309} The Sardo-Italian Code criminalized belonging to an \textit{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.\textsuperscript{310} The national penal code of 1889, the Zanardelli Code,\textsuperscript{311} created the crime of \textit{associazione per delinquere}, criminal association.\textsuperscript{312} The Rocco\textsuperscript{313} code of 1931,\textsuperscript{314} expanded the crime of criminal association that the Zanardelli code estab-

\begin{itemize}
\item \textsuperscript{307} Vassalli, \textit{supra} note 306, at 264.
\item \textsuperscript{308} 7 \textit{Manzini}, \textit{supra} note 11, at 192.
\item \textsuperscript{309} Vassalli, \textit{supra} note 306, at 264.
\item \textsuperscript{310} C.p. arts. 426-30 (1859) (It.).
\item \textsuperscript{311} Vassalli, \textit{supra} note 306, at 266. In 1888, Giuseppe Zanardelli, the Italian Minister of Justice, was instrumental in completing the new penal code. \textit{Id}.
\item \textsuperscript{312} C.p. art. 248 (1889) (It.) (Emilio Camous and Giovanni Luschi eds., 1895).
\item [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.]
\item 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.
\item 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.\textsuperscript{[translation by Comment author]}
\end{itemize}
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 association \(^{318}\) under Italian law, as long as there is a permanent \(^{319}\) group of at least three people dedicated

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\(^{313}\) Vassalli, supra note 306, at 271-72. Italian Minister of Justice Alfredo Rocco oversaw the creation of the new code. \(\text{Id.}\)

\(^{314}\) \(\text{Id.}\) at 272. On July 1, 1931, the Rocco Code took effect. \(\text{Id.}\)

\(^{315}\) 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 scorrono 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.

\(\text{Id.}\)

[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 form one to five years.

. . . .

If the associates are armed and overrun the countryside or the public roadways, imprisonment form 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.” \(\text{Id.}\) [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. \(\text{See Grande, supra note 284, at 190-209}\) (describing legal basis for early police intervention).


\(^{319}\) 7 MANZINI, supra note 11, at 195.
to committing an open-ended series of crimes. The criminal organization needs only a rudimentary structure, sufficient to commit the target crimes. Formal organizations, such as corporations, may be criminal associations if their members decide as a group to commit crimes.

Each member of the criminal association must join the organization voluntarily. The members must agree to pursue the shared criminal goal of the group. The members must intend to engage in a continuous course of criminal conduct, 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.

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

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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.
328. C.P. art. 416bis (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 sé 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, such as the use of intimidation to acquire government contracts. Prior to the addition of article 416bis, 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. Under 416bis, 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.

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

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. 416bis (It.).

331. Giuseppe Di Lello Finuoli, Associazione di tipo mafioso (art. 416 bis c.p.) e problema probatorio, 1984 FORO IT. Parte V-I, 246, 246. Under 416bis the loose structural element of the traditional associazione per delinquere combined with the sociological specifications describing the Mafia to allow prosecutors to bring enormous maxi-processi, 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. 416bis (It.).
334. Judgment of 5 October 1994 (Dimitry), 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 sedzioni unite session, 11 judges, sitting en banc preside over the matter. Id.
336. Due arrestati dopo le accuse del pentito Galasso - Coinvolti parlamentari, avvocati e un giornalista; Camorra, è 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. Grasso dealt with Judge Masi through Giuseppe Demitry, a Socialist Deputy in the Italian National Assembly. Grasso claimed that Demitry was an intermediary, who helped to “adjust” criminal trials of Camorra members.

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

Prosecutors, however, charged Demitry as an accomplice to a Mafia organization. In earlier decisions, sections of the Corte di Cassazione had held that a defendant could not be complicit with a criminal association, because aiding the association, with the intent to help it commit crimes, made one a member of the association. 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. Prosecutors, however, linked the complicity statute

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337. Id.
338. Id.
340. Id. at 426.
342. Id.
343. C.P. art. 110 (It.).
344. Frosali, supra note 341, at 1019.
346. Id. at 426.
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. 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. The doctrine of external complicity imposes the penalties for Mafia membership on outsiders who aid and abet the Mafia.

2. French Criminal Association Law

The Napoleonic Penal Code of 1811 contained the first French law proscribing organized criminal groups. The law applied only to criminal organizations with a formal structure and did not reach loosely organized criminal groups. When the laws against complicity, attempt, and criminal association proved ineffective against anarchist groups in the late nineteenth century, the French Parliament revised the Penal Code to remove the structural requirements from the law, and based

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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.


354. C. pén. Annoté 990 (Émile Garçon 1952) (Fr.).

355. Id. at 991.

356. Id.
the criminal group primarily on the criminal agreement. Under the French Penal Code of 1994, the French Parliament expanded the number of target offenses of criminal associations, but the basic structure of the statute remained unchanged.

After the French Revolution, Napoleon suppressed the brigandage that had arisen in the French countryside. The Penal Code of 1811 contained provisions against hierarchically organized criminal groups. 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. The statute had provisions for aiders and abetters.

357. C. pén. Annoté (Émile Garçon 1952) arts. 265-68 (Fr.); Culioli, supra note 11, at 5.
359. C. pén. art. 450-1 (Fr.).
360. Vitu, supra note 22, at 6.
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.\textsuperscript{365}

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

\begin{quote}
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).
\end{quote}

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, \textit{supra} note 22, at 5-6.

\textsuperscript{365} C. \textit{Pén.} art. 268 (1811) (Fr.).

\textsuperscript{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, \textit{supra} note 22, at 4. The French left dubbed these the \textit{lois scellées}, wicked laws. \textit{Id.}; \textit{Histoire de la Justice sous la IIIe République}, \textit{supra} note 366, at 292, 263.
The revised articles 265-68 eliminated the requirement that a criminal association have a formal structure. Under the revised articles, an agreement to commit serious crimes could create a criminal association whose members could be sentenced to hard labor. The law no longer required a specified number of members, a hierarchy, or a division of spoils, but it retained the earlier provision extending liability to aiders and abettors. In 1981, the Parliament added a requirement that the defendants must commit at least one overt act in furtherance of the criminal association.
On March 1, 1994, a revised French Penal Code went into effect. The current Code provisions against criminal association, articles 450-1 to 450-3, expand the number of target offenses to include delits punishable by 10 years in prison. 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.

Under French law, a person who assists in the commission of a crime may be liable as an accomplice. An accomplice acts before or during the commission of the crime to assist the principal, who commits the crime. The accomplice must know that the principal intends to violate the law, and must intend to participate in the violation. Complicity is distinct from other group crimes committed by a mob, an insurrection, or a criminal association. A defendant can be complicit in the offense of association de malfaiteurs either a crime or a delit based on the severity of the target offense. The Parliament again restricted the target offenses to crimes. Three years later, it reinstated the changes made in 1981.

The Code defines accomplices as: a person is an accomplice to a crime or a delit 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.

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376. See Tomlinson, supra note 370, at 144 (describing delits 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.

[A person is an accomplice to a crime or delit 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).
382. Id. at 3. Underlying a mob, for example, is a sudden, collective impulse without prior intent to violate the law. Id.
licit 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.\footnote{Id. The time when the criminal association is discovered determines the nature of the accomplice's offence. 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. \textit{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. \textit{Id}.}

II. \textit{REVES v. ERNST \& YOUNG}

In \textit{Reves v. Ernst \& Young}, the Supreme Court limited liability under § 1962(c) to people who operate or manage a RICO enterprise.\footnote{\textit{Id}. at 170.} The decision attempted to distinguish degrees of involvement by outside professionals in enterprises for which they provide professional services.\footnote{\textit{Id}. at 184-85.} The result, however, has been to compel plaintiffs to modify their tactics to achieve the result \textit{Reves} was intended to prevent.\footnote{\textit{See DiSanto, supra note 18, at 1068 (noting the ways \textit{Reves} can be circumvented).}}

A. History

In \textit{Reves v. Ernst \& Young},\footnote{\textit{Id}. at 173.} 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.\footnote{\textit{Id}. at 175. The original accounting firm was Russell Brown and Company, which merged with Arthur Young and Company, later becoming Ernst \& Young. \textit{Id}. at 173.} In January 1980, the Co-op general manager, Jack White, obtained loans from the Co-op to finance construction of a gasohol plant\footnote{\textit{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), \textit{reh'g denied}, 1993 U.S. App. Lexis 22560.} for his company, White Flame Fuels, Inc. ("White Flame").\footnote{\textit{Reves}, 507 U.S. at 172-73.} In September 1980, Jack White and the Co-op's accountant were indicted on charges of tax fraud.\footnote{\textit{Id}. at 173.} A consent decree\footnote{\textit{Id}. at 173.} relieved White of his debts...
to the Co-op and established the Co-op's ownership of the gasohol company from February 1980.\textsuperscript{394}

In January 1981, Jack White and the Co-op accountant were convicted of tax fraud.\textsuperscript{395} At the criminal trial, Harry Erwin, the managing partner of Russell Brown and Company testified on Jack White's behalf.\textsuperscript{396} After the trial, Jack White's lawyer contacted Russell Brown to discuss retaining the firm to audit the Co-op.\textsuperscript{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.\textsuperscript{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.\textsuperscript{399} On April 22, 1982, Arthur Young presented the 1981 audit to the Co-op board.\textsuperscript{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.\textsuperscript{401} For accounting purposes, White Flame was valued at its fixed-asset value of $4.5 million.\textsuperscript{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.\textsuperscript{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.\textsuperscript{404}
financial statements failed to disclose the information about the financial health of White Flame that had been in the full audit.\footnote{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.\footnote{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.\footnote{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.\footnote{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.\footnote{409} The Co-op filed for bankruptcy, freezing the demand notes in the bankruptcy estate.\footnote{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.\footnote{411} The District Court certified a class of noteholders as plaintiffs.\footnote{412} The plaintiffs settled with all defendants except Arthur Young.\footnote{413} The District Court granted summary judgment for Arthur Young on the RICO claim, and the Eighth Circuit Court of Appeals affirmed.\footnote{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.\footnote{415}
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.
\(^{418}\) *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.\(^4\)\(^{39}\) The Court, however, limited the liability of outsiders by finding that Congress addressed § 1962(a) and (b) specifically to outsiders.\(^4\)\(^{40}\) Section 1962(c) had a more limited reach.\(^4\)\(^{41}\) Nevertheless, outsiders who associate themselves closely enough with the enterprise can be liable if they operate or manage the enterprise.\(^4\)\(^{42}\)

2. Dissent

Justice Souter, joined by Justice White, dissented from the majority opinion.\(^4\)\(^{43}\) 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.\(^4\)\(^{44}\) Justice Souter observed that the statute was written to reach those who are merely associated with an enterprise in which they participated indirectly.\(^4\)\(^{45}\) The word conduct, Justice Souter noted, is more inclusive than the majority's interpretation, and extends to those who merely carry out an activity.\(^4\)\(^{46}\) 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.\(^4\)\(^{47}\)

Justice Souter also found that the actions of Arthur Young met even the operation or management test of the majority.\(^4\)\(^{48}\) 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.\(^4\)\(^{49}\) Justice Souter viewed Arthur Young's actions as impermissibly en-

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440. *Id.* at 185.
441. *Id.*
442. *Id.*
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.
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.\textsuperscript{450}

3. Problems

\textit{Reves} resolved the growing disagreement over the scope of § 1962(c), but recent cases have resurrected the dispute in different forms.\textsuperscript{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.\textsuperscript{452} The Supreme Court intended the "operation or management" test of \textit{Reves} to be a simple rule for courts to apply.\textsuperscript{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,\textsuperscript{454} whether the operation or management test applies to criminal as well as to civil RICO,\textsuperscript{455} and what importance courts should give to alternate theories of participation.\textsuperscript{456}

a. Extent of Liability

In \textit{United States v. Oreto}, members of a loan sharking ring were convicted under 1962(c) and (d).\textsuperscript{457} The First Circuit Court of Appeals interpreted \textit{Reves} to apply specifically to "outsider" liability.\textsuperscript{458} The appellants in \textit{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).\textsuperscript{459}

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

\begin{itemize}
    \item \textsuperscript{450} \textit{Id.} at 189-95.
    \item \textsuperscript{451} See DiSanto, \textit{supra} note 18, at 1079-88 (describing inconsistent application of \textit{Reves}).
    \item \textsuperscript{452} Vitiello, \textit{supra} note 18, at 1397, 1400.
    \item \textsuperscript{453} \textit{Reves}, 507 U.S. at 179.
    \item \textsuperscript{454} Vitiello, \textit{supra} note 18, at 1367.
    \item \textsuperscript{455} See Camp, \textit{supra} note 18, at 87-92 (arguing for narrow reading of civil RICO and broad reading of criminal RICO).
    \item \textsuperscript{456} See Vitiello, \textit{supra} note 18, at 1387-98 (discussing \textit{Reves} in lower courts).
    \item \textsuperscript{457} 37 F.3d 739 (1st Cir. 1994), \textit{cert. denied}, 115 S. Ct. 1161 (1995).
    \item \textsuperscript{458} \textit{Id.}
    \item \textsuperscript{459} \textit{Id.} at 750.
    \item \textsuperscript{460} 43 F.3d 1546 (1st Cir. 1994).
\end{itemize}
the affairs of Aetna by filing fraudulent auto repair claims.\(^{461}\)
Defendant auto body shops and their owners colluded with cor-
rupt 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 af-
fairs.\(^{463}\) The defendants, who were associated with the enter-
prise 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 Ap-
peals reversed the conviction of a member of a gang that dealt in
stolen property because the appellant, Formisano, merely fol-
lowed orders and was not in a position to operate or manage the
enterprise.\(^{466}\) Anthony Viola ran an enterprise near the Brook-
lyn 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 insuf-
ficient evidence to show that Formisano had sufficient discre-
tionary 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. Firstar,\(^{472}\) the trial court dismissed

\[\text{\textsuperscript{461}} \text{Id. at 1552.} \]
\[\text{\textsuperscript{462}} \text{Id. at 1552.} \]
\[\text{\textsuperscript{463}} \text{Id.} \]
\[\text{\textsuperscript{464}} \text{Id. at 1559-60.} \]
\[\text{\textsuperscript{466}} \text{Id. at 43.} \]
\[\text{\textsuperscript{467}} \text{Id. at 39.} \]
\[\text{\textsuperscript{468}} \text{Id. at 43.} \]
\[\text{\textsuperscript{469}} \text{Id. at 43-45.} \]
\[\text{\textsuperscript{470}} \text{Reves, 507 U.S. at 185.} \]
\[\text{\textsuperscript{471}} \text{See Daniel R. Fischel & Alan O. Sykes, \textit{Civil RICO after Reves: An Economic} \textit{Commentary,} 1998 Sup. Cr. Rev. 157, 193-94 (pointing out that Reves plaintiff could have} \]
the initial suit, on the grounds that the defendants had not, as 
Reves requires, managed or operated the RICO enterprise. In 
their amended complaint, the plaintiffs alleged that the enter-
prise consisted of a shifting group composed of banks, a bank 
holding company, and constituent banks. The court held 
that the new enterprise met the Reves test, although the underly-
ing facts had not changed.

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. The RICO enterprise that Congress orig-
inally envisioned had numerous associates peripherally involved 
in its affairs. While they might not reach the level of manag-
ers, they nevertheless are essential to the enterprise and aid it 
from the outside. The federal aiding and abetting statute al-
 lows them to be convicted for their role in helping the RICO 
enterprise.

474. Id. at 966.
475. DeWit, 904 F. Supp. at 1516.
476. Id. at 1516-19.
478. TASK FORCE REPORT, supra note 132, at 4, 8-10, 51.
479. Id. at 51.
1995); see, Judith L. Rosenthal, Comment, Aiding and Abetting Liability for Civil Violations 
of RICO, 61 TEM. 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 Securi-
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.

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d. RICO Conspiracy

Section 1962(d) makes it unlawful for a person to conspire to violate §§ 1962(a), (b) or (c).\textsuperscript{481} Section 1962(d) follows traditional conspiracy doctrine and prohibits the formation of an agreement to violate the substantive sections of § 1962,\textsuperscript{482} regardless of whether any substantive violations were committed.\textsuperscript{483} By alleging a RICO conspiracy, prosecutors can bypass the limitations of \textit{Reves}.\textsuperscript{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 \textit{Reves} test.\textsuperscript{485} The penalties for a RICO conspiracy conviction are the same as for conviction for a substantive RICO violation.\textsuperscript{486}

III. COMPARISON

\textit{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.\textsuperscript{487} As a result, civil plaintiffs have crafted RICO complaints to avoid the limitations \textit{Reves} created.\textsuperscript{488} In addition, \textit{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.\textsuperscript{489} French and Italian criminal association laws provide examples of laws directed at group criminality that recognize liability for attenuated roles.

\textsuperscript{481} 18 U.S.C. § 1962(d).
\textsuperscript{482} United States v. Neapolitan, 791 F.2d 489, 492 (7th Cir.), cert. denied, 479 U.S. 940 (1986).
\textsuperscript{483} Sutherland, 656 F.2d at 1186-87.
\textsuperscript{484} See DiSanto, supra note 18, at 1064 (observing common law crimes allow plaintiffs to avoid \textit{Reves} problems).
\textsuperscript{485} Id.
\textsuperscript{486} 18 U.S.C. §§ 1963-64.
\textsuperscript{487} See supra notes 451-80 and accompanying text (discussing result of \textit{Reves}).
\textsuperscript{488} See supra notes 470-86 and accompanying text (discussing methods of avoiding \textit{Reves} limitations).
\textsuperscript{489} See Clarkin, supra note 213, at 1080-31, 1066-69 (discussing outside professionals and RICO liability).
ated connections to the central criminal group. 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. 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). Reves, however, has accentuated the distinction between insiders, who belong to an organization, and outsiders, who have an occasional relationship with the main group. 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.

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

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).
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).
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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\textit{bis} of the Italian Penal Code.

The breadth of Anglo-American conspiracy law has extended liability to peripheral members of criminal conspiracies.\textsuperscript{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.\textsuperscript{513} As in conspiracies, the degree of involvement and the \textit{mens rea} of the defendant, rather than a formal relationship to an enterprise, should control RICO liability under § 1962(c).

\begin{footnotes}
\item[507] 7 \textsc{Manzini} \textit{supra} note 11, at 194-96 (describing membership requirements in Italian criminal association); \textit{Vitu}, \textit{supra} note 22, at 6 (describing membership French criminal association).
\item[508] \textit{See supra} notes 345-52 and accompanying text (discussing complicity with Italian criminal association); \textit{supra} notes 361-78 (discussing complicity with French criminal association).
\item[509] \textit{See supra} note 184 and accompanying text (discussing Congress' concern with peripheral members of racketeering enterprises); \textit{DiSanto, supra} note 18, at 1088-89 (noting that while CCE specifically targets leaders of narcotics enterprises, RICO, passed by same Congress, did not).
\item[510] 18 \textsc{U.S.C.} § 1962.
\item[511] \textit{See Clarkin, supra} note 213, at 1030-31, 1066-69 (discussing outsiders and RICO liability).
\item[512] \textit{See supra} notes 40-98 (discussing breadth of conspiratorial liability).
\item[513] \textit{See supra} notes 80-98 (discussing complicity with conspiracy).
\end{footnotes}
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.