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RICO: THE CRIME OF BEING A CRIMINAL, PARTS III & IV*

Gerard E. Lynch**

III. RICO: A NEW KIND OF BEAST?

In the first portion of this study,1 we saw that the Supreme Court in its 1981 Turkette decision2 endorsed what was already the consensus view of the courts of appeals that a group of individuals associated in fact to pursue entirely illegitimate purposes could constitute a RICO enterprise.3 Prosecutions of such associations have quickly become the leading use of the statute. It can be reliably estimated that more than forty percent of the reported appellate cases involving RICO indictments concern prosecutions in which the alleged enterprise was such an illicit association.4 When the cases are classified by the nature of the predicate criminal acts rather than of the alleged enterprise, roughly the same figure appears: about forty percent of the cases involve allegations of concerted criminal activity by more-or-less organized criminal groups, with the rest divided among the various types of perversion of legitimate institutions discussed in the preceding sections.5 These figures demonstrate that the principal use of RICO has not been to deal with the distinctive evil of infiltration by the mob into legitimate enterprises, but rather to add an additional weapon to prosecutors' efforts to attack organized criminal groups themselves for their primary illegal activities.

The illicit association cases present a broad spectrum of illegal activities. In many of the cases, the illicit activities charged as predicate acts involve repeated instances of the same general type of criminal conduct. The large number of RICO narcotics prosecutions typify this kind of case, although similar examples involving gambling and prostitution activity can be cited.6 Other cases involve arson, extortion, and

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* These are the second two parts of a four part Article.
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4. See Lynch, supra note 1, at note 303.
5. Id. at 735 (Table 1).
6. More than 10% of the 236 RICO indictments in our sample of appellate cases involved illicit enterprises in which the predominant racketeering activity consisted of narcotics violations. Gambling cases accounted for 15 of the indictments (6.4%), and there were also a handful of prostitution cases. Altogether, these classic examples of organized provision of illegal services and products by criminal associations accounted for nearly 20% of all RICO indictments in the sample. Id.
Theft or fencing schemes.  

The use of RICO in many of these cases appears indistinguishable from the use of ordinary conspiracy law. Although most of the RICO cases seem to involve particularly large or lucrative conspiracies, some of them are strikingly ordinary criminal conspiracies. Why have prosecutors invoked RICO so frequently? The cases in this area are so diverse that no single answer is possible. In some instances, particularly in simple cases involving schemes limited to one particular sort of crime, the answers parallel those we have already seen in the political corruption, white collar, and labor racketeering areas.

A. Jurisdictional Use of RICO

In theory, RICO can serve as a device to obtain federal jurisdiction to prosecute common-law crimes against persons or property that would normally be within the province of local law enforcement. A purse snatcher or mugger may seem the quintessential example of the sort of street criminal who is the responsibility of the local police force and the local district attorney to apprehend and prosecute. If two or three muggers, however, form a loosely knit gang and can be shown to have cooperated in two or more such robberies they have become—assuming that some effect on interstate commerce can be fantasized—a RICO enterprise, and can be prosecuted federally. Given the higher public concern about street crime than about the less immediately threatening sorts of activity that compose the principal objects of federal law enforcement efforts, an ambitious United States Attorney might well want to grab a piece of this kind of crime-fighting action by using RICO to stake out a federal presence in the war on street robbery.

The use of RICO purely as a jurisdictional device to supplement or preempt local law enforcement efforts against ordinary street crime has so far been mostly a theoretical fear. The Department of Justice's RICO Guidelines emphasize the importance of avoiding encroachments on local law enforcement, and specifically disapprove RICO

7. Id.
9. For examples of relatively small-scale vice rings indicted under RICO, see United States v. Tunnell, 667 F.2d 1182 (5th Cir. 1982) (prostitution); United States v. Colacurcio, 659 F.2d 684 (5th Cir. 1981) (gambling), cert. denied, 455 U.S. 1002 (1982).
10. See Lynch, supra note 1, at notes 309–425.
12. See, e.g., United States Dep't of Justice, U.S. Attorney's Manual § 9-110.200 (1984) ("One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned.")
indictments “where the predicate acts consist solely and only of state offenses” except in certain instances.\(^\text{13}\) This might be dismissed as mere lip-service to the values of federalism and, in fact, the exceptions are sufficiently amorphous to provide little barrier to prosecutions of entirely local criminal activity. Nevertheless, pure cases of disregard for these principles are rare.\(^\text{14}\)

Still, the jurisdictional use of RICO is not without significance. Even in cases that present only one straightforward conspiracy involving a single type of criminal activity, jurisdiction and venue barriers may prevent prosecutors from presenting all the evidence relating to the single conspiracy in the same trial. In *United States v. Winter*,\(^\text{15}\) for example, federal investigators had developed evidence of a wide-rang-

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13. Id. at § 9-110.330. Needless to say, the exceptions are broadly drafted and subject to considerable flexibility of interpretation. For example, “[c]ases where local law enforcement officials are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest,” id. at § 9-110.330(A) are, as far as I can tell, in the eye of the beholder. The guidelines, in any event, are not judicially enforceable. See Lynch, supra note 1, at note 250.

14. One case in which jurisdictional use of RICO seems to have occurred is *United States v. Licavoli*, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984). In *Licavoli*, the only predicate acts charged against two key defendants were a conspiracy to murder a rival gang leader and the murder of that same individual. Thus, as to those defendants, the entire basis of the RICO charge was a single scheme to commit murder—an act that would not, absent RICO, be within federal jurisdiction. The defendants, however, had already been acquitted in a state prosecution for the same conspiracy and murder. The use of RICO to create federal jurisdiction was thus necessary to make use of the “dual sovereignty” exception to the double jeopardy principle. *Abbate v. United States*, 359 U.S. 187 (1959); *Bartkus v. Illinois*, 359 U.S. 121 (1959). Assuming defendants’ guilt, zeal to obtain a conviction in these circumstances is certainly understandable, but the use of RICO to avoid jurisdictional barriers to what is already something of an evasion of constitutional requirements could certainly be considered an abuse of the statute.

A case that might appear to exemplify the pure use of RICO as a jurisdictional device in the case of ordinary blue-collar crime is *United States v. Aleman*, 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980). In *Aleman*, two defendants were tried for violating §§ 1962(c) and (d) of RICO by engaging in three robberies of homes in Illinois and Indiana. Although the federal court had jurisdiction over the Indiana offense because its proceeds were transported across state lines, 18 U.S.C. § 2314 (1982), and federal firearms charges were available against at least one of the defendants, 609 F.2d at 301, the Illinois robberies were strictly local crimes. RICO seems to have been used largely so that the Illinois robberies could be prosecuted by the United States Attorney rather than by Illinois authorities.

The case illustrates, however, the number of considerations that may go into the decision to prosecute a case under RICO. While the Illinois robberies, absent RICO, could only have been tried in state court, and the Indiana robbery could also have been prosecuted in the courts of that state, no court anywhere, without the use of RICO, could have tried all three offenses under the same indictment. Use of the federal forum provided by RICO enabled the three robberies to be tried together, to the considerable advantage of the prosecution. *Aleman* thus may be a case not so much of jurisdictional claim-jumping, but of the use of RICO as a trans-jurisdictional joinder device. See infra notes 15–16 and accompanying text.

ing scheme to fix horse races at various race tracks. Although the case was prosecuted in Massachusetts, the scheme affected racing in New Hampshire, Rhode Island, Pennsylvania, and New Jersey. Such multi-state activity may be difficult to prosecute efficiently under conventional doctrines of criminal law and procedure. Substantive criminal acts may be committed in a variety of jurisdictions, making it impossible to join all related transactions in the same venue. While a conspiracy encompassing the entire scheme may be prosecuted in any district where any overt act was committed, unless the substantive offenses can be prosecuted in the same district, the federal conspiracy statute may not provide penalties commensurate with the scope of the criminal conduct involved. RICO may function, in cases like Winter, as a jurisdictional device to prosecute trans-jurisdictional schemes—or, in effect, as an aggravated conspiracy statute.

Congressional expansion of federal criminal jurisdiction makes it possible for federal law enforcement agencies to reach most of the forms of organized criminal conduct that have been attacked using RICO, under certain circumstances. Theft, arson, extortion, prostitution, gambling, and of course narcotics trafficking are all covered by federal statutes. While the use of RICO to assert jurisdiction over criminal conduct that has not yet been made subject to federal intervention could be seen as abusive, as in the area of political corruption, the frequent resort by Congress to artificial jurisdictional devices to secure federal jurisdiction often makes the dividing line between federal and state jurisdiction arbitrary. As to any individual

18. In this particular instance, RICO may not have been indispensable to obtaining proper venue for enough criminal charges to prosecute the scheme adequately. The indictment included 42 counts of sports bribery and Travel Act violations, 18 U.S.C. §§ 224, 1952 (1982), so that presumably a single conspiracy count and the various Travel Act offenses would permit the charging of conduct occurring outside of Massachusetts. Nevertheless, the availability of provable Travel Act violations is essentially fortuitous; RICO will sometimes be the only way of avoiding fragmented prosecution of far-flung criminal activities. See, e.g., United States v. Bagaric, 706 F.2d 42 (2d Cir.), cert. denied, 460 U.S. 840 (1983).
20. See, e.g., 18 U.S.C. § 844(i) (1982) (destruction by fire or explosion of building or property used "in any activity affecting interstate or foreign commerce").
25. See Lynch, supra note 1, at notes 336-41 and accompanying text.
criminal act, this patchwork jurisdiction might not matter. Unlike the case of local governmental corruption, there is no systemic reason to think that the absence of federal jurisdiction to prosecute an act of gambling or arson will lead to failure to prosecute the crime. Where, however, the criminal conduct is part of a pattern of criminal transactions conducted by an organized criminal conspiracy, the fragmented pattern of jurisdiction may prevent any court from having jurisdiction over enough of the case to permit unified prosecution of the entire operation in a manner that makes significant penalties available. RICO has been of genuine value in permitting such prosecutions.

B. RICO as a Penalty Enhancer

In some cases, the impetus for the use of RICO in criminal enterprise cases appears to be, as in the white collar and labor cases, its extreme, mandatory and procedurally simple financial penalties. At least some of the large number of narcotics cases in which RICO counts are included can probably be accounted for on this basis. In most narcotics cases, of course, there is no need for RICO to enhance the incarceration penalties available; federal narcotics offenses carry potentially drastic sentences. Nor do narcotics offenses present the jurisdiction and venue barriers to unified prosecution discussed in the preceding section.

26. Id. at notes 347-48 and accompanying text.
27. Of course, in particular cases, state evidentiary rules more restrictive than their federal counterparts might make state prosecutions difficult, providing prosecutors with a motive to bring federal charges instead. Broad federal statutes such as RICO facilitate such forum-shopping. See, e.g., United States v. Zemek, 634 F.2d 1159, 1164 n.4 (9th Cir. 1980) (taped conversations would have been excluded under state law).
28. Of course, the ability to create ever-larger criminal proceedings by increasing the number of charges brought in the same prosecution presents problems of its own. These problems are addressed below, in the aggravated form presented when the RICO indictment encompasses not repeated instances of similar criminal conduct, but rather multifarious crimes united only by common affiliation or association among those who have committed them. See infra notes 191-197 and accompanying text.
29. See Lynch, supra note 1, at notes 360-425 and accompanying text.
30. In more than 10% of the RICO cases in the sample (26 out of 236), the criminal enterprise prosecuted was a drug distribution ring. Id. at 735 (Table I).
31. The two substantive and one conspiracy narcotics offenses that would ordinarily be the basis for charging a drug offender with violations of 18 U.S.C. §§ 1962(c) and (d) (1982) already expose a defendant to as much as 60 years' imprisonment. 21 U.S.C. §§ 841, 846 (1982). Certain high-level narcotics traffickers may even be subject to unparolable life imprisonment under the "kingpin" or "continuing criminal enterprise" statute. Id. § 848.
32. Because conspiracies to violate the federal narcotics laws are punishable under a separate statute carrying its own substantial penalties, see 21 U.S.C. § 846 (1982), rather than being subject to the general federal conspiracy statute, 18 U.S.C. § 371 (1982), and because narcotics offenses are subject to federal jurisdiction without exception, rather than on the patchwork basis of random jurisdictional factors, narcotics offenses typically do not present difficulties of federal jurisdiction or of locating a district
On the other hand, as with other forms of criminal activity, the financial penalties attached to narcotics violations have not necessarily been commensurate with the extraordinary profit potential of such violations. The fines provided by federal narcotics laws, while steeper than those applicable to mail fraud, conspiracy, and other white collar offenses, until recently have not been remotely comparable to the profits of major drug dealers. Even if the fines had been significantly higher, however, they would not be adequate to take the profit out of drug dealing. The collection of fines presents a far graver problem in the case of narcotics dealers, whose assets are generally underground, than in the case of white collar offenders, who more commonly have visible sources of payment. While narcotics offenses always carried the potential for civil forfeiture actions, before the Comprehensive Crime Control Act of 1984, RICO's procedurally efficient criminal forfeiture remedy was only available under the narcotics statutes against the supervisors and managers of the ring subject to prosecution under the Continuing Criminal Enterprise statute. Prosecutors may have been induced to add RICO counts to ordinary narcotics conspiracy charges in order to avail themselves of its automatic forfeiture provisions.

This hypothesis is supported by several inferences that can be drawn from the sample data. RICO indictments seem to be used in narcotics cases with some regularity where the narcotics ring involved was particularly extensive or profitable. In addition, the narcotics cases include a relatively large number of references to application of the forfeiture remedy, or to the involvement of a legitimate business organ-

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33. Before 1984, the maximum fine applicable to defendants convicted for the first time of distributing the most serious categories of narcotics was only $25,000. See 21 U.S.C. § 841(b)(1)(A) (1982) (amended by 21 U.S.C. § 841(b)(1)(A) (Supp. III 1985). Cf. United States v. Young, 745 F.2d 733 (2d Cir. 1984) (seizure at drug dealer's residence of $1,379,240 in cash, jewelry valued at $1,371,105, 29 fur coats and other valuable property), cert. denied, 470 U.S. 1084 (1985). Such an offense now carries a fine of up to $250,000, which is raised to $500,000 for repeat offenders, 21 U.S.C. § 841(b)(1)(A) (Supp. III 1985), or an alternative fine of up to twice the "gross profits or other proceeds" of the violation, id. § 853(a).


36. See Lynch, supra note 1, at notes 266–67 and accompanying text.

37. See, e.g., United States v. Zielie, 734 F.2d 1447 (11th Cir. 1984), cert. denied, 469 U.S. 1189 (1985); United States v. Cauble, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Godoy, 678 F.2d 84 (9th Cir. 1982), cert. denied, 464 U.S. 959 (1983); United States v. Mannino, 635 F.2d 110 (2d Cir. 1980). Since forfeitures will not invariably give rise to appellate issues, the appellate cases do not provide an especially reliable indication of the number of cases in which forfeiture is sought or obtained.
zation as a front for narcotics operations.\textsuperscript{38} Such references suggest that RICO is used where an element of infiltration of legitimate business suggests that invocation of RICO is particularly apt, or where the availability of forfeiture offers an alluring additional sanction.

One might question, however, whether the use of RICO to achieve marginally greater penalties in cases in which extensive financial penalties and extremely harsh jail terms are already available to deter and punish justifies the existence of the statute. As in the case of white collar and labor offenses, if weak financial sanctions in narcotics laws hinder their effective enforcement, a direct approach to that problem that avoids the dangers and complexities of RICO is obviously preferable.\textsuperscript{39} Moreover, Congress in 1984 responded to that problem by enacting a dramatic increase in the fines applicable to narcotics offenses,\textsuperscript{40} providing an alternative fine equal to twice the gross profits or proceeds from narcotics where even the enhanced fines are insufficient,\textsuperscript{41} and adapting the criminal forfeiture procedures pioneered by RICO to all felony narcotics cases.\textsuperscript{42} If additional penalties are needed in the fight against narcotics dealers, RICO is not necessary to provide them.

In some cases, RICO prosecutions are predicated not only on narcotics violations, but on other offenses committed in furtherance of narcotics activity. One common additional offense in RICO prosecutions of criminal activity is corruption of law enforcement. In some cases, the extent of corruption related to narcotics, gambling or prostitution is so extreme that the law enforcement organization itself becomes the focus of prosecutorial interest.\textsuperscript{43} In others, the corruption


\textsuperscript{39} Nor do other possible reasons for the use of RICO in narcotics cases rooted in the subjective motivations of prosecutors justify enactment of a new statute. In some cases, the use of RICO seems to be attributable to the understandable prosecutorial preference for redundancy of charges as a safety precaution. See, e.g., United States v. Mannino, 635 F.2d 110, 118 (2d Cir. 1980) (unnecessary to decide whether RICO forfeiture was proper, since same forfeiture in any event required by 21 U.S.C. § 848 (1982)). Other redundant uses of RICO may stem from prosecutors' tendency to multiply charges to emphasize their view of the seriousness of the case.


\textsuperscript{43} Generally speaking, I have classified these cases in Table I of Lynch, supra note 1, at 735, as corruption rather than narcotics or gambling cases. See, e.g., United States v. Ambrose, 740 F.2d 505 (7th Cir. 1984) (narcotics), cert. denied, 472 U.S. 1017 (1985); United States v. Griffin, 660 F.2d 996 (4th Cir. 1981) (gambling), cert. denied, 454 U.S. 1156 (1982); United States v. Altomare, 625 F.2d 5 (4th Cir. 1980) (gambling);
of law enforcement is merely an adjunct to a prosecution directed principally at the criminal group's primary activities.\(^44\)

In such cases, in addition to its value as a sentence enhancer, addition of a RICO charge also serves to bolster the prosecution’s ability to join charges for trial. Even without RICO, crimes committed in order to obstruct an investigation might be successfully added to an indictment for the principal offenses as "parts of a common scheme or plan,"\(^45\) or treated as aspects of a continuing conspiracy.\(^46\) The use of an overarching RICO offense, however, serves to clinch the prosecution’s ability to present the corruption charges together with the underlying narcotics or other violations.

This motivation for use of RICO is especially strong where the offenses sought to be joined are very serious and prejudicial, and thus particularly likely to be severed in the exercise of the trial judge's discretion.\(^47\) Several cases in which the principal focus of the criminal enterprise was the distribution of narcotics exemplify this phenomenon. *United States v. Thomas*,\(^48\) for example, involved "a huge narcotics ring run by a governing body called the 'Council.'"\(^49\) In addition to narcotics offenses, the predicate acts charged against the defendants, all allegedly important members or associates of the Council, included the murder of workers in the narcotics enterprise thought to be potential informers or otherwise threatening to the power of its leaders.\(^50\) Without RICO, the government’s ability to charge these murders would


47. See *Fed. R. Grim. P. 14.*


49. Id. at 1362. A principal witness against the Council's members was one of its former leaders, Leroy "Nicky" Barnes. Id.; see also United States v. Barnes, 604 F.2d 121 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980).

50. According to the Court of Appeals:

In existence for 12 years—from 1972 to 1983—the Council purchased bulk quantities of pure heroin. Its . . . purpose was to pool the members' resources, share narcotics sources, allocate sales territories, adjudicate disputes among members and handle the narcotics business of jailed members. Each Council member had a separate narcotics business and employed subordinates to dilute and distribute the heroin in his territory. The Council also dealt in cocaine, PCP, and marijuana. Council members routinely approved the
have been dubious. First, except in unusual circumstances, murder is a state offense, not subject to federal jurisdiction. Second, even if jurisdiction could be obtained in some circumstances, a strong argument could be made that the joinder of acts of violence would unfairly prejudice the jury's ability to judge the evidence of narcotics crimes. The effort to avoid these arguments against use of the murder evidence undoubtedly encourages use of RICO in such cases. The use of RICO to incorporate collateral crimes of violence into indictments charging conspiracies to carry on narcotics or other "victimless" activities, however, like its use to overcome jurisdictional boundaries to joinder of related offenses, is only a minor instance of a phenomenon that reaches its fulfillment in massive indictments of organized crime members, or members of other sorts of criminal organizations, for a wide variety of separate types of criminal activities, united only by the common purpose of the organization to promote the long-range economic or political goals of its members. It is now time to consider that phenomenon.

C. The Multi-Faceted Criminal Enterprise

RICO has thus been used by federal authorities to make possible a wide variety of prosecutions that could not have been brought effectively without it. But while these cases show the use of RICO to obtain jurisdiction, to increase available sanctions, and to effect otherwise dubious joinder of offenses, the resulting trials would not look terribly strange to a criminal lawyer who had spent the last twenty years in a Rip Van Winkle-style slumber. For all of the advantages RICO has conferred upon prosecutors, the trials in the cases discussed so far have been easily recognizable as bribery trials, narcotics conspiracy cases, labor racketeering cases, and so on. In each, two or more reasonably closely related criminal acts, usually of the same general nature, have been charged against a reasonably manageable number of defendants. Although the jury is asked, at the end, not only to decide the defend-

757 F.2d at 1362.

51. The indictment in Thomas included one count of conspiracy to murder government witnesses in violation of 18 U.S.C. § 241 (1982). That count apparently did not cover all of the murders allegedly attributable to the defendants; moreover, some weakness in the government's evidence or theory may be indicated by the fact that no defendants were convicted on that count. Thomas, 757 F.2d at 1362.

52. For other RICO cases involving narcotics organizations in which murder was apparently included among the acts charged, see United States v. Mahoney, 712 F.2d 956, 957 (5th Cir. 1983) ("drug dealing [and] the execution and burial of two potential drug purchasers"), cert. denied, 468 U.S. 1220 (1984); and United States v. Hawkins, 681 F.2d 1343, 1346 (11th Cir.) (defendant's argument that murder evidence unfairly prejudiced him in what was essentially a narcotics case summarily rejected "because the indictment includes murder as one of the offenses in the pattern of defendants' racketeering activity . . . even though the indictment did not charge murder"), cert. denied, 459 U.S. 994 (1982).
ants' guilt on the various specific acts, but also to make an overall determination whether those acts formed a "pattern" in connection with an "enterprise," the rules of procedure and evidence, and the ultimate tests of guilt, have hardly been revolutionary.

But what would our attorney Van Winkle make of United States v. Castellano? The indictment in Castellano charged twenty-four defendants in seventy-eight counts. Count 1 of the indictment alone charged all of the defendants and a number of unindicted "co-racketeers" with violating section 1962(c), in that they conducted the affairs of a "crew" or subdivision of an organized crime family through a pattern of eighty separate acts of racketeering, including "twenty-six murders, bribery, extortion, narcotics violations, thefts from interstate shipments, mail and wire fraud, obstruction of justice, transportation of stolen property, and transportation of women for purposes of prostitution," extending over a period of more than eleven years. Several of the acts of racketeering themselves consisted not of individual actions, but of complex conspiracies and schemes, or were technically duplicitive in that they charged more than one crime arising out of the same criminal episode. Numerous acts of racketeering charged could not have been prosecuted as criminal offenses in their own right, either because the statute of limitations had already run on those offenses, or because they had been the subject of previous prosecutions. Moreover, a large number of those acts could never have been charged independently in federal court for lack of jurisdiction, and in any event almost none of the racketeering acts could have been prosecuted in the government's chosen venue, because "virtually every significant racketeering act alleged in the indictment" occurred outside that district.

While the range of activities charged against the enterprise was vast, the involvement of many of the defendants in those activities could only be described as tangential. For example, one defendant was a juror who allegedly took a bribe to fix a prosecution of one of the members of the "crew"; another's entire involvement (limited to three of the eighty racketeering acts charged in the indictment) consisted of hiring members of the crew to bribe and ultimately to murder a witness against his son in a state prosecution entirely unrelated to the affairs of the enterprise; others were involved only in one of the many criminal

55. Id. at 1378–79.
56. Id. at 1379, 1423–24.
57. See id. at 1380–84.
58. See id. at 1413–23. Thirty-six of the eighty racketeering acts alleged in the indictment either "(i) . . . were the subject of prior state proceedings; (ii) . . . have previously resulted in federal convictions; [or] (iii) . . . were the subject of favorable federal rulings." Id. at 1413.
59. Id. at 1388.
affairs of the enterprise, and not at all in its more violent activities. All of these defendants were to be tried together, despite the fact that little of the evidence in what could only be an extraordinarily lengthy trial would have any direct bearing on their own actions. Moreover, the government’s proof would not be limited to the actions of the defendants on trial. The actions and fates of several alleged co-racketeers “not [named as] defendant[s] herein because [they were] murdered” would also be proved, as would the fact that the “defendants are part of organized crime, and particularly the Mafia.”

Our Rip Van Winkle of a defense lawyer would probably regard the notion that such a case could be tried in this form as the product of a demented prosecutor with delusions of grandeur and no understanding of the rules of procedure and evidence. Yet the government’s indictment, and its plan to try the case in a single proceeding, were sustained in virtually every particular by a scholarly and moderate district judge in a careful opinion that persuasively demonstrates that RICO permits all of these consequences.

Nor is Castellano an aberration. The fourteen cases from our sample classified as involving “diversified syndicates,” and most of the cases categorized as involving “violence and extortion” or “political violence,” involved criminal conduct almost as diverse, and problems of trial procedure almost as complex, as the Castellano prosecution. The cases present various patterns. In some, like Castellano, the RICO enterprise is explicitly identified as a traditional organized crime family—in effect, an arm of the Mafia—engaged in the provision of unlawful goods and services (prostitution, gambling, narcotics, loan-sharking), appropriation of the property of others (theft, fraud, extortion) and crimes of violence attendant on the operation and enforcement of such schemes. Others involve groups of criminals that are smaller or that

60. Id. at 1402-07.
61. Id. at 1428.
62. United States v. Castellano, 610 F. Supp. 1359 (S.D.N.Y. 1985) (Sofaer, J.). Judge Sofaer left the bench shortly after writing that opinion to become Legal Advisor to the State Department. One assumes that the judge’s resignation was unrelated to the prospect of presiding over the trial of the Castellano indictment. The judge to whom the case was thereupon assigned decided to sever some of the non-RICO counts of the indictment, but the RICO count is still scheduled to be tried more or less as described in Judge Sofaer’s opinion.
63. See Lynch, supra note 1, at 735 (Table I).
64. See, e.g., United States v. Persico, 774 F.2d 30 (2d Cir. 1985) (Colombo organized crime family; extortion, loan sharking, gambling, narcotics, interstate theft from interstate shipments, bribery, and intimidation by threats, beatings and murders); United States v. Gallo, 763 F.2d 1504 (6th Cir. 1985) (Cleveland organized crime group; murder, narcotics, gambling); United States v. Ruggiero, 754 F.2d 927 (11th Cir.) (“a loose-knit enterprise composed of members of several La Cosa Nostra ‘families’”; gambling, extortion, collection of debts by violence, bribery, robbery, narcotics), cert. denied, 471 U.S. 1127 (1985); United States v. Ruggiero, 726 F.2d 913 (2d Cir.) (Bonanno organized crime family; murder, possession of stolen property, theft from interstate
lack formal affiliation with traditional organized crime groups, but that engage in similar patterns of ongoing, organized criminality.\textsuperscript{65} At least one case involves the efforts of a criminal group to control a legitimate industry through a pattern of criminal activity, in a classic pattern of violent infiltration of legitimate business.\textsuperscript{66}

In addition to these groups of organized criminals, RICO has been used against groups whose methods may sometimes resemble those of traditional organized crime syndicates, but whose goals are quite different—political terrorists. In these cases, too, RICO has enabled prosecutors to link together a wide range of different offenses committed by numerous different individuals, linked together by common aims, overlapping patterns of complicity in different crimes and general awareness that others committed to the same goals were engaged in similar illegal acts, in ways that would be impossible under traditional rules of joinder, jurisdiction and venue. For example, in \textit{United States v. Bagaric},\textsuperscript{67} prosecutors presented evidence of "at least fifty acts of extortion carried out in this country, two murders of extortion victims, several unsuccessful efforts to murder, approximately a dozen bombings and attempted bombings . . . and the transportation of weapons and explosives from coast to coast," committed by a terrorist group of Croatian nationalists.\textsuperscript{68} Although venue was laid in New York, the activities of the ten defendants in the thirteen-week trial centered on Chicago, Los Angeles, Cleveland and Toronto, and included evidence of criminal acts in New York, Pittsburgh, San Francisco, Milwaukee, Akron and Bridgeport—as well as Canada, Paraguay and West Germany—over a

\begin{itemize}
\item United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980) (attempt to monopolize Washington state tavern business through murder, arson, bribery, mail fraud, extortion and gambling), cert. denied, 450 U.S. 985 (1981).
\item 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983).
\item 583 F.2d 748 (5th Cir. 1978) (narcotics, assault, kidnapping, extortion, robbery), modified, 590 F.2d 1379 (en banc), cert. denied, 440 U.S. 962 (1979). United States v. Elliott, 571 F.2d 880 (5th Cir.) (narcotics, arson, theft from interstate shipments, murder), cert. denied, 439 U.S. 953 (1978), is the prototype case in this category.
\item 66. United States v. Zemek, 634 F.2d 1159 (9th Cir. 1980) (attempt to monopolize Washington state tavern business through murder, arson, bribery, mail fraud, extortion and gambling), cert. denied, 450 U.S. 985 (1981).
\item 67. 706 F.2d 42 (2d Cir.), cert. denied, 464 U.S. 840 (1983).
\item 68. Brief for the United States at 3-4, United States v. Bagaric, 706 F.2d 42 (2d Cir.) (No. 82-1247), cert. denied, 464 U.S. 840 (1983).
seven-year period. Although the testimony proved conclusively that the convicted defendants were all committed members of the group, and had each been involved in two or more of the specific violent acts alleged, the cast of characters involved in each act of racketeering proved by the government differed. Several similar prosecutions, involving other extremist political sects, can be cited.

While the number of cases fitting this pattern is small in comparison to the number of cases involving government corruption, business fraud, labor racketeering or more specialized criminal organizations, it is in these cases that RICO presents its most innovative face, and its most significant challenge to orthodox notions of criminal law, procedure and evidence.

D. The Transaction-Based Model of Crime

In order to understand RICO's value in prosecuting diversified illicit enterprises, and the potential abuses of such prosecutions, we must first understand the limits imposed on criminal prosecutions by our conventional understanding of what a crime is, and the potential of RICO to explode those limitations.

Fundamental to our traditional law of crimes, criminal procedure and evidence is a conception of crime that is transaction-bound. Syn-

69. Id. at 3–23. See also 706 F.2d at 46–51.
70. For example, only one of the defendants was linked to the very first act of racketeering alleged, an attempted murder in Pittsburgh in 1975.
71. See, e.g., United States v. Chimurenga, 760 F.2d 400 (2d Cir. 1985) (black revolutionaries; conspiracies to commit armed robbery and engineer prison escapes); United States v. Ferguson, 758 F.2d 843 (2d Cir.) (same), cert. denied, 106 S. Ct. 124 (1985); United States v. Ivic, 700 F.2d 51 (2d Cir. 1983) (Croatian terrorists; murder, arson, explosives). For other prosecutions involving political extremists, but involving less extreme combinations of acts or defendants, see United States v. Arocena, 778 F.2d 943 (2d Cir. 1985) (“Omega 7” Cuban exile group; murder, arson, extortion, narcotics; only one defendant), cert. denied, 106 S. Ct. 1281 (1986); United States v. Dickens, 695 F.2d 765 (3d Cir. 1982) (“New World of Islam” black political/religious group; armed robberies), cert. denied, 460 U.S. 1092 (1983).
72. Of the 236 RICO indictments in the sample, 14 involved diversified criminal syndicates, and another 6 involved violent political groups—together, just under 10% of the total. To these might be added a few of the cases in which the enterprise was principally involved with a less diffuse form of criminal activity, but in which use of RICO as a prosecution vehicle permitted addition of other more-or-less related criminal acts. See, e.g., the narcotics cases discussed supra notes 44–51 and accompanying text. While most of the cases I have classified as principally involving violence and extortion, see Lynch, supra note 1, at 735 (Table I), involve conspiracies of a more limited nature, see, e.g., United States v. Licavoli, 725 F.2d 1040 (6th Cir.), cert. denied, 467 U.S. 1252 (1984), several of them seem to involve broader criminal organizations, and may also present in qualified form problems similar to those of the diversified syndicate cases. See, e.g., United States v. Contreras, 755 F.2d 733 (9th Cir.), cert. denied, 106 S. Ct. 100 (1985); United States v. Russotti, 717 F.2d 27 (2d Cir. 1983), cert. denied, 465 U.S. 1022 (1984); United States v. Thevis, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); United States v. Barton, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981).
thesizers of the common-law tradition tell us that the core of any definition of crime is a particular act or omission.\textsuperscript{73} That act or omission is conceived as taking place in an instant of time so precise that it can be associated with a particular mental state of intention, awareness of risk, or neglect of due care.\textsuperscript{74} The verbs that form the heart of the definitions of particular offenses ("takes and carries away," "engages in sexual intercourse," "damages by starting a fire," "sells a controlled substance") typically refer to single rather than repeated actions, completed in a brief span of time. Where the verbs in penal statutes instead refer to causing a particular result ("causes the death of another human being," "causes serious physical injury")—a process that can extend over a period of time—the focus of inquiry into a defendant's culpability must nevertheless be a specific, momentary act or omission.\textsuperscript{75} Even the crime of conspiracy, which in practice may permit an examination of an extended course of conduct by one or more individuals, does so in the guise of using that course of conduct as evidence from which to infer that a particular act of "agreement" occurred, presumably at a specific, if not precisely ascertainable, moment in time.\textsuperscript{76}

Of course, while the criminal act itself must generally meet this criterion, other elements in the definition of a crime sometimes allow expansion of the relevant time-frame. Attendant circumstance elements can have this effect. For example, in the crime of rape, the act of penetration provides an identifiable instant in which the crime is complete. But the required circumstance that the act of intercourse be the product of forcible compulsion, which really represents the crux of the offense, may significantly blur the time boundary of the inquiry, and make identification of the precise act that makes the conduct criminal (as opposed to the act that completes the offense) more difficult. In


\textsuperscript{74} Although omissions are frequently transaction-specific (e.g., failure to throw a rope to a drowning man), often they are not (e.g., failure to provide nourishment or medical care for a child). The tendency to shade into undefined courses of conduct is in large part what makes liability for omissions problematic.

\textsuperscript{75} It may be argued that this is not entirely true for accomplices. Verbs like "aid" do not describe concrete, particular action, and thus may permit some slurring of the general requirement that criminal liability crystallize in a specific act. For example, in the famous case of Wilcox v. Jeffrey, 1 All E.R. 464 (K.B. 1951), in which a jazz critic was convicted for aiding a performance by an alien not authorized to work in the United Kingdom, did Wilcox become liable when he attended the Coleman Hawkins concert? When he applauded? When he wrote about it? All of these acts seem relevant to the court's conclusion that he provided aid or encouragement. Still, these acts are closely enough linked in time to be considered part of the same transaction. Whether accessory liability could be predicated on a series of distinct acts or transactions, no one of which was sufficient in itself to constitute aid, is more problematic.

\textsuperscript{76} The relation of RICO to conspiracy law is discussed in more detail infra notes 117–154 and accompanying text.
borderline cases of intimidation and implied threat, it may be difficult to determine which, if any, of a series of actions by an accused rapist constituted the culpable application of force. Similarly, defenses such as duress or self-defense make relevant courses of conduct, by the defendant or another, that break the boundaries of the brief transaction that constitutes the charged offense. Most dramatically, the insanity defense can make the defendant's entire life history the subject of a trial.

Most importantly, the mental element of most crimes (and, in the case of conspiracy, the mental act of agreement itself) will often make relevant a course of conduct extending beyond the specific criminal transaction, because of the need to prove such mental states inferentially. For example, intent or premeditation may be shown by prior activities that show planning for the crime. Proof of motive, which is also relevant to proving intent, may require an extensive inquiry into the background of the specific act charged. But almost all of these possible expansions of the scope of the inquiry are anchored to the particular act or transaction in question in the case. The expanded inquiry is always directed at ascertaining the circumstances or mental state of the accused at a particular instant identified by the act charged. Other acts or events are relevant only to the extent they support an inference about that question.

The focus on particular events in defining crimes is not merely a linguistic convention. The requirement that criminal punishment be based on a specific act has deep roots. The very nature of criminal punishment, as distinct from other uses of the compulsive power of the state (such as mandatory treatment for physical or mental illness), requires that a person not be punished for bad character, tendency to commit crime, or even a specifically formulated intention to commit some particular prohibited act. Before the state can deprive a citizen of liberty in a punitive way, the individual must manifest that character or tendency by the commission of some concrete prohibited act.77

In significant part, the purpose of this limitation is the protection of an individual from punishment for thoughts or traits not yet exemplified by actual harmful conduct.78 But the moral basis of the focus on particular acts extends beyond this problem. Even for those accused of committing what is unquestionably a concrete, particular offense, we are careful to guard against the possibility that a defendant may be convicted and punished for bad character rather than for the particular act charged. The insistence on incident-based liability thus has important consequences for our rules of procedure and evidence.

Since the crime with which a defendant is charged took place at a

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77. This doctrine has constitutional status in the United States. See Robinson v. California, 370 U.S. 660 (1962).

78. The law of inchoate crimes, and in particular the question of the point at which preparatory conduct generates liability for attempt, is a principal concrete instance of this problem.
particular moment in time, the relevance of a defendant's actions prior to that moment is always problematic; some tendency to support an inference about what the defendant did or what he thought at the moment of the crime is always necessary for such a prior act or event to matter.\textsuperscript{79} We are particularly concerned about the relevance of prior actions which themselves constitute crimes. Because we fear that a jury will "irrationally" conclude that a person who has committed prior crimes will be guilty of the offense for which he stands accused on a particular occasion, or will dismiss the very question of his present guilt in favor of a condemnation of his general bad character, evidence of prior crimes—as well as evidence of general bad character or criminal associations—is usually excluded from evidence. Such information is admissible only where its particular relevance to the specific act charged greatly outweighs the "prejudice" it occasions by distracting the jury from the only question properly before it—the defendant's actions in the particular incident being examined.\textsuperscript{80} For similar reasons, charges that a defendant is guilty of more than one offense, or that two or more defendants are guilty of joint crimes, may only be tried together where the charges are so closely related that it would be manifestly inefficient to have separate trials.\textsuperscript{81} Where joint trials of different alleged offenses or offenders are permitted, we are—in theory at least—careful to guard against the danger that evidence relevant to one crime will unfairly "spill over" into what ought to be a clinically pure evaluation of the evidence concerning another.\textsuperscript{82} A criminal trial thus tends to focus on a particular incident or transaction.

The transaction-based model is so fundamental to our ways of thinking about criminal law that we tend to take it for granted. Professor Kelman has pointed out the importance of questioning the functions of such "unconscious interpretive constructs" that "shape the way we view disruptive incidents."\textsuperscript{83} He views "narrow time-framing" and a tendency to treat incidents as "disjoined" or separate transactions (central aspects of the transaction-based model) as tools to "buttress the traditionally asserted intentionalism of the criminal justice system," and suppress the political choices inherent in imposing punishment.\textsuperscript{84}

Both the procedural and substantive manifestations of the model

\textsuperscript{79} The defense attorney's standard effort to gain sympathy for her client by eliciting testimony about his personal and family history, to take a common example, is technically objectionable, though generally allowed by prosecutors for tactical reasons and by judges who believe in giving defendants "latitude" in applying the rules of evidence. If such testimony goes on too long, one may expect to hear the judge instruct the attorney to "get on to something relevant soon."

\textsuperscript{80} See, e.g., Fed. R. Evid. 404(b).

\textsuperscript{81} See, e.g., Fed. R. Crim. P. 8.

\textsuperscript{82} See, e.g., Fed. R. Crim. P. 14.


\textsuperscript{84} Id. at 600, 664.
of crime based on specific incidents or acts are indeed associated with a particular conception of the individual as a moral actor. The careful elaborations in our penal codes of the precise nature of the prohibited acts, and the equally careful calibrations of the degree of blameworthiness to be attributed to different prohibited acts, seem to presuppose actors with a free will to avoid the prohibited conduct, who can fairly be apportioned different degrees of guilt or punishment based on the nature of the conduct in which they have chosen to engage. Indeed, our rules of procedure seem to carry this notion of moral freedom even further. The individual is implicitly conceived not only as free in principle to act in accordance with or in violation of defined norms, but also as free at any given moment to make choices at odds with any consistent character that may be deduced from his prior acts. To infer that a defendant committed the particular offense for which he is being tried from the fact that he has previously committed other crimes of a generally similar nature—or, worse still, other crimes of an entirely different nature—is not only unfair, but inconsistent with a fundamental supposition that criminal behavior is punishable because it represents a free choice at a particular moment in time to commit an immoral act.

Indeed, the power of this model of the individual is so strong that some proponents of the "just deserts" model of punishment have argued that the focus on the individual incident rather than on the character of the offender should be extended even into the sentencing process. On this view, a defendant's past conduct or overall character would have no relevance at all in determining an appropriate sentence, giving especially concrete content to the idea of punishing the crime and not the criminal. At this point, however, our tradition until recently has balked, and the sentencing decision has been seen, within limits set by a vague principle of proportionality and by concrete maximum sentences devised by legislatures in correlation to the seriousness of particular offenses, as including appropriate attention to treatment and incapacitation goals based in part on the general character of the offender. The prevalence of legislative proposals for less discretionary, more conduct-based sentencing systems may suggest that the retributive view of crime may be weakening even the citadel of sentencing discretion.

85. The politically “conservative” conception that an individual’s acts are each separately punishable acts of a morally autonomous actor is in this sense the flip side of the “reformist” conception of human perfectability that insists that the former offender should be assumed to have reformed. Both require that character evidence have a limited role to play in the criminal justice system.


But Professor Kelman is wrong in his claim that these moral notions are the sole basis of the transaction model, and that they have served to obscure the function of criminal law as a means of social control. The historical roots of the transaction model reach back far beyond the relatively recent philosophical arguments with which Kelman associates it. Indeed, the notion that individuals (or at least nobles) should not be punished except for defined conduct—according to the law of the land—has roots in the explicitly political demands of the barons at Runnymede not to be subjected to punishment by arbitrary fiat from above. It is precisely because criminal punishment constitutes an exercise of power by the strong over the weak that the weak have demanded limitations on its exercise, including that punishment only be imposed on a showing of particular conduct, defined in advance.

If such a system is to function, a trial has to be about something relatively concrete.\textsuperscript{88} The historical and political roots of the transaction model show, on one hand, that that model cannot merely be dismissed as a mask for fundamentally arbitrary exercises of power; they suggest, on the other, that to those not committed to a purely retributivist position, the attributes of that model are contingent—part of the important but adjustable balance that the criminal law must always maintain between the exercise of social control and the maintenance of individual liberty.

E. The Enterprise Offense

RICO prosecutions of criminal enterprises present a serious challenge to the substantive and procedural implications of this transaction-based model of crime.

This challenge is partially apparent on the face of the statute. Ordinary criminal statutes, as we have seen, define the conduct they prohibit in terms of rather concrete actions that can be committed in an identifiable moment of time. Indeed, two of the three substantive prohibitions imposed by the RICO statute in essence follow this very model. Those sections make it a crime to "use or invest" money from particular sources in a particular way,\textsuperscript{89} and to "acquire . . . any interest" in an enterprise by means of certain conduct.\textsuperscript{90} While the neces-

\textsuperscript{88} I think Professor Schwartz has this relationship between fair procedure and narrowly time-bound definitions of criminal conduct in mind in criticizing Kelman for his "failure to imagine what criminal trials would be like" absent the limits of the transaction model. Schwartz, With Gun and Camera Through Darkest CLS-Land, 36 Stan. L. Rev. 413, 451 (1984).

\textsuperscript{89} 18 U.S.C. § 1962(a) (1982).

\textsuperscript{90} 18 U.S.C. § 1962(b) (1982). In fact, § 1962(b) uses the language "acquire or maintain" an interest. (Emphasis added.) As we have seen, § 1962(b) has been infrequently used, and prosecutions invoking it have generally charged the acquisition of business interests through criminal means, in keeping with the intention of the statute to prohibit infiltration of legitimate entities by criminals. See Lynch, supra note 1, at notes 270–84 and accompanying text. In the rare case in which the "maintain" language has
sity of proving a "pattern of racketeering activity" may well permit proof of a variety of (possibly only distantly related) criminal acts, the act that constitutes the offense is a single, specific action—acquisition of a business interest. The particular moment at which an individual commits the prohibited act can, in theory and usually in practice, be identified. Past acts of racketeering are relevant to the offense charged only if they bear directly on the particular acquisition of an interest charged in the indictment.\footnote{1}

Section 1962(c), in contrast, makes it a crime to "conduct or participate, directly or indirectly, in the conduct" of the affairs of any "enterprise[... through a pattern of racketeering activity."\footnote{2} The very words of the statute reveal an intent to prohibit not any particular, time-bound action, but a course of conduct extending over a potentially lengthy period of time. Although the predicate acts of racketeering are conventional crimes, defined in terms of specific conduct, the actual RICO violation is not identifiable by the physical contours of a particular action or effect. Rather, the defining characteristic of the "pattern of racketeering" is the relationship of certain conduct to other conduct and to the "enterprise," which itself is an abstract construct of certain interpersonal relationships. Whether or not this definition is vague in the technical legal sense of the word,\footnote{3} the level of abstraction in the definition permits the offense to cover a wide variety of conduct for which ordinary language does not supply a single common term.\footnote{4}

RICO is such an oddity among penal statutes that its exponents frequently claim that it is not really a criminal statute at all, arguing that "RICO is a remedial, as opposed to substantive, statute" because "[t]he

any specific force, see, e.g., United States v. Brown, 583 F.2d 659 (3d Cir. 1978), cert. denied, 440 U.S. 909 (1979), the crime is essentially similar to cases normally brought under § 1962(c), and the discussion in the text concerning that section is applicable. See Lynch, supra note 1, at note 273.

91. This requirement poses a practical as well as a theoretical limitation on the number and breadth of criminal acts that can be tied into a single indictment. This is most apparent in 1962(b) cases, where the only relevant racketeering acts are those that were the means of acquiring a single business. If Al Capone acquired a particular vending machine business by a series of acts of extortion, his record of prior criminality would be as irrelevant in a prosecution under § 1962(b) as in any other case; the only crimes that could be shown as part of the pattern would be those involved in the particular scheme to acquire that one business. Section 1962(a) may permit more flexibility, because of the difficulty of tracing proceeds to a particular crime. Still, the prosecution bears the burden of showing that the funds invested came from identifiable acts of racketeering, thus necessitating some proof tying the investment to its sources, and limiting the prosecution's ability to include all it knows about the defendant's criminal career.\footnote{2}


93. See Lynch, supra note 1, at notes 146–51 & 237–60 and accompanying text.

94. Of course, "murder" and "theft" are no more "natural" categories—assuming there is any such thing as a "natural" category—than is "racketeering." They are abstract legal concepts that are culturally imposed on physical events. These categories, however, are sufficiently rooted in broader, nontechnical cultural categories to seem virtually natural to lay citizens.
provisions of section 1962 do not create ‘new crimes’ but serve as the prerequisites for the invocation of increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes.”

But this claim is misleading. In formal terms, RICO is plainly a criminal statute; each of its provisions, including section 1962(c), defines a certain cluster of behaviors as a new crime. Like section 1962(c), a statute establishing a higher penalty for certain murders defined as “first-degree” does not prohibit conduct previously lawful, but rather establishes “prerequisites for the invocation of increased sanctions for conduct which is [already] proscribed.”

But such statutes are certainly substantive criminal laws, in any commonly understood meaning of the term.

The distinction between remedial and substantive statutes is not merely formal or rhetorical; it has serious procedural and substantive consequences. If RICO were truly only a remedial statute which added an additional sentencing consideration to affect the punishment meted out for what were elsewhere defined as criminal acts, there might well be no need to require that the sentence-enhancing element be proved to a jury beyond a reasonable doubt; the recidivist or organized enterprise element might be deferred to a post-trial sentencing hearing, with the necessary findings to be made before a judge subject to a lower standard of proof.

Moreover, it is the fact that RICO does define a crime that entails some of its most dramatic procedural and evidentiary consequences.

95. United States v. Neapolitan, 791 F.2d 489, 495 (7th Cir.), cert. denied, 107 S. Ct. 421 (1986); see also Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies, 53 Temp. L.Q. 1009, 1021 n.71 (1980) (“RICO is not a criminal statute; it does not make criminal conduct that before its enactment was not already prohibited, since its application depends on the existence of ‘racketeering activity’ that violates an independent criminal statute.”). This claim, of course, is flatly wrong as to § 1962(a), which makes criminal an act (the investment of money derived from certain sources) that was previously lawful. The claim is presumably to be understood as principally applicable to § 1962(c).

96. Neapolitan, 791 F.2d at 495.

97. Cf. 18 U.S.C. § 3575 (1985) (prospectively repealed 1984) (statute provides for increased sentence for dangerous special offenders); see also McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986). A statute that significantly increased the available sentence whenever it could be shown that the crime a defendant was convicted of was committed in the course of conducting the affairs of an enterprise through a pattern of racketeering activity would be distinguishable from the statute upheld in McMillan. That Pennsylvania statute provided for a mandatory minimum sentence, not an increase in the maximum, based on a fact that was relatively easily ascertainable—visibly possessing a firearm during the commission of an offense—and did not involve a dramatic increase in either the stigma or the total potential punishment beyond that already attached to the basic prohibition. The Court’s holding may turn out to be conditioned on all three of these facts. Still, the principal factor driving the opinion, as the citations to Patterson v. New York, 492 U.S. 197 (1977), make clear, is a highly formal distinction between elements of crimes and mere sentencing considerations. It is perfectly clear that RICO as now drafted is, for purposes of the McMillan doctrine, a criminal statute.
Since section 1962(c) defines participating in the affairs of an enterprise through a pattern of racketeering as a crime separate and apart from the predicate acts, it does not merely enhance the statutory penalty for the predicate acts, but rather permits the imposition of consecutive sentences for the RICO offense and the predicates.98 Because the RICO offense is a separate crime, the statute of limitations runs only from its completion; thus, every additional racketeering offense committed in furtherance of the enterprise’s affairs within ten years of a previous one extends the statute of limitations for another five years for prosecution of the entire pattern.99 A RICO indictment thus may hold a defendant accountable for acts that took place twenty or more years before the date of the indictment—not for the penalty attached to the predicate crime, but for the separately defined RICO offense.

Even within the ordinary limits of the double jeopardy principle and the statute of limitations, a prosecutor can use section 1962(c) to place before a single jury in a single trial offenses that could not otherwise be included in the same indictment or admitted into evidence at the same trial. Suppose, for example, the authorities develop evidence that the same defendant from whom they have recently made an undercover purchase of narcotics is a member of an organized crime family who committed a contract killing three years earlier. Under our ordinary, transaction-bound rules of procedure and evidence, the defendant would have to be tried separately for each offense. Since the earlier crime is plainly not part of the same course of events as the later, joinder of the two crimes would not be possible; if the homicide had taken place in another state, jurisdictional or venue problems would also prevent joinder.100

In a trial on the narcotics charge alone, moreover, the evidence of a prior homicide committed by the defendant would likely be excluded as irrelevant and highly prejudicial. Evidence that the defendant in a narcotics trial was part of the “Mafia” would surely be excluded as merely prejudicial evidence of the defendant’s character and associations. And the prosecutor presumably would not even think about trying to elicit evidence of crimes that some other member of the same crime family had committed, in which this particular defendant was not personally involved. Evidence of the defendant’s involvement in organized crime or of the murder he may have committed might finally surface after the defendant’s conviction, as part of an argument for a

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100. Moreover, if the evidence of the homicide, though legally sufficient to support a guilty verdict, was relatively weak, a judgment might well be made that the chances of obtaining a conviction did not justify the risks of requiring an important informant to testify, so that case might not be prosecuted at all.
severe sentence.\textsuperscript{101}

If the case could be indicted and tried under RICO, however, all of the evidence regarding this defendant's activities could easily be presented in the same trial. Since the government would have to allege and prove a pattern of racketeering activity, the murder and the narcotics offense could be alleged as elements of the same crime, the violation of section 1962(c). The rules precluding admission of evidence of other crimes, consequently, would simply have no application—evidence of the homicide would not be evidence of a prior crime, but evidence of the very offense charged in the indictment.

Jurisdictional and venue problems disappear, as well. It is irrelevant that the federal government lacks jurisdiction to prosecute ordinary homicides; the crime charged here is racketeering that affects interstate commerce, not murder. The single crime of racketeering, like any other crime, can be prosecuted in any district where a portion of the crime was committed,\textsuperscript{102} so any venue problem with combining crimes committed in different districts disappears.

The government would also have to allege and prove that the crimes were committed in furtherance of the affairs of an enterprise, so the prosecution would be permitted to show the existence, purposes and structure of the organized crime family, and the defendant's membership in it.\textsuperscript{103} Even if no other defendant were on trial, this may necessitate reference to criminal activities committed by other members of the organization, as examples of its continuing nature, hierarchical structure, or purposes as an entity; if the defendant were indicted along with several other alleged members of the same organized crime family, as is commonly done in RICO prosecutions, their crimes would of course have to be proved too. Joining those defendants in the same indictment would automatically be proper, of course; since the defendants were all jointly charged with the same crime—the RICO violation—we are faced not with the joinder of several separate offenses by different actors, but with a single offense all the defendants are alleged to have committed together.\textsuperscript{104}

All of these procedural consequences stem from the fact that viola-

\textsuperscript{101} At this point, ironically, the information that previously had been kept out of the process altogether not only would be permitted to have a potentially dramatic effect on the defendant's fate, but would be admitted into the process in forms that at the trial would have been regarded as so unfair and unreliable as to be excluded. See McMillan v. Pennsylvania, 106 S. Ct. 2411 (1986); United States v. PatICO, 579 F.2d 707 (2d Cir. 1978), cert. denied, 444 U.S. 1073 (1980); Williams v. New York, 337 U.S. 241 (1949).\textsuperscript{102} 18 U.S.C. § 3237 (1985).\textsuperscript{103} See, e.g., United States v. Ruggiero, 726 F.2d 913, 918 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Brooklier, 685 F.2d 1208, 1223 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).\textsuperscript{104} For a typical example of the casual rejection customarily given by appellate courts to arguments for severance in RICO cases, see United States v. Russo, 796 F.2d 1443 (11th Cir. 1986).
tion of section 1962(c) is defined as a single crime, and our procedural system, for reasons alluded to above, attaches considerable importance to the concept of a crime as a unified event, distinct from other crimes. If RICO's effects are principally remedial, in the sense that the statute's importance lies not in the prohibition of certain conduct, but in the procedural and sentencing consequences of committing conduct already defined as criminal, it accomplishes most of those effects precisely by the fact that it is indeed, in formal terms, a substantive criminal statute.

In substance, as well as in form, section 1962(c) defines a substantive crime. The RICO offense is not reducible to the predicate acts of racketeering. If the jury determines beyond a reasonable doubt that the defendant committed those acts, it still must find an additional element before it can convict: that the predicate acts were committed in the conduct of the affairs of an enterprise.105

The significance of this additional element varies considerably in different types of RICO cases. Where, as in the bulk of the labor, business and governmental crimes,106 the enterprise is a more or less formal entity, the structure of the section 1962(c) offense is quite conventional: the prohibited conduct is the commission of the predicate acts, with the relation of the crimes to an enterprise serving as an aggravating factual circumstance. Like most such aggravating factors (possession of a weapon, causing injury, entry at night), the existence of the enterprise and the relation of the criminal conduct to it are relatively easily ascertainable, noncontroversial facts.107

Where the enterprise is an illegitimate association-in-fact, however, the existence of the enterprise is not merely an easily established formal element of proof. Rather, the existence of the enterprise is both potentially controversial and genuinely significant in legally differenti-
ating RICO offenses from mere aggregations of predicate crimes. Indeed, it can be argued that the enterprise element constitutes the essence of the crime. Operation of a criminal organization—unlike operation of a business corporation—is not morally neutral. Nor is it merely an incidental fact about the context in which a criminal act was committed. Rather, it constitutes a distinct species of social harm.

The arguments made by appellants in *Turkette*\(^{108}\) and *Elliott*\(^{109}\) illustrate the importance of the enterprise element. In each case, the defendants' legal and factual claims were that the government had, at best, shown that various individuals had committed various distinct crimes. In effect, they were asserting the factual accuracy and legal necessity of applying a transactional view of crime to their various antisocial acts. The courts rejected this argument, however, holding that the whole offense was indeed greater than, or at least distinct from, the sum of its parts—that, at least on the facts of those cases, it was legitimate to hold the defendants guilty not only of a series of separate criminal transactions, but of entering into a relationship, exemplified by a course of conduct over a period of years, that itself was criminal. It is the operation of the *criminal enterprise* through criminal acts, not merely the commission of the acts themselves, that constitutes the crime of RICO.

But whether or not a group of individuals, who, in various combinations, committed a series of predicate offenses, constituted an enterprise, and whether each of the defendants was part of that enterprise, are not always questions of historical fact. Where a criminal group has a sufficiently tangible organization, it may be possible to confirm the existence of the enterprise, and to identify someone as a “member.”\(^{110}\) But one need not be a “member” of an organization to participate in the conduct of its affairs,\(^{111}\) and, of course, not all illicit enterprises are so conveniently structured. As is often true with the “agreement” that is the *actus reus* of conspiracy, the jury is not necessarily being asked to decide whether a particular event occurred. Rather, it is being asked to impose a conceptual construct on the events that it finds took place.\(^{112}\)

110. Remember the Katzenbach Commission’s attention to the Mafia’s initiation rites. See Lynch, supra note 1, at note 34; see also United States v. Rubio, 727 F.2d 786 (9th Cir. 1984) (search warrant for insignia and other indicia of membership in the Hell’s Angels).
112. If the issue were one of fact, a competent defendant would at least in theory be able to resolve it. Even if no one else can ever be absolutely certain what happened, the murderer himself will in the ordinary case know that he killed someone, and usually has privileged access as well to his own state of mind while acting. (Of course, the mental states made relevant by the criminal law are sometimes so precise and subtle that as a
What the jury is being asked to decide is whether the defendant's acts should be treated as evidence of a commitment to a criminal association.\(^{113}\)

Such a commitment is not, in any conventional sense, an "act." The jury's task is to assess in a global way the nature of the defendant's involvement in a network of criminal activities and associations, to determine whether the total picture of the defendant's criminal career permits the judgment that he has become part of an underworld "enterprise." If character can be defined as the residue of a series of moral decisions, the jury in a very real sense is being asked to make a judgment on the defendant's character.

In making such a judgment, the jury is entitled to rely not only on evidence of the defendant's own crimes, but also on evidence of the crimes of those with whom he is alleged to have thrown in his lot. Such evidence is excluded from the transaction-model trial, precisely because it may distract the jury from its responsibility of deciding what the evidence shows about a particular act. In an illicit-enterprise RICO trial, it is admitted, precisely because the jury is asked to make a judgment not only about what discrete acts the defendant committed at particular moments in time, and what his intention was with respect to each act at those moments, but also about how those acts fit into his entire moral life: Were they parts of a pattern? Were they committed as part of his association with a subculture of crime?\(^{114}\)

RICO illicit association cases thus pose both a substantive and a procedural challenge to the transaction-based model of criminal law. Substantively, the standard legal texts tell us that a distinct act or omission is the core event constituting a crime,\(^{115}\) and academic analyses of practical matter, a person of ordinary intelligence would have difficulty in accurately identifying and reporting his exact intent, so that the jury in effect must often create, rather than find, an understanding of what "happened.") But the enterprise element is sufficiently artificial that a defendant would in many cases be surprised to learn that he was part of one. And his surprise would not necessarily be a defense; courts have suggested that no knowledge or intent with respect to the enterprise element is required for conviction under \(\S\) 1962(c). See, e.g., United States v. Scotto, 641 F.2d 47, 56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981). But see United States v. Castellano, 610 F. Supp. 1359, 1398-1402 (S.D.N.Y. 1985).

\(^{113}\) This question is verbally similar to the familiar aiding and abetting instruction that requires a jury to find that a defendant "in some sort associate himself 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. Bommarito, 524 F.2d 140, 145 (2d Cir. 1975) (citation omitted). In the ordinary complicity case, however, the "venture" with which a defendant is alleged to have associated himself is itself a discrete criminal transaction and usually (though not always), the accomplice's participation also takes the form of one or more specific acts or omissions.

\(^{114}\) Of course, the risk of prejudice persists, because the only way the jury can determine the defendant's participation in the enterprise is by assessing the proof about individual acts, and its view of disputed evidence about those acts will no doubt be affected by evidence tending to show that the defendant was overall a bad actor.

\(^{115}\) See supra note 73.
penal codes, including ones that in some ways radically attack the Anglo-American consensus, are principally concerned with articulating the precise circumstances in which specified acts should be subject to condemnation as crimes. The distinctive nature of criminal punishment, we are told, is that it represents a societal response to and judgment upon particular moral actions, rather than to a person's character, status, or intentions. The RICO illicit association cases, in contrast, demand a more global judgment about a defendant's character and loyalties. To be found guilty, it is not enough that the defendant has committed specific criminal acts; those acts must be part of an ongoing commitment to the values of a criminal organization.

Our procedural and evidentiary rules support the substantive values of the transaction-based model of crime by rigorously focusing the trial process on information that bears directly on demonstrating what happened, in the physical world and in the defendant's consciousness, during the particular transaction under examination. RICO trials, however, permit a much wider exploration of the context of the particular predicate acts, both in the defendant's history, and within the institutions and communities of which he is a part.

F. RICO and Conspiracy

The challenge RICO presents to conventional criminal law thinking is not without precursors. Indeed, it can be argued that the practical and theoretical problems presented by RICO prosecutions have long been festering under the law of conspiracy. There is considerable truth to this observation, although for reasons developed below, RICO constitutes a more extreme departure from the traditional model.

In theory, conspiracy, unlike section 1962(c), functions as an inchoate crime, criminalizing an agreement to perform prohibited acts without regard to the consummation of the criminal plan. If two or more people sit at a table and expressly agree to rob a bank the next day, they are guilty of conspiring to rob the bank. Structurally, the crime fits the transaction model: although the "act" of agreeing is a somewhat bloodless one, at least in this simple hypothetical it is clear that the defendants have done something beyond engaging in antisocial

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116. See, e.g., G. Fletcher, supra note 86.
117. In fact, Professor Johnson's attack on conspiracy law, Johnson, supra note 16, could be regarded as an attack on RICO avant la lettre.
118. Subject to the requirement, in most jurisdictions, that one of the conspirators take some overt act toward fulfillment of the goal. The overt act requirement does little to bring conspiracy more squarely within the transaction model. The requirement does not even exist in some jurisdictions or for all types of conspiracies, and it is widely agreed that the agreement itself is the gravamen of the crime of conspiracy. See 1 Model Penal Code § 5.03 commentary at 452-56 (1985) (discussing overt act requirement).
thoughts or having deformed characters. They have taken a particular step toward accomplishment of social harm that can, at least in theory, be demonstrated to have occurred at a specific time and place.\(^\text{119}\)

In practice, however, three principal complicating factors undermine this theory, and bring conspiracy closer in its effects to RICO. First, even where such a simple express agreement to join in a criminal activity has been made, direct evidence of such an agreement will not often be available.\(^\text{120}\) Absent an informer or electronic surveillance, the authorities will never know when and where the agreement was made, or what were its precise terms. Accordingly, the making of the agreement will ordinarily have to be inferred from the actions of the parties to it. After the bank robbery has occurred, one may determine from the apparently planned coordination of the robbers' actions that an agreement had been made.\(^\text{121}\) Moreover, the agreement need not be express at all—the agreement to commit the crime, though actual, may be made without words.\(^\text{122}\) This further complicates the difficulty of inferring its terms.

Second, the scope of possible conspiratorial agreements is both wide and not clearly defined. It is well established that a single conspiracy can include among its objects the commission of several crimes—either multiple violations of the same statute or violation of several statutes.\(^\text{123}\) Thus, it is perfectly legitimate to charge defendants with conspiring not merely to rob one bank, but to rob several, or to rob a bank and buy drugs with the proceeds, or to commit mail fraud, evade taxes, and obstruct justice. Whether the evidence shows one conspiracy with multiple objects or several distinct conspiracies is essentially a question of fact: "the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects."\(^\text{124}\)

\(^{119}\) I put to one side any question about whether the act described is sufficiently socially dangerous to warrant prohibition, or (assuming it is) whether an inchoate crime of this sort should be held, like an attempt, to "merge" into the completed crime if the plan is consummated. See, e.g., Johnson, supra note 16, at 1150–52, 1157–64.

\(^{120}\) Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943); Glasser v. United States, 315 U.S. 60, 80 (1942). As one court put it, "A conspiracy is seldom born of 'open covenants openly arrived at.'" Lacaze v. United States, 391 F.2d 516, 520 (5th Cir. 1968).

\(^{121}\) This means that, at least in federal practice, the use of conspiracy to prosecute inchoate behavior is rather unusual—the offense is usually added to a substantive charge of a complete offense. See Marcus, Conspiracy: The Criminal Agreement in Theory and in Practice, 65 Geo. L.J. 925, 930–32 (1977).


\(^{123}\) Braverman v. United States, 317 U.S. 49, 53 (1942); accord, 1 Model Penal Code § 5.03(3) (1985).

\(^{124}\) Braverman, 317 U.S. at 53. Because the question of the scope of the conspiratorial agreement is a question of fact, it has been held to be an issue "singularly well-suited to resolution by the jury." United States v. McGrath, 613 F.2d 361, 367 (2d Cir. 1979), cert. denied, 446 U.S. 967 (1980). The issue is so appropriate for jury resolution
This would present little problem for traditional theory if we had a tape recording of the meeting at which a group of criminals agreed to their unlawful plan. But when the breadth of potential conspiratorial agreement is combined with the likely reliance on circumstantial evidence to prove the agreement, and the possibility that the agreement was only implicit in any event, the concept of agreement begins to lose its moorings. In the context of a typical narcotics conspiracy prosecution, it is plain that all of the participants at various levels of a distribution network have not “agreed,” even implicitly, on any precise series of actions; at best, various individuals at different levels have agreed to engage in certain specific acts of possession or distribution, with the understanding that the acts and agreements of others at other levels are necessary for the success of their venture. The nature of the required agreement has subtly changed from the paradigm with which we began: the typical conspiracy to distribute narcotics does not involve an express agreement to engage in specific acts, but a series of mutually unconnected decisions to engage in a business known to involve a high degree of mutual interdependence.125

The requirement of agreement is further diluted by the frequently repeated doctrine that a conspirator does not need to agree to, or even to know about, all of the objects of the conspiracy in order to be liable for joining it.126 This doctrine is virtually an inevitable consequence of allowing the formulation of indictments charging conspiracies with multiple objects that extend over a period of time. It is extremely likely that the parties to such an agreement will change over time, and that adherents may be recruited to execute portions of the plan without being made aware of all of its contours.127 It serves the convenience of prosecutors and courts to say that these new recruits are “members” of

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125. The case most often cited in treatises and casebooks for this proposition is United States v. Bruno, 105 F.2d 921 (2d Cir.), rev’d on other grounds, 308 U.S. 287 (1939), but it is illustrated daily in federal narcotics prosecutions.


127. Indeed, those contours themselves often develop and change over time. As the drafters of the Model Penal Code have pointed out, if Braverman’s emphasis on unity of agreement requires “inquiry into the precise time at which each objective was conceived, it is unrealistic”—different objectives no doubt evolve over time. 1 Model Penal Code § 5.03 commentary at 439 (1985). But as with so many other fine questions about the scope of conspiracy law, the courts have found a verbal formula to fudge the problem. “The courts generally avoid such inquiries . . . by finding that the original agreement subsequently came to ‘embrace’ additional objects.” Id. What this “embrace” consists of other than a new agreement is unclear.
the conspiracy. But when each conspirator knows only some of the objects of the "agreement," it becomes difficult to see what reality remains to the notion of agreement. Moreover, because the overall agreement itself is usually merely an inference from the concrete offenses committed by the putative conspirators, what can be found in retrospect to be a single "conspiracy" embracing multiple objects may well consist merely of a series of crimes united only by rather casual links among the perpetrators.

Third, as with RICO, the procedural and evidentiary consequences directly or indirectly associated with a conspiracy charge make conspiracy charges attractive to prosecutors, and create possibilities of abuse. Charging that various substantive offenses are objects of a unitary conspiracy usually permits joinder of those offenses in a single trial, permits selection of a favorable venue, and facilitates introduction of hearsay evidence. These procedural advantages more readily account for the widespread use of conspiracy charges in federal criminal cases than any difference between the substantive elements of conspiracy and consummated offenses.

When these factors are considered, the widespread assumption that RICO vastly expands the ambit of possible conspiracy prosecutions becomes somewhat puzzling. Let us assume that our hypothetical conspirators sitting at the table have more resources, and more ambition, than a handful of potential bank robbers. The proposal on the table, in consequence, is that the conspirators would pool their existing networks for narcotics distribution, gambling and prostitution; divide up the city into territories in which each would have an exclusive franchise; intimidate potential informers or complainants by murder and arson; and diversify their activities by infiltrating members of the ring into a securities firm in an effort to steal negotiable bonds and launder the proceeds of their illicit activities. Had the FBI been recording this meeting on a court-authorized "bug," is there any reason why those present at the meeting could not be charged with conspiring to commit a series of state or federal crimes?

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129. In fact, the inclusion of a substantive conspiracy charge in an indictment is essentially irrelevant to the operation of the rule permitting introduction of co-conspirators' hearsay statements, see, e.g., R. Lempert and S. Saltzburg, A Modern Approach to Evidence 394 (2d ed. 1982); Marcus, Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective, 7 Am. J. Grim. L. 287, 288 (1979), but the overlap of the substantive and evidentiary concepts and lawyers' and judges' occasional ignorance of the distinction make for a common misperception that special hearsay rules apply in conspiracy cases.

There is no readily apparent reason why not. Certainly, the diversity of the criminal objects of the conspiracy should not be an obstacle. As noted above, so long as the conspirators have joined in a single common agreement, that agreement can have as its object the violation of several statutes. There is no conceptual reason why an agreement to commit fraud, evade taxes and obstruct justice should be indictable as conspiracy, while an agreement to spread the net more widely and commit a broader range of crimes should not.

_United States v. Elliott_, 131 the decision that popularized the notion of RICO as a super-conspiracy statute, contains the most extensive judicial effort to distinguish between conspiracy law and sections 1962(c) and (d). 132 The Elliott court announced that “RICO has displaced many of the legal precepts traditionally applied to concerted criminal activity. Its effect in this case is to free the government from the strictures of the multiple conspiracy doctrine and to allow the joint trial of many persons accused of diversified crimes.” 133 But the court’s discussion of just how this is so is perplexing.

The crux of the court’s “doubt that a single conspiracy could be demonstrated” rests essentially on two observations. 134 First, the court points out that various subgroups of the alleged conspirators had no contact with each other. 135 But as we have seen, and as the Elliott court elsewhere concedes, “‘a party to a conspiracy need not know the identity, or even the number, of his confederates’”—let alone have direct contact with them. 136 This could hardly be a basis for rejecting a jury finding of a single conspiracy.

Second, and more significantly, the court states that “[t]he activities allegedly embraced by the illegal agreement in this case are simply too diverse to be tied together on the theory that participation in one activity necessarily implied awareness of others.” 137 Essentially the court here is holding that the prosecution has failed to meet its burden

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131. 571 F.2d 880 (5th Cir. 1978), cert. denied, 439 U.S. 953 (1979).
132. Id. at 900–03.
133. Id. at 900.
134. Id. at 902. One commentator has concluded from the court’s earlier discussion of “wheel” and “chain” conspiracies, id. at 900–01, that the court would not have found a § 371 conspiracy in Elliott because the activities of the defendants fit neither the “wheel” nor the “chain” pattern. Note, supra note 130, at 112-13. But there is no requirement that a conspiratorial agreement fit any particular visual metaphor. As Judge Friendly noted more than 20 years ago, “As applied to the long-term operation of an illegal business, the common pictorial distinction between ‘chain’ and ‘spoke’ conspiracies can obscure as much as it clarifies.” United States v. Borelli, 336 F.2d 376, 383 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965).
135. Elliott, 571 F.2d at 902 (“Foster had no contact with Delph and Taylor during the life of the alleged conspiracy. Delph and Taylor, so far as the evidence revealed, had no contact with Recea Hawkins.”).
136. Id. at 903 (quoting United States v. Andolschek, 142 F.2d 503, 507 (2d Cir. 1944)).
137. Id. at 902.
of proving that a single agreement existed. If the government is relying on inference to show the overall agreement, the inference must be sufficient to persuade a reasonable jury beyond a reasonable doubt that the common plan existed, and it is not unreasonable to argue that mere proof of a collection of entirely unrelated crimes is insufficient for this purpose.

But then, how does RICO come "to the rescue"? The problem, according to the court, is that in organized crime cases, the need to infer a common agreement "inhibited mass prosecutions because a single agreement or 'common objective' cannot be inferred from the commission of highly diverse crimes by apparently unrelated individuals." The solution is that "RICO helps to eliminate this problem by creating a substantive offense which ties together these diverse parties and crimes." Since the RICO objective is to "participate in the affairs of an enterprise through a pattern of racketeering activity," and not to commit the particular substantive crimes that serve as the predicate acts, the lack of apparent relation between the crimes is irrelevant "so long as we may reasonably infer that each crime was intended to further the enterprise's affairs."

This is simply double talk. According to the court's analysis, what was missing for conviction of a "traditional" conspiracy was not a legally sufficient objective, but evidence sufficient to support a finding that that objective existed in this particular case. Explaining the inadequacy of the evidence under conventional conspiracy law, the court had stated:

Even viewing the "common objective" of the conspiracy as the raising of revenue through criminal activity, we could not say, for example, that Foster, when he helped to conceal stolen meat, had to know that J. C. was selling drugs to persons unknown to Foster, or that Delph and Taylor, when they furnished counterfeit titles to a car theft ring, had to know that the man supplying the titles was also stealing goods out of interstate commerce.

The court thus seems to accept that an agreement to raise revenue through miscellaneous criminal activity is indictable as a conspiracy, holding only that the evidence here did not show such an

138. Id.
139. Id.
140. Id.

141. Id. at 902-03. The Elliott court was "convinced" that Congress specifically intended "to authorize the single prosecution of a multi-faceted, diversified conspiracy by replacing the inadequate 'wheel' and 'chain' rationales with a new statutory concept: the enterprise." Id. at 902. As others have argued, Note, supra note 130, at 121-23, and as demonstrated above, see Lynch, supra note 1, at notes 51-118 and accompanying text, the notion that Congress intended this result is pure fantasy.

142. Elliott, 571 F.2d at 902.
agreement.\textsuperscript{143}

But if there was insufficient proof to infer a single agreement to "raise revenue through criminal activity," how can the proof in turn be sufficient—as the court says it must be—to permit finding "agreement on an overall objective" to "further the enterprise's affairs"?\textsuperscript{144} After all, the enterprise in this case consists of nothing other than an association to raise revenue by committing crimes.\textsuperscript{145} Conversely, if it is permissible to infer from a defendant's participation in particular concrete crimes that he simultaneously agreed to participate in the affairs of an overarching enterprise, why not just rename the "enterprise" a "conspiratorial agreement with multiple criminal objects" and infer his agreement to that?\textsuperscript{146}

Within the court's confusion, however, lurks a truth. Although the borders of permissible conspiracy prosecutions remain unclear, and in theory encompass an agreement to form a gang and commit whatever crimes the leadership orders, the broad agreement by courts and commentators that RICO still somehow expands the range of conduct that can be prosecuted as a conspiracy strongly suggests that courts and prosecutors recognized limits, if not on the kinds of agreement that could in principle be indicted as conspiracies, at least on the kinds of criminal conduct that would be permitted in practice to support an inference of a unifying scheme. The \textit{Elliott} court was no doubt both sincere and accurate in stating that it would not have permitted the defendants there to have been convicted of a simple conspiracy. And whatever courts might have accepted if tested, few precedents can be found in "traditional" conspiracy cases for agreements of the breadth and complexity of RICO illicit association cases involving diversified criminal syndicates.\textsuperscript{147} RICO thus may be better seen as the occasion

\textsuperscript{143} The court's conclusion is probably right, although the reason given in the quoted passage is subtly wrong. If the members of the "J.C. Hawkins Gang" had agreed to unite their efforts to produce revenue by committing whatever crimes J.C. could dream up, it could not matter that when Foster helped conceal the stolen meat, he did not know that J.C. was selling drugs—so long as he had agreed to the overall scheme, the fact that he did not know all the specific objects (or more accurately, the specific means by which the unifying object was to be accomplished) would not defeat his liability for the single conspiracy. See supra notes 126–127 and accompanying text.

\textsuperscript{144} \textit{Elliott}, 571 F.2d at 902–03.

\textsuperscript{145} See id. at 904 (defining the "essential nature" of the enterprise as "to associate for the purpose of making money from repeated criminal activity").

\textsuperscript{146} Thus, the principal problem with the \textit{Elliott} court's claim to have discovered a radically new form of conspiracy is not that it is unsupported by the legislative history, Note, supra note 130, at 116–17, or that its expanded notion of conspiracy is undesirable, id. at 109, Holderman, Reconciling RICO's Conspiracy and Group Enterprise Concepts with Traditional Conspiracy Doctrine, 52 U. Cin. L. Rev. 385 (1983), but that it is self-contradictory.

\textsuperscript{147} The continuing, and even increasing, prosecution of cases like Castellano demonstrates that Holderman was premature in suggesting in 1983 that a retreat from \textit{Elliott} was at hand. Holderman, supra note 146, at 393–402. While the enthusiastically expansionist rhetoric of \textit{Elliott} may find little reflection in later cases, opinions such as United
for a change in judicial and prosecutorial policy than as a provider of new theoretical concepts.

Three points need to be made about this analysis, however. First, the change in policy itself is significant. Whether RICO conspiracies involve the recognition of a new conspiratorial objective or greater latitude for prosecutors to charge and juries to find agreements that—had they been express and proven by direct evidence—would always have been recognized as illegal conspiracies, the prosecutions that result are distinctly broader than had previously been undertaken. Earlier conspiracies, however large and long-lasting they were alleged to be, typically were bounded by a single type of illegal activity (such as narcotics or gambling) or by an easily described intermediate-range objective involving a continuous flow of activity (such as conspiracies to commit securities fraud and evade taxes, or to hijack trucks, kidnap drivers, and bribe policemen). RICO prosecutions, as we have seen, have not been so limited.

Second, by incorporating state crimes as predicate activity, RICO does in fact expand the range of criminal objects that can be prosecuted in a single federal prosecution. Yoking the plenary subject matter jurisdiction of the states to the plenary geographic jurisdiction of the federal government permits unification of offenses that could not previously have been brought together in a conspiracy prosecution in any jurisdiction. This is particularly significant in organized crime cases, where it permits unified prosecution of multiple crimes of violence that would previously have been regarded as unrelated.

Third, by creating a substantive offense worded in terms of a course of conduct, RICO constitutes a theoretical break with the transactional model of crime. Section 1962(c) explicitly recognizes a crime that can be described as a course of conduct involving relationships with criminal groups, rather than as a single moral act. Although conspiracy prosecutions in practice permit presentation of a course of con-
duct in a single trial, in theory at least the crime remains defined in terms of a single act of agreement.

This conceptual change may have practical consequences. However attenuated the concept of agreement becomes in the actual administration of conspiracy law, the need to anchor the crime in a hypothetical instant of agreement may have helped courts to maintain some boundary around the kind of conduct that would be permitted to be tried as a unitary conspiracy. The fiction that all of the crimes charged were part of a specific agreement could only be maintained if it plausibly could be imagined that the core players at least could have sat together and agreed—even if it was clear that they did not in the particular instance do so. “Participation in the affairs of an enterprise” more accurately captures the reality of what fringe participants in a conspiracy do than “agreeing” to the overall objectives of its core members, and therefore permits easier inferences of guilt.

While the Elliott court was concerned with the relation between ordinary conspiracies and RICO conspiracies under section 1962(d), the effect of sections 1962(c) and 1962(d) in these respects is essentially identical. Indeed, the difficulty of distinguishing between section 1962(c) and section 1962(d) in illicit association cases reflects the radical difference between those cases and other RICO violations.

A single individual can violate section 1962(a) or (b) or (c) in the context of a legitimate enterprise, without the aid of accomplices. A conspiracy to violate these sections therefore reflects a comprehensible concept and, subject to the debate about whether conspiracy ever identifies a harm distinct from the substantive offense that is its object, constitutes a distinct crime. In the illicit enterprise cases, however, the overlap between the completed and conspiracy offense is total. At least if a single criminal cannot be both an enterprise and a defendant, the criminal enterprise whose affairs are conducted through a pattern of racketeering can only exist to the extent its members have agreed to form it. Each individual member, moreover, can only be guilty of conducting his affairs through a pattern of racketeering to the extent that he knows that his particular crimes are part of a larger criminal enterprise with which he has voluntarily associated himself—precisely the mental state required to join the RICO conspiracy.


149. The statement found in some opinions that § 1962(c) requires no mental element beyond that required to commit the predicate offenses, see, e.g., United States v. Biasucci, 786 F.2d 504, 512 (2d Cir.), cert. denied, 107 S. Ct. 104 (1986); United States v. Scotto, 641 F.2d 47, 56 (2d Cir. 1980), cert. denied, 452 U.S. 961 (1981); United States v. Boylan, 620 F.2d 359, 361-62 (2d Cir.), cert. denied, 449 U.S. 833 (1980), may make sense in the context of a legitimate organization, where the corruption of a legitimate institution is merely a byproduct of the commission of the predicate crimes, and in any case is necessarily known to the actor. But to hold that a defendant in an illicit enterprise case need not know that his crimes have any relevance to a broader enterprise
This overlap does not mean that courts were wrong to reject the arguments that section 1962(d) is an incoherent effort to penalize "conspiring to conspire," 150 or that multiple punishment for violating sections 1962(c) and (d) violates the double jeopardy clause. 151 An inchoate conspiracy to violate section 1962(c) is a comprehensible crime, if one rarely to be encountered. Had they been arrested immediately after their conclave, the conspirators deciding to found an organized crime syndicate hypothesized above would have violated section 1962(d), but not section 1962(c). 152 And so long as the Blockberger rule is applied at the level of abstract elements of the offense rather than in the context of the facts of a particular case, 153 it remains true that section 1962(c) is a separate offense from section 1962(d) because an agreement is not a formal element of the substantive offense. But it does mean that in the context of illicit enterprise prosecutions, the prohibition of conspiracies serves no purpose and should not be included in a modified statute.

Traditional conspiracy law, in short, is an important precursor of RICO, and indeed in theory might well encompass many of the results that have been reached with that statute. The limits of traditional conspiracy law are to be found not in the types of goals that a conspiratorial agreement could in theory have, but in judicial policing of the inferences that would be drawn from participation in various kinds of crimes. Within those limits, conspiracy law has fostered an erosion of the transaction model of criminal law and criminal procedure. Like RICO, conspiracy permits prosecutors to present complex events in a single criminal proceeding, and to avoid focusing on particular, identifiable acts or transactions. 154 But RICO has been the vehicle by which


152. See text following note 130 supra. This would be true even if one of the conspirators had not agreed that he personally would commit more than one predicate act. It is not necessary that a conspirator agree that he personally will commit the acts necessary to make him liable for the substantive offense. The majority view on this issue is therefore correct. See United States v. Adams, 759 F.2d 1099, 1116 (3d Cir.), cert. denied, 106 S. Ct. 336 (1985); United States v. Carter, 721 F.2d 1514, 1529–31 (11th Cir.), cert. denied, 469 U.S. 819 (1984); United States v. Brooklier, 685 F.2d 1208, 1220 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983). Contra, United States v. Ruggiero, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); United States v. Winter, 663 F.2d 1120, 1136 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983).


154. A few other statutes deserve mention in this respect, though all, because of
courts have considerably expanded those limits, and thus permitted
still greater departures from the transaction model.

G. The RICO Model Evaluated

1. The Challenge to Substantive Law. — Much of the criticism of RICO
implicitly assume the immutable validity of the conventional model of
criminal law and procedure; the critics apparently believe that to note
the ways in which RICO departs from the conventional is sufficient to
condemn it. But the transaction-based model of criminal law is not
beyond challenge. To evaluate the legitimacy of the RICO illicit enter-
prise cases, we must question why we have that model, whether we
abide by it in practice, and what it costs us to preserve it.

One value served by the transaction model of crime is its preclu-
sion of punishment in the absence of behavior manifesting a concrete
threat of harm to legitimate social interests. The notion that a defend-
ant is being punished merely for his character or status, or for the dan-
ger that he potentially represents, is often said to be offensive to our
concepts of fairness. A person may be a seething mass of antisocial
ideas, repulsive character traits, dangerous tendencies, and even con-
crete evil plans, but he is neither a criminal nor subject to punishment
until he commits specific proscribed acts. Even if society might gain by
engaging in preemptive strikes against such villains, it is essential to the
liberty and security of ordinary citizens that government not be permit-
ted to deprive them of freedom unless they violate clearly defined
norms. "Character" or "predicted danger" are flexible and unpredict-
able standards of decision, too easily used as tools of oppression.

These substantive concerns, however, are not directly violated by
RICO. Although the distinguishing features of RICO are its somewhat
amorphous associational and course of conduct elements, a fundamen-
tal prerequisite of a substantive RICO violation is the commission of
particular criminal acts. These predicate racketeering acts are them-
soever conventional, transactionally defined crimes, requiring the com-
mission of particular conduct for their violation. RICO does not permit

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their subject matter limitations, are far less radical than RICO. The continuing gam-
(1982), provide enhanced penalties for engaging in specified types of continuous in-
volve ment in crimes of those kinds. And one of the many attractions of the mail and
wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (1982), to government attorneys is un-
doubtedly the latitude they permit in framing the fraudulent scheme alleged. The
scheme can be as narrow as cheating a particular person in a single transaction, or as
broad as running a perversely fraudulent financial enterprise.

155. Tarlow's thorough and thoughtful articles, Tarlow, RICO Revisited, 17 Ga. L.
Rev. 291 (1983); Tarlow, RICO: The New Darling of the Prosecutor's Nursery, 49 Ford-
ham L. Rev. 165 (1980), are essentially of this type.

156. See, e.g., United States v. Salerno, 794 F.2d 64 (2d Cir. 1986) (holding uncon-
stitutional as a violation of due process preventive detention of criminal defendants to
a person to be convicted on the basis of his thoughts, tendencies, intentions, or character alone; defined and concrete antisocial acts are a part of the definition of the crime.

A comparison with the unconstitutional statute in *Robinson v. California*\(^\text{157}\) is instructive. California law made it a crime to be a narcotics addict, without requiring any particular narcotics-related action. The Supreme Court's opinion could be read as suggesting two possible grounds for finding this statute offensive: the absence of a concrete proscribed act and the defendant's arguable inability to control his actions. We now know that the first of these grounds was controlling; nothing in the *Robinson* principle precludes punishment of the addict's possession or use of narcotics.\(^\text{158}\) The critical defect of the statute was that it did not require proof that the defendant had actually done anything within the state's boundaries.

RICO does not contravene the *Robinson* principle. It is not a crime under section 1962(c) to have the character or status of a racketeer, but to be a racketeer who commits acts of racketeering. Nor would RICO raise the problems associated with the second branch of the *Robinson* case. To the extent that the elements of association with an illicit enterprise and pattern of criminal conduct define a "status" of "racketeer," that "status" is neither passive (unlike addiction, it cannot be acquired *in utero* or by medical treatment) nor uncontrollable (unlike addiction, continued involvement in the criminal enterprise is not the product of physiological compulsion).

Nevertheless, RICO does make aspects of a defendant's background and associations an aggravating factor in a defined crime. But our law has never held that such factors are irrelevant to the quantum of punishment that can be administered to one who has violated concrete norms. The practical operation of law enforcement, in fact, frequently aims to do precisely what a purely retributive model of criminal law tells us is illegitimate: to punish based on character and propensity rather than on the condemnation of specific actions. Considerations of "character" and "danger to the community," often said to be banished from the definition of criminal conduct, pervade the critical discretionary decisions of all three of the agencies responsible for applying those definitions: prosecutors, juries, and sentencing judges.\(^\text{159}\)


\(^{159}\) While such considerations are rarely directly invoked in definitions of crimes (though they sometimes are, as in laws prohibiting possession of weapons by ex-felons), it may well be argued that they implicitly give shape to important substantive criminal law doctrines. The doctrine of provocation in the law of homicide, for example, may reflect a judgment about the character of the offender in such a case as much as about the gravity of a particular act. Providing a complete defense in cases of duress may
A defendant's prior criminal acts and associations with organized criminal groups, as well as all sorts of more amorphous features of his character, are permissible factors for a judge to take into account in imposing sentence, and are regularly used for that purpose. The current discontent with broad judicial sentencing discretion does not, for the most part, dispute the wisdom of basing sentencing decisions on the character of the offender as well as of the offense; rather, the goal is to reduce the perceived unfair disparity of sentencing by systematizing the value to be assigned to various factors. The Supreme Court's recent death penalty jurisprudence, indeed, requires capital sentencing to take account of a broad range of mitigating factors.

The acceptability of such considerations in the exercise of prosecutorial discretion and jury nullification is less well documented, since those discretionary features of the system are even less subject to appellate oversight than sentencing. But any experienced plea-bargainer knows that a defendant's prior record is a critical determinant of the treatment the defendant will be offered. Nor is this practice highly controversial. Few would condemn a prosecutor for offering leniency to a young bank teller with no criminal record and a stable background who embezzled a sum of money, while insisting on prosecuting another teller who had committed a similar act, but who had prior con-

reflect an assessment of the character, and predictive assumptions about the danger to the community, of someone who commits an unjustified criminal act only under extreme pressure, more than an assessment that the actor was blameless. For a discussion of the role of evidence of character in proving offenses, see Uviller, Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845 (1982).


161. See, e.g., 28 U.S.C. § 991(b) (Supp. III 1985) (purposes of United States Sentencing Commission). While some academic questioning of the relevance of character to sentencing has taken place, see supra note 86 and accompanying text, serious legislative reform proposals have all taken the character of the offender, at least as reflected by prior convictions, into account. See, e.g., 28 U.S.C. § 994(d) (Supp. III 1985) (Sentencing Commission to consider relevance of various elements of background and character); New York State Comm. on Sentencing Guidelines, Determinate Sentencing Report and Recommendations 6 (1985) (severity of crime and prior conviction record of offender as "cornerstones" of proposed presumptive sentencing structure); see also 28 C.F.R. § 2.20 (1986) (parole guidelines based on offense severity and offender characteristics).


victions and who was believed to be a member of a youth gang. Such
discretion is clearly not based on the relevance of the prior conduct to
any element of the potential charge, but on a substantive judgment
about the seriousness to be attributed to the defendant's misconduct in
light of a factual context beyond the temporally and spatially limited
transaction with which the penal code is concerned.

Jurors' exercise of their power to enter a verdict of acquittal
notwithstanding the facts and the law is an even murkier
topic, but it
seems clear that a conviction is less likely if the jury is not persuaded
that the defendant is a bad actor who deserves condemnation. Cer-
tainly this is the practical belief of most prosecutors and defense attor-
neys. Trial lawyers devote considerable effort to influencing the jury's
perception of a defendant's character. Apparently these efforts pay off.
Studies of jury behavior indicate that jurors' reactions to the character-
istics of the defendant play a major role in explaining verdict disagree-
ment between judges and juries.

The importance of these considerations to the substantive con-
cerns of the criminal law is obvious. The protection of the public from
criminal conduct is a central purpose of organized society. Given the
substantial evidence that a large proportion of the criminal acts are
committed by a relatively small number of repeat offenders, it makes
sense to single out such offenders for special attention from prosecu-
tors, investigators and sentencers. Organized criminal groups in par-
ticular make possible the infliction of greater harm than can be
committed by individuals. Critics of conspiracy law have justly
pointed out that this "group danger" argument does not provide a suf-
cient rationale for the separate punishment of every agreement cov-

164. For example, it is not based on the likely factual accuracy of a defendant's
claim that money had been taken by mistake.
165. See, e.g., the extended discussion by Judges Leventhal and Bazelon in United
167. See, e.g., Cohen, Incapacitation as a Strategy for Crime Control: Possibilities
and Pitfalls, in Crime and Justice 1 (M. Tonry & N. Morris eds. 1983); M. Moore, S.
Estrich, D. McGillis & W. Spelman, Dangerous Offenders 23–62 (1984); United States
Dep't of Justice, Uniform Crime Reports—1974 46–48 (1975), reprinted in 1 L. Radzi-
nowicz & M. Wolfgang, Crime and Justice 151–55 (2d ed. 1977); D. West, Delinquency
71–96 (1982); M. Wolfgang, R. Figlio & T. Sellin, Delinquency in a Birth Cohort (1972);
168. The classic formulation of this argument is to be found in the Supreme
Group association for criminal purposes often, if not normally, makes possible
the attainment of ends more complex than those which one criminal could ac-
complish. Nor is the danger of a conspiratorial group limited to the particular
end toward which it has embarked. Combination in crime makes more likely
the commission of crimes unrelated to the original purpose for which the group
was formed. In sum, the danger which a conspiracy generates is not confined
to the substantive offense which is the immediate aim of the enterprise.
ered by the conspiracy concept. But many of the RICO illicit association cases exemplify precisely the sort of case in which even the critics implicitly acknowledge that the "group danger" argument makes sense. Many of the crimes charged in those cases could not have been committed without the existence of an organized enterprise.

Moreover, criminal punishment is not only aimed at controlling or reducing the tangible harms that flow from particular forms of antisocial conduct. An important function of criminal justice is the reinforcement of the solidarity of the law-abiding community by the formal condemnation of offenders. This function is most effectively served where it is manifest that the criminal being punished is not merely a person who has committed a single mistake, but someone who can plausibly be cast as a person of deeply flawed character who has chosen to live outside the value system of the dominant group.

This last perception, indeed, may be particularly relevant to the wrong committed by organized criminals. Professor Fletcher has argued strongly that recidivist criminals should not be punished more severely than first-offenders out of resentment towards their rebelliousness. Unlike parents of defiant teenagers, he contends, lawmakers in a liberal society "are not entitled to react to a 'persistent' criminal as though their personal authority were challenged." But a criminal who chooses to give his allegiance to the code of the Mafia rather than to the code of civil society is not merely challenging the "personal authority" of lawmakers. He is inflicting a deep injury on the social fabric, both by declaring his own intent to prey upon those

169. See, e.g., Johnson, supra note 16, at 1151; Marcus, supra note 121, at 930–38.
170. Professor Johnson acknowledges, for example, that "[u]ndoubtedly some criminal combinations are more dangerous than individual criminals," and cites the Brown Commission's "Organized Crime Leadership" statute, see Lynch, supra note 1, at note 121, and infra note 215 and accompanying text, as an example of a "more discriminating" way of taking account of this danger. Johnson, supra note 16, at 1151–52; see also Marcus, supra note 121, at 934 ("the group danger argument is correct in many cases").
174. Even in the case of the ordinary recidivist, of course, what is at stake is not the personal authority of the lawmakers, but the collective authority of the polity in whose name the laws are made. In the ordinary case, however, I would agree with Professor Fletcher that enhanced punishment of repeat offenders must be justified in terms of predictive and protective goals rather than by any such "defiance rationale."
who agree to live within the law and by challenging the law-abiding citizen's belief that adherence to the norms of society is required, protected, and rewarded.

For the criminal justice system to reinforce adhesion to social norms, it must not only distinguish those to be condemned from ordinary citizens who merely yield to temptation, it must also actually and forcefully condemn those it finds worthy of condemnation. Little is more debilitating to the willingness of ordinary citizens to live within the law than a perception that persistent violators of the law are unpunished. In the area of organized crime, the disparity between social reality and legal reality can become particularly acute, as the legal system strives to isolate a defendant's particular acts from their personal and social context. Respect for law is hardly fostered when the legal system myopically focuses on isolated, perhaps minor, offenses of individuals whose entire lives make plain their complete commitment to a career of organized lawbreaking.

If facts extrinsic to a particular criminal transaction are significant to the proper operation of the criminal justice system, it is not clear why they should be confined to the shadows of its "discretionary" components. Delineation of society's official code of morality is one purpose of a penal code, and the character of the offender is clearly irrelevant to this purpose. But a penal code also shares the purposes of the law enforcement system of which it is a part. So long as the values protected by the requirement that concrete conduct be a part of the definition of crime are preserved, there is no special reason why factors relating to the defendant's character and associations should not be included in the definition of crimes.

Rather, removing these factors from the shadows of discretionary decisionmaking can serve valuable ends. If there is broad social agreement that considering the context of violations is legitimate, making that consideration explicit can only increase public understanding and approval of the system. Moreover, express inclusion of aggravating circumstances based on professional criminality furthers the goal of consistent and accurate decisionmaking, by subjecting allegations of organized crime involvement to the same procedural safeguards as other factors bearing on guilt. There is no procedural regularity at all to a prosecutor's determination that a particular defendant is associated with organized crime; a jury's judgment of character in a trial from which evidence going beyond the transaction at issue is in principle excluded can only be fragmentary and unreliable, and even a judge's factfinding at sentencing is required to meet only minimal procedural standards. If membership in organized crime is relevant to our judgment of

175. See, e.g., 1 Model Penal Code § 1.02(1) (1985).
176. See supra notes 159-166 and accompanying text.
a defendant, engaging that issue in a public trial process, subject to ordinary procedural safeguards, is not in principle inappropriate.

2. The Challenge to Criminal Procedure. — From the perspective of the traditional model of criminal prosecution—especially the perspective of defense attorneys within that tradition—it is difficult to see RICO trials of the illicit association type as anything but abominations. As described above, the definition of the elements of a RICO violation of this type leads inexorably, by application of the ordinary rules of evidence and procedure, to the undermining of the principles underlying those rules, and the reversal of their ordinary consequences. Thus, for example, rules requiring that evidence be relevant to some element of the particular offense charged in the indictment ordinarily exclude evidence of a defendant’s membership in unpopular organizations, for fear that the jury will be prejudiced against a defendant who has been involved with dissident groups or unsavory associates. In an illicit enterprise RICO case, these rules will instead permit evidence of the defendant’s associations, and of criminal activity conducted by his associates, in order to prove the existence of an enterprise, and the defendant’s participation in its affairs.

This is not merely upsetting to those accustomed to the old order; if one credits the intuitions of virtually all experienced professionals in this area, it seriously alters the likelihood that defendants will be convicted. Defense attorneys regularly seek severance of their clients’ trials from those of other defendants, attack the joinder of separate offenses in the same indictment and argue for the exclusion of evidence of uncharged crimes previously committed by the defendant, out of the well-founded belief that juries will more easily convict defendants they believe are frequent offenders or associates of other criminals. Prosecutors, presumably out of the same belief, typically resist such efforts and seek opportunities to join charges or defendants and to offer evidence of other crimes, whenever the rules arguably permit.

To the extent that RICO offers prosecutors greatly expanded opportunities to present evidence of multiple crimes in the same trial, the illicit-enter-

177. See supra notes 98–104 and accompanying text.

178. The extent of this concern is illustrated by United States v. Ellison, 793 F.2d 942 (8th Cir.), cert. denied, 107 S. Ct. 415 (1986), where the defendant, the leader of a white supremacist, anti-Semitic organization called “the Covenant, the Sword and the Arm of the Lord” offered to stipulate that the organization constituted an “enterprise” within the meaning of § 1961(4), in an effort to preclude the government from offering evidence of criminal conduct not charged in the indictment, and apparently not committed by the defendant, including the burning of a Jewish community center. The courts refused to require the government to stipulate, holding that the government was entitled to offer such evidence to prove the existence of the enterprise (subject to the usual balance of probative value and unfair prejudice), and that the government had a right “to present to the jury a complete picture of the events constituting the crime charged” rather than accept a mere “‘naked admission.’” Id. at 949 (quoting United States v. Peltier, 585 F.2d 314, 324 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979)).
prise indictment can be criticized for effectively overriding the various rules of evidence and procedure that have been devised for the specific purpose of regulating this conflict.  

From the standpoint of the transaction model of crime, this criticism of RICO is entirely justified, for as we have seen, the rules being undermined by RICO are the consequences and guardians of that model. If the purpose of the criminal code is to state society's definitive moral judgment about certain forms of behavior and provide for the punishment of those who commit acts judged to be prohibited, the only relevant evidence at a trial can be that which bears upon the existence of the factors determined by the penal code to be morally relevant. While it does not follow inexorably from this view that evidence of a defendant's character, associations or behavior on other occasions should be excluded, the argument that such evidence would unfairly distort the finding of facts about the episode to be judged is a very powerful one in a system conceived on this model.

179. One must be careful, however, about the tendency to romanticize these procedural rules. In attacking the use of conspiracy indictments to override normal procedural rules, Professor Johnson argues generally that these procedural issues should be settled on their own terms, rather than being preempted by a charge of conspiracy. Johnson, supra note 16, at 1171 (“[I]t would be better for the courts to look to the policies and interests that underlie joinder rather than to the substantive law of conspiracy.”), 1182 (“Exceptions to the normal operation of the statute of limitations should be made in that statute itself . . . .”). But this may presuppose clearer notions about the policies underlying these procedural rules than in fact exist, not to mention judges with more leisure and information to assess the likely results of procedural determinations than we can pragmatically expect. Thus, since the existence of a common scheme is the key, as Professor Johnson acknowledges, both to joinder of defendants and to the substantive law of conspiracy, id. at 1167–68, it hardly seems that better joinder decisions would be promoted if courts made them without reference to the presence of conspiracy charges. Similarly, Professor Johnson argues that conspiracy principles should continue to govern venue decisions even if there were no crime of conspiracy. Id. at 1179. These observations do not contradict Professor Johnson's principal claim, which is that the existence of conspiracy as a separate crime is unnecessary to accomplish the various social benefits claimed for it. But they may explain the lack of practical bite to his suggestions. If the rules of procedure that are undermined by conspiracy law do not themselves yield predictable, sound results at variance with the result reached through conspiracy law, there is little reason to restore them by abolishing conspiracy. It may be that the best rule of thumb for judges to apply, at a point when they have little knowledge of the evidence to be presented, in deciding whether crimes should be tried together is the prosecutor's ability to argue with a straight face that the crimes can all be seen as the products of a single agreement.

180. Anyone who believes, as an empirical matter, that a person is likely to behave more or less consistently over time must concede that such behavior is relevant to assessing the likelihood that the person behaved in that manner on a particular occasion. The strength of any inference to be drawn, the empirical likelihood that jurors will miscalculate that strength or decrease the degree of their concern for finding facts accurately if aware that a defendant has done other bad things, the balance between the value of such information and its dangers, and the extent to which judges or legislators should impose their views about these questions on jurors, are all matters subject to possible disagreement.
Modern techniques of criminal investigation, however, particularly in the investigation of organized crime, have put increasing pressure on the traditional trial. To some extent, the popular model of criminal investigation, like the academic model of the penal code, is transaction-based. The job of the police is to investigate incidents reported to them, with the goal of determining, if possible, who committed the acts complained of and whether in all the circumstances the incident constitutes a crime. The inquiry of the investigator is thus in important respects parallel to the inquiry of the student of substantive criminal law, in that the decision whether sufficient evidence exists to make an arrest is predicated on the elements determined by the legislature as justifying punishment.

But in fact the investigation of organized criminal groups typically does not proceed in an incident-related pattern. The police rarely get a complaint that a particular sale of narcotics has occurred at a particular place and time; even if they did, prosecution of that transaction might be difficult. Moreover, even if a retrospective investigation of such a complaint might prove successful, law enforcement strategy against some forms of crime may well call for more information than that required to convict for a particular episode.

Thus, in the investigation of some types of crime, proof of the particular incident may be only the starting point of an investigation. The goal may be not merely to convict the defendant of the particular offense that was the basis of the complaint, but to use the complaint as a springboard to investigate the suspect's affairs to determine whether a larger set of charges should be brought, or whether other defendants should be charged. Indeed, police and prosecutors have begun to form special "career criminal" units to single out for intensive investigation crimes charged against defendants thought to be responsible for large

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181. There is, of course, no theoretical barrier to prosecutions for sale of narcotics based on retrospective eye-witness testimony. That is, after all, the same type of evidence usually relied on in robbery or assault cases. Perhaps because the only witnesses usually available to such crimes are themselves participants in the crime (and therefore presumably discreditable), or perhaps because juries are accustomed to more unimpeachable proof (e.g., tape recordings, undercover agent testimony, seized narcotics), such prosecutions are uncommon.

182. For example, discretion may routinely be exercised to decline to prosecute small-scale narcotics sales by persons who are themselves addicts, if they agree to enter a treatment program. A minor narcotics dealer or a businessman who bribed a government official may be more valuable as an informant concerning other criminal activities he is aware of than as a defendant in a single-count indictment. Further investigation of the perpetrator may well be called for in order to assure appropriate punishment: because judges base sentencing decisions in part on their understanding of the defendant's character and the degree of his involvement in crime, it may be inadvisable to prosecute even a major dealer for a minor offense, unless the prosecution can document additional offenses.
Modern investigative methods are congenial to this sort of investigation. The use of informers or undercover agents, or the implanting of electronic surveillance devices, is not calculated primarily to develop evidence relating to a specific past transaction under investigation; more commonly, such tactics will result in police monitoring of the ongoing activities of persons as they commit a series of crimes over a period of time. Some scholars and law enforcement officials have referred to such investigative techniques as "proactive," to distinguish them from the "reactive" nature of techniques designed to uncover evidence of a past crime known to the police.\(^{184}\)

When law enforcement officials investigate in this manner, however, their perspective on crime changes. Traditional police methods lead the detective to see a bank robbery, for example, from the perspective of the bank teller—as an eruption of deviant behavior into the ordinary life of society, to be traced to its source in some particular individual. Thus, the "reactive" investigation reinforces, as well as derives from, the transaction model of crime. But the investigator who observes the development of a criminal plan by means of infiltration or electronic surveillance sees the crime from the perspective of the perpetrator—as part of an ongoing enterprise of criminal activity conducted by the defendant on a regular basis.

The transaction-oriented trial is capable of presenting "the facts" in a way that satisfies the traditional detective, since it conforms to the preconceptions, the methods, and the results of his investigation. But the "proactive" investigator no longer sees a trial that explores the events of any one particular transaction as providing a satisfactory ac-

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184. See, e.g., Moore, Invisible Offenses: A Challenge to Minimally Intrusive Law Enforcement, in ABSCAM Ethics 19–21 (G. Caplan ed. 1983); Magarity, RICO Investigations: A Case Study, 17 Am. Crim. L. Rev. 367, 368 & n. 9 (1980). The difference between traditional investigative methods and "proactive" investigation could be analogized to the distinction drawn by Professor Ackerman between "reactive" and "activist" regulatory regimes. B. Ackerman, Reconstructing American Law 23–37 (1984). Like other "activist" state action, "proactive" investigations assume that the role of the state—in this instance, of criminal law enforcement—is not merely to react to past events and judge whether particular conduct should be treated as deviant, but to monitor, influence and control future events—to view criminal activity, as it were, ex ante. Of course, the "proactive" investigation is not fully "activist" in Professor Ackerman's terms, because it accepts the "reactive constraint" of "apprais[ing] particular actions against the background of ongoing social practice." Id. at 26. The policeman is still a policeman, not a social engineer. Nevertheless, given that law enforcement is in its very essence a "reactive" activity in this sense, inextricably engaged in the assessment of individual conduct, it is noteworthy that even law enforcement has become more activist in the more limited sense of orienting its investigations to future behavior, thus focusing increasingly on entrapping and eliminating threatening individuals rather than merely reacting to past events.
count of "the facts." To break up the information achieved by the penetration of an informer or a "bug" into a criminal organization into discrete units, to be presented at separate trials relating to separate transactions, is no longer a natural course of action; it seems rather to violate than to further the presentation of the truth as the investigator has come to learn it. He wants to tell a different, fuller story.\textsuperscript{185}

In conventional criminal procedure, the "proactive" investigation now meets a resolutely "reactive" system of justice. As elaborated above, our ordinary concept of crime is based on an assessment of discrete acts to determine their consistency with moral norms, and our normal concept of criminal procedure limits the evidence to be presented to that which bears on that inquiry. The investigator cannot present what appears to him to be the full story, because the only story that interests the system is the far more limited story of a particular criminal transaction.

RICO, however, is tailor-made to fit the proactive investigation. The activities of the suspects who have been monitored can be presented as those of an illicit association comprising those suspects; the multiple crimes they and their associates have committed are the pattern of racketeering activity through which they have conducted its affairs. By means of a section 1962(c) indictment, the whole of the story uncovered by the investigation can be presented.\textsuperscript{186} As Magarity writes, RICO "allows investigators and prosecutors to look at and present facts in a new manner."\textsuperscript{187} Rather than taking the evidence gath-

\textsuperscript{185} I do not mean to suggest that police officers have ever been naively unaware of the methods of operation of the underworld. But whatever the police officer knows or believes about the general behavior of criminals, reactive methods of investigation tend to confine the category of available "evidence" to what can be learned about the particular incident. More intrusive methods like wiretapping give the investigator concrete documentation of the broader pattern behind the particular incident, and thus put greater pressure on the procedural system to permit presentation of that context.

\textsuperscript{186} It bears emphasis that the illicit association trial presents the "whole" story \textit{that the investigators have uncovered}. The abstraction of the RICO enterprise enables the prosecution to define as an entity whatever subset of a criminal organization they uncover, or to lump into a single enterprise a variety of criminal schemes that center on a particular individual or group. See Lynch, supra note 1 & text following note 194. While the robbery of a single bank may be perceived as a distinct event by participants as well as by later investigators, the RICO "enterprise" and "pattern" are flexible characterizations capable of being superimposed on events after the fact in a variety of different ways.

\textsuperscript{187} Magarity, supra note 183, at 368. Magarity writes as if the "RICO investigation" is a new manner of beast, and that the RICO statute has somehow made such proactive investigations possible. Id. at 368–69. This is not quite the case. Investigations of the type he describes certainly predate RICO, and are frequently used in contexts, such as narcotics investigations, in which RICO is not necessarily contemplated as the ultimate means of prosecution. It seems to me more accurate to think of RICO as providing an outlet for the presentation of the results of such investigations, which would still be valuable investigative tactics in the absence of RICO, in a new and more effective way.
ered in a lengthy investigation of a criminal group, featuring electronic surveillance and undercover infiltrators, and chopping it up into trial-size bits focused on individual crimes, RICO permits a single trial to become a presentation of the full picture revealed by the investigation.

All of this seems beside the point, of course, to the exponent of conventional, reactive criminal procedure. The whole point of a trial is to determine the truth of an accusation of the commission of a criminal act. In theory there may not be any inconsistency between this goal and the presentation of several such accusations in the same proceeding. In practice, however, our system has made the judgment that unless carefully controlled, joinder of offenses or defendants threatens to pollute each inquiry with prejudicial and irrelevant overtones from the others. To the extent that letting the prosecution tell its "full" story interferes with the jury's ability to decide whether each separate allegation of crime has been proved beyond a reasonable doubt, it conflicts with the basic purpose of the system and must be rejected.

The proponent of RICO has several responses, that involve increasingly radical questioning of the traditional trial model. First, even without questioning the basic premises of the transaction model of crime, it is arguable that existing joinder and evidence rules are more restrictive than is necessary to prevent unfair prejudice. Despite the fears that massive RICO indictments enable prosecutors to bolster marginal cases by tying minor or innocent defendants to others against whom there is overwhelming proof of heinous crimes, juries in RICO cases frequently bring themselves to acquit. The fear of "spillover prejudice" may be exaggerated.

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188. See supra notes 79-81 and accompanying text.

189. Any random sample of RICO cases will reveal a large number in which one or more defendants are acquitted, either of the RICO counts or of all charges. See, e.g., United States v. Rubio, 727 F.2d 786 (9th Cir. 1984) (all defendants acquitted of violating 18 U.S.C. §§ 1962(c) and (d) (1982)); United States v. Bagaric, 706 F.2d 42 (2d Cir.) (four of ten defendants acquitted), cert. denied, 464 U.S. 840 (1983); United States v. Campbell, 702 F.2d 262 (D.C. Cir. 1983) (all defendants acquitted of RICO count); United States v. Walsh, 700 F.2d 846 (2d Cir.) (one of three defendants acquitted), cert. denied, 464 U.S. 825 (1983). While cynical defense attorneys have been known to suggest that prosecutors deliberately include weak defendants in large RICO and conspiracy indictments as grist for compromise verdicts, even this claim presupposes that juries are able to distinguish different quantities or qualities of evidence against different defendants. Moreover, in some ways mass trials may work to the advantage of minor defendants. Proof beyond a reasonable doubt is not a mathematical concept, and overwhelming and incontrovertible proof against some defendants may raise jurors' expectations beyond what would suffice to convict others if their cases were heard in isolation. Furthermore, in the mass of evidence offered against a large number of defendants, the jury may simply miss the significance of circumstantial evidence against marginal defendants.

190. Nor should the prejudicial impact of such evidence be evaluated in a vacuum. The jury's task is not only to evaluate the technically relevant evidence in an intellectual fashion, but to decide whether the conscience of the community demands the condemnation of the defendant. Putting the individual crime in the context of the criminal en-
But these limited arguments cannot succeed within the transaction model of crime. The danger that more lenient rules of admissibility or joinder would distract the jury from analyzing the probative weight of the relevant evidence may be exaggerated, but if the jury's only task is to make a judgment about the likelihood that the defendant committed a particular act, there is no reason to permit them to be distracted at all. That defendants themselves may seek to distract them is no answer. Our system is not designed to give both sides an even shot at winning, but to create significant barriers to the conviction of the innocent, and some measure of protection to the merely technically guilty. A case that cannot withstand the modest tactical advantages given to the defendant is not a strong enough case to warrant conviction. Arguments about the amount of actual prejudice caused by RICO only address the degree of harm it causes; they do not rebut its inconsistency in principle with the transaction-based model.

But advocates of RICO can make a deeper argument. Procedurally as well as substantively, RICO insists that the whole is more than the sum of its parts. If jurors react differently to the prosecution of a bookmaker when he is tried alone for illegal gambling than they do to the same evidence presented as part of an illicit association case in which the bookmaker is charged with participating through a pattern of gambling offenses in the conduct of a violent crime "family," it can be argued that they are not being overwhelmed by prejudice, but that they are responding to a genuine difference in the facts presented. The additional evidence is not merely extraneous information, to be excluded as prejudicial or condoned for its antinullification effect, but in any case irrelevant to analyzing the defendant's involvement in a specific transaction. Rather, it is an essential part of what makes the defendant's actions particularly threatening to society. Only if the jury is permitted to see the fuller story—the pattern that links this particular defendant's acts to social harm—can a judgment about his guilt be made.

The cumulative power of RICO charges manifests itself in another way as well. The difficulty of convicting the leadership of organized crime syndicates is based in large part on the difficulty of securing evidence directly connecting them to particular crimes. Often, the evidence that can be mustered to show a defendant's involvement in a particular offense will be weak when measured against the demanding standard of proof to a unanimous jury beyond a reasonable doubt. But when a jury is presented with a series of such cases in a single trial, and asked whether the evidence proves beyond a reasonable doubt that the defendant is a racketeer, the case becomes powerful, rather than marginal.191

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191. This is of course a slight oversimplification of the jury's function in a RICO
Viewed from within the transaction model of crime, this is perhaps RICO's most troubling effect. Jurors may be able to compartmentalize evidence against different defendants; common sense supports the judge's instruction that overwhelming proof that A is a murderer does not tell us whether B is a narcotics dealer. But insulating the evidence that B dealt in drugs in 1971 from the evidence that he was involved in a 1975 arson-for-profit scheme and from the proof concerning his participation in a 1980 homicide is a harder task. In the traditional view, if the evidence of each separate crime falls short of persuasion beyond a reasonable doubt, the defendant is not guilty of anything: three times zero should be zero. Permitting a jury to consider the three charges at once only contaminates the issue.

There is, of course, great force to this argument. Even in a RICO case, the jury is not asked directly whether the defendant is a racketeer. He is guilty only if he is found, beyond a reasonable doubt, to have committed at least two of the specific predicate acts charged, and it is inconceivable that the jury is not influenced, in considering each separate act, by the evidence relating to the other predicate offenses. A defendant may thus be convicted even though the jury would not have found the evidence of each act sufficiently persuasive had it been considered in isolation.

The RICO illicit enterprise offense can only be defended if such a conviction is acceptable. I maintain that it is. There is nothing illogical or unfair about permitting a racketeering conviction to be predicated on particular offenses that would not result in convictions in separate trials. The disputable witnesses or inferences that each crime was committed do in fact corroborate each other, making it more likely that each is correct than it would be if the evidence of the other did not exist. We may, at the end of such a RICO trial, have a reasonable doubt about precisely which of the crimes charged involved a particular defendant, but his involvement in more than one of the criminal activities of the enterprise may nevertheless have been proved to that standard.

Moreover, the spectacle of a "reputed Mafia leader" with few
arrests and no convictions to show for what Congress, the FBI, and the press contend—and any fair-minded historian would conclude beyond a reasonable doubt—is a lifetime as an organized criminal, is a depressing one for the criminal justice system. A procedural system that does not provide a vehicle for the authoritative resolution of allegations of this kind is faulty, and can only breed disrespect for the law.

Finally, and most radically, RICO may lead us to ask whether criminal procedure, like substantive criminal law, may not have more functions than are traditionally recognized. Certainly when the government undertakes to prove in a criminal trial that the Mafia exists, and that jurisdictional disputes among its members are settled by a "commission" comprised of the heads of the five families, more is going on than simply a determination of the culpability of a handful of aging gangsters. Such a trial becomes at least in part an exercise in public education and ritual denunciation of criminal activity.

Once again, from a conventional standpoint, to make this claim is to condemn the proceedings. The determination of factual guilt or innocence is the overt function of a criminal trial. To permit the government to bring cases that allow vivid description of the "big picture" of organized crime at the cost of loosening procedural constraints designed to safeguard defendants against erroneous conviction undermines that function.

But this response overstates the extent to which our present procedural system is concerned solely with accurate fact-finding. Criminal trials also serve other purposes. Important aspects of the system, from the exclusionary rule to the jury itself, may be preserved in spite of, rather than because of, their effect on accurate fact-finding. It is easy to denounce the theatrical quality of high-visibility criminal trials as soap opera, contrived for public entertainment by ambitious prosecutors and pandering journalists. But the criminal trial’s quality as ritual drama is vital to the denunciatory function of criminal justice. The jury is not the only appropriate audience for the story the government seeks to tell in an illicit enterprise case. Using a criminal trial to make a larger point about organized crime than the guilt of a particular individual in a particular transaction serves these broader functions.  

presented was in a form that would not have been admissible in a jury trial at all. By expanding the concept of "crime" beyond the boundaries of a particular transaction, RICO may make it easier to obtain a conviction, but it does so by making the seriousness of the threat presented by the defendant subject to the ordinary standards of proof before a jury.


195. Moreover, we no longer principally rely on the trial to separate the guilty from the innocent; when 90% of criminal charges are resolved by guilty plea, and many more potential cases are not brought because of police or prosecutorial determinations, for the overwhelming majority of criminal defendants the critical determination of guilt or innocence is made administratively, by the law enforcement bureaucracy. The jury trial
Recognizing the importance of context to the gravity of individual criminal acts, increasing the possibility of convicting racketeers who might otherwise slip through the cracks in a transaction-based model of procedure, and utilizing the dramatic context of the criminal trial to educate the public to models of criminal activity more significant than the isolated derelictions of particular individuals are important and appropriate goals for criminal law. If procedural rules that make the accomplishment of these goals more difficult stem not from fundamental requirements of fairness, but from a particular model of crime that undervalues those goals, those rules will be subject to the pressure for change and distortion that have propelled the ever-broadening interpretation of RICO.

3. The Challenge to Judicial Administration. — Such arguments are tenable, however, only if the RICO trial affords due process. I have argued that admitting broader categories of conduct to what can permissibly be defined as criminal does not offend substantive notions of fairness, and that the risk of procedural prejudice that results from broader notions of relevance is not fundamentally unfair. But the most serious threat RICO poses to the fairness of criminal trials may be more mundane.

Can our system of trial by jury present even an appearance of fairly resolving the allegations made in the Castellano196 indictment? The sheer length and complexity of the resulting trial causes serious doubts. Whether or not jurors can ordinarily be trusted to make a good faith effort to keep separate the evidence against different defendants, is it within the physical and mental capacity of a jury to recall accurately the separate evidence relating to so many different individuals and so many separate incidents? What is the effect on a jury pool of the elimination of all potential jurors who cannot serve in a trial that may last over a year? What are the psychological effects on a jury of being involved in the sometimes emotional and sometimes boring trial process for that length of time? The threat of substantive injustice in RICO cases may come far more from such practical concerns than from the conceptual issues discussed above.

The collateral effects of such a trial on defendants must also be considered. While we understand that merely being charged with a crime involves serious financial, emotional, and reputational costs, the law has been content essentially to ignore those costs, holding a grand jury’s charge based on probable cause sufficient to require a defendant to bear them. But when a defendant named in a RICO indictment is alleged to be involved only in a limited aspect of the case, the burdens

entailed by a nine- or ten-month trial that mostly concerns other people's actions may be so great that some other response is required.

Such mass trials also have a serious impact on a defendant's right to counsel. The attention of a skilled advocate is a far more fundamental guarantee of fairness of fact-finding than the various rules imposed by the transaction model of procedure. But the difference between the cost of a lawyer for a short trial and that of hiring an attorney to spend the better part of a year in court is surely sufficient to deprive many marginal RICO defendants of retained counsel.

The lawyer's effectiveness, too, may be compromised in a mass trial. Ordinary discovery practices may vastly increase the difficulty of trial preparation in such a case: can the prosecution be permitted to provide only one copy of tape recordings, transcripts, or documents, and put the burden of sharing or reproducing the materials on defendants? Can lawyers for defendants with potentially conflicting interests divide responsibility for reviewing the mass of discovery materials? At trial, can a judge limit the number of attorneys who may cross-examine the same witness or be heard at bench conferences? These are live and perplexing questions facing judges and lawyers involved in RICO mega-trials.

This is not the place for a discussion of the problems of managing the complex criminal trials that RICO makes possible. For one thing, those problems are not unique to RICO, but are common to a variety of lengthy and complex criminal proceedings. For another, as an academic I am not necessarily in the best position to address them. But it bears remembering that RICO challenges not only the theoretical model that animates our criminal procedure, but also the mechanics by which that model is implemented. The latter challenge may prove the most difficult for RICO to overcome.

H. Towards a Narrower Statute

In Part II of the first portion of this Article, we found that for many of its uses, the rather complicated apparatus of RICO, with its risks of vesting discretion in prosecutors to increase dramatically the penalties applicable to various crimes, seemed peculiarly unnecessary. Similar prosecutions could easily have been brought, in the absence of RICO, if expanded federal jurisdiction and increased penalties were available in particular situations.

We have now seen, however, that unlike the use of RICO to prosecute rather ordinary cases of governmental corruption, white collar

197. RICO exacerbates the problems posed by such monster trials by increasing the occasions on which they will occur and by increasing the theoretically possible breadth of the allegations that can be encompassed by a single charge.

198. See Lynch, supra note 1 at notes 229-426 and accompanying text.
crime, and labor racketeering, the use of RICO against complex criminal enterprises raises serious questions about the nature of our conceptions of crime and of criminal procedure; this application of RICO cannot be rendered unnecessary by adoption of a more conventional substitute. Any substitute that preserved the value of RICO in prosecuting illicit associations would raise similar questions.

These questions have received little attention from courts and commentators. Because RICO was adopted without debate about its consequences for our procedural system, and with little apparent understanding of the new conception of crime it implied, prosecutors and courts have taken its literal terms and applied them in ways that have served the interests of law enforcement as perceived by the prosecutors, with little discussion of the consequences. Critics have too frequently been content merely to point out ways in which RICO violates conventional notions of fair procedure.

That is not enough. It is not enough politically, since the apparent success of RICO as a device for convicting criminals the public believes should be convicted makes it easy for the political process to brush aside theoretical considerations. If RICO is inconsistent with conventional notions of what a penal statute ought to look like, and RICO trials do not fit previous conceptions of what criminal procedure is for, it may be that our notions and conceptions have to give way, because RICO is probably here to stay.

Neither is it enough intellectually. As I have tried to show, certain uses of RICO present a genuine intellectual challenge to the transaction-based model of substantive criminal law, and to the reactive model of criminal procedure that implements it. The tentative conclusion of this Article is that while RICO implies a radically different view of what can be defined as a "crime" and what are fit subjects for presentation in a criminal trial, this new view is not inconsistent with fundamental fairness, and may better reflect the reality of criminal activity in our society than the transactional model. At the very least, RICO requires serious reexamination of our conventional notions.

Even if it were agreed that RICO illicit enterprise prosecutions are in principle effective and morally acceptable ways of combating organized criminal groups, it would not necessarily follow that RICO as currently written is the best, or even an acceptable, statutory device for allowing such prosecutions. As with the other areas in which RICO has proved effective against various forms of crime, it is likely that the same effects can be achieved by a statute that is more carefully drafted to attack the specific evil presented, without the all-encompassing scope of the present RICO statute. Since the organizing concept of RICO was

199. It can be seen from this discussion that not all cases of public corruption, fraud and labor offenses are "ordinary." At least some such cases are sufficiently far-ranging to share many of the characteristics of the multi-faceted illicit enterprise cases.
not a direct prohibition of membership in a criminal organization, but rather the prohibition of infiltration of legitimate enterprises by members of such organizations, it is little wonder that RICO is not crafted to fit the kind of conduct against which it has proved most useful.

Improving on RICO, however, is no easy task. Since the essential value of the racketeering enterprise concept is its identification of instances where the whole of a defendant’s criminality may be greater than the sum of his particular criminal acts, as a result both of repeated involvement in crime as a profession and of association on a regular basis with a criminal organization, the problem is to reduce the scope of RICO’s prohibitions more nearly to this core concept. But as we have seen, the difficulty of defining the concept of organized crime is one of the very problems that led to RICO’s present form.\textsuperscript{200}

The excessive breadth of one of the key elements in RICO—the definition of “enterprise”—is the principal obstacle to narrowing the scope of RICO to a prohibition of illicit associations. Most of the particular types of “enterprise” included in the statutory definition\textsuperscript{201}—for example, partnerships, corporations, unions—identify legitimate enterprises potentially subject to corruption by criminals. As already indicated, it is difficult to defend the proposition that crimes committed in the interests or through the instrumentality of such organizations are distinctively more serious than the same acts committed on one’s own behalf. The residual definition of enterprise as “any . . . group of individuals associated in fact,” is excessively broad and amorphous to serve as the distinguishing feature of a new form of criminality—which is essentially the role played by the enterprise concept in the illicit association cases. Some greater effort to isolate and define the characteristics that distinguish a criminal syndicate from a series of ad hoc conspiracies with occasionally overlapping membership is required.

The case law arising under RICO has made fitful starts in this direction. In \textit{United States v. Anderson},\textsuperscript{202} the Eighth Circuit, grappling for the first time with an illicit association-in-fact RICO prosecution, rejected what was already the majority of circuit court opinion endorsing such prosecutions.\textsuperscript{203} But neither did the court follow the few cases holding that a RICO enterprise needed to be “legitimate.”\textsuperscript{204} Instead, it reversed the convictions of two local administrators who had taken kickbacks on the ground that the term “enterprise” was intended “to encompass only an association having an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal that has an existence that can be defined apart from the commission of the predicate acts constituting the ‘pattern of racketeer-

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  \item \textsuperscript{200} See Lynch, supra note 1, at notes 119–25 and accompanying text.
  \item \textsuperscript{201} 18 U.S.C. § 1961(4) (1982).
  \item \textsuperscript{202} 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).
  \item \textsuperscript{203} Id. at 1362–72.
  \item \textsuperscript{204} Id. at 1372.
\end{itemize}
The court’s emphasis on “an economic goal . . . apart from the commission of the predicate acts” in practical effect would likely have excluded most illicit associations, and therefore presumably did not survive the Supreme Court’s decision in United States v. Turkette. But the notion that an enterprise should have an “ascertainable structure” and “an existence . . . apart from the commission of the predicate acts” are not inconsistent with the existence of enterprises that pursue entirely illicit goals. Indeed, Turkette largely endorses this requirement. Holding that the enterprise and pattern elements of RICO are indeed distinct (though potentially provable by the same evidence), the Supreme Court stated that the existence of the enterprise as “an entity separate and apart from the pattern of activity in which it engages” is proved by evidence of “an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”

This language has not been terribly helpful in restraining the scope of RICO. Some courts have expressly or implicitly rejected the Anderson formulation as inconsistent with the acceptance by Elliott and Turkette of enterprises consisting of “an informal criminal network engaged in racketeering activity.” “[A]scertainable structure” is hardly a universal characteristic of associations held to be RICO enterprises.

The cases thus point out the heart of the problem: how to define in words the degree of organization that separates “organized” from “disorganized” crime. Organized crime groups are usually “informal”—they do not generally have constitutions, by-laws, and membership cards. On the other hand, if RICO is justified by any distinctive harm, it is precisely that which occurs when the ordinary association of individuals for a criminal purpose becomes a regularized, identifiable organization carrying out repeated criminal acts over a period of time. If such groups do not pose a distinct threat, there is little justification for a statute that goes beyond conventional conspiracy doctrine. Some
requirement of structure, then, should be an essential part of the definition of enterprise under RICO, as well as of any replacement statute.

The size of the organization might also be a defining element in a statute proscribing organized crime. While continuity of personnel is a standard attribute ascribed to RICO enterprises, frequently the only core members of the group defined as the enterprise turn out to be the principal defendant and the government's informant.\textsuperscript{210} There is precedent for statutes punishing continuing criminal activity in concert with a minimum number of confederates,\textsuperscript{211} and adding such a requirement to an anti-organized-crime law would make sense. Whatever the imprecision in our concept of organized crime, three burglars don't make it.\textsuperscript{212}

Another possible defining characteristic of the sorts of enterprises that should be prohibited is the type of criminal activity in which it engages. The RICO experience raises questions about the utility of any such attempt. As we have seen,\textsuperscript{213} the list of RICO predicates reached its present unwieldy length because of the accurate perception that organized crime groups would engage in any sort of criminal activity that was expedient and profitable. The desire not to allow any organized crime activity to escape made for a virtually all-encompassing list, and the cases examined above demonstrate that most of the listed predicates have appeared in one or another illicit association prosecution.

This experience does not totally discredit the attempt to define organized crime in terms of its works, however. In RICO, the list of predicate acts serves simultaneously to define the types of illicit organizations covered and the specific conduct that must be committed to identify a defendant as a member of the enterprise. It is far from clear, however, that these two functions need to be so closely linked. If the purpose of the statute is to recognize that criminal conduct is more serious where it is committed in furtherance of a criminal enterprise, there is little reason to exempt any felony from the list of offenses subject to sentence enhancement if the requisite relationship is proved. There is no reason that mail fraud, receiving stolen property, or, for that matter, illegal traffic in protected animals,\textsuperscript{214} should not be subject to RICO sanctions if those offenses are committed for the profit of an organized crime syndicate.

On the other hand, in defining the associations in whose interests

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  \item \textsuperscript{210} Turkette itself exhibits this pattern. See Lynch, supra note 1, at text following note 194.
  \item \textsuperscript{211} See, e.g., 18 U.S.C. § 1955 (1976) (an illegal gambling business requires the involvement of five or more persons); 21 U.S.C. § 848 (1982) (requires "five or more other persons" to qualify as a continuing criminal enterprise).
  \item \textsuperscript{212} Cf. United States v. Aleman, 609 F.2d 298 (7th Cir. 1979) (series of burglaries committed in two states by three individuals falls within scope of RICO), cert. denied, 445 U.S. 946 (1980).
  \item \textsuperscript{213} See Lynch, supra note 1, at notes 123–24 and accompanying text.
  \item \textsuperscript{214} See 18 U.S.C. § 42 (1976).
\end{itemize}
the proscribed conduct must be committed, such global coverage is less necessary, and more dangerous. The type of crimes that most lend themselves to organized professional activity, as generations of crime commissions have reported and as the RICO cases confirm, are those involving distribution of illegal goods and services (for example, narcotics, gambling, prostitution), and those that operate at the interface between legal and illegal society (for example, money laundering, fencing, labor corruption, and loan-sharking). Serious violent crimes should also be included, both because murder and extortion are the tools by which criminal organizations are maintained, and because any organized group whose object is the commission of violent crimes (for example, terrorist groups) presents an especially dangerous threat to society. But if a group of criminals is not engaged in a pattern of conduct that includes offenses of this kind, it does not pose the distinctive threat implicit in the vernacular notion of "organized crime." Moreover, it is the inclusion in the definition of criminal syndicates of such offenses as mail fraud, robbery, and theft from interstate shipments, that permits expansive intrusions of RICO into ordinary white collar crime and street crime.215

These considerations suggest at least the outlines of a relatively simple anti-organized-crime statute. Such a statute would provide penalties similar to those in RICO for anyone who commits any two or more state or federal felonies as a member or associate of, and in furtherance of the business of, any criminal syndicate. A criminal syndicate could be defined as any group of five or more individuals associated on a continuing basis for the commission of a series of crimes involving murder, kidnapping, arson, extortion, bank robbery, distribution of narcotics, gambling, prostitution, loan-sharking, labor corruption, or disposition of the proceeds of criminal activity, or any combination of such activities.216

215. Acts of obstruction of justice, bribery and witness tampering are also good examples of acts that should be subject to enhanced punishment if committed in furtherance of a criminal enterprise, but should not be part of the definition of the pattern of criminal activity that constitutes an enterprise. Obviously, such acts are serious, and can be expected to occur in connection with organized crime. But their inclusion in the list of predicate activity for RICO, 18 U.S.C. § 1961(1)(B) (1982), means that whenever a business executive who has engaged in a fraud tries to bribe a colleague to lie to a federal investigator, the fraudulent conspirators have engaged in a pattern of racketeering and are subject to RICO sanctions. If the enterprise had to be shown to have committed substantive offenses typical of organized crime before obstructive conduct by one of its members was subject to RICO sanctions, the reach of the statute would be considerably limited.

216. This suggestion is in large part modeled on the prohibition of "Organized Crime Leadership" contained in the proposed federal penal code drafted by the Brown Commission. National Commission on Reform of Federal Criminal Laws, Study Draft of a New Federal Criminal Code § 1005 (1970). See supra note 170 and Lynch, supra note 1, at note 121. A major difference between that proposal and the suggestion in the text is that the Brown Commission's proposal only applied to those who occupied leadership
Such a statute would permit prosecution of any of the larger and more dangerous criminal groups prosecuted as illicit enterprises under RICO. The benefits of associating individual acts with their larger context would be preserved; those who committed serious crimes of any kind in association with the enterprise would be covered. On the other hand, the problems of legality created by the all-encompassing scope of RICO would be alleviated. While there is inherent vagueness in any effort to define an organized criminal enterprise, the effort to limit the covered enterprises by size, structure, and objectives would make it far more difficult for prosecutors to escalate penalties for ordinary crimes. Unlike RICO, for example, such a statute could not be applied to white-collar crime, receipt of graft by local officials, or small-scale concerted criminal activity.

Finally, by tying the aggravating elements of participation in an ongoing criminal enterprise more firmly to particular crimes committed by a defendant, my proposal preserves the procedural benefits that permit presentation of the full context of criminal acts, while more closely fitting the traditional forms of substantive criminal liability.

The RICO illicit association cases show that a statute that in essence criminalizes membership in an organized criminal group can serve a valuable law enforcement purpose without undermining fundamental principles of fairness. But as with other proposals advanced above, my principal argument is not that law enforcement authorities need such a statute. The point, rather, is that they already have one. Unpacking RICO into a series of specific remedies for specific problems permits debate about the legitimacy of its various effects and the best means to accomplish them—debate that never occurred when RICO was passed.

IV. SUMMARY AND CONCLUSION

We have come a long way from the Katzenbach Commission, and from Roman Hruska's efforts to criminalize the investment of dirty money in legitimate business. Indeed, one of the principal lessons of this study is the vast disparity between what the legislative history shows that Congress was conscious of doing when it enacted RICO, and what, with the help of eager prosecutors and generally eager federal courts, it actually did.

or violent roles in such syndicates, while my suggestion applies enhanced penalties to the foot soldiers of criminal enterprises as well. As now written, RICO "draws no distinction between the foot soldier and the general." United States v. De Peri, 778 F.2d 963, 983 (3d Cir. 1985), cert. denied, 106 S. Ct. 1518 (1986). Whether or not it makes sense to provide even further enhanced punishment for the leaders of such an enterprise, cf. 21 U.S.C. § 848 (1982) (imposing stiff penalties for individuals occupying management positions in continuing narcotics enterprises), the premise of this discussion is that RICO is correct to see participation in a criminal enterprise as a distinctive offense for all members.
The principal impetus behind RICO was a desire to do something about what was perceived to be a serious threat to the economy and morality of the United States from organized criminal infiltration into legitimate economic sectors. The means by which this was to be accomplished were twofold: the imposition, for the first time, of criminal sanctions on the act of infiltrating a legitimate enterprise, and the creation of collateral antitrust-type penalties, such as forfeiture (as well as a separate civil cause of action), that would enable the courts not only to punish the infiltrator and reduce his economic incentive to invade legitimate business, but to expel him from the legitimate sector by expropriating his interest in the infiltrated enterprise.

As we have seen, this strategy was of doubtful promise from the outset. It has always been doubtful whether the acquisition by a criminal of an interest in a legitimate business is either harmful in itself, or an act that is usefully criminalized as an easily proved inchoate crime. Events have vindicated the doubters. The sections of RICO that directly prohibit infiltration have rusted on the shelf, being used principally as subsidiary counts in RICO indictments that take a different approach to the problem of organized crime. Only in the area of labor racketeering can it be said that RICO has been used in ways that specifically target organized criminal influence in legitimate institutions, and even in that area, the principal utility of RICO has been the increased sanctions it has effectively made available for ordinary racketeering activity, and the joinder of offenses it has made possible, rather than innovative concepts of enterprise liability or infiltration per se.

But if Congress did not accomplish what it set out to do in enacting RICO, its actions were hardly without effect on law enforcement. The broad draftsmanship of RICO, occasioned by the difficulty of defining with precision what was meant by “organized crime” and “infiltration,” put a powerful weapon in the hands of federal prosecutors. Virtually all of the most threatening sorts of conduct previously prohibited by either state or federal law, of both white- and blue-collar varieties, were made subject to federal jurisdiction, with extremely severe penalties of incarceration, fine and forfeiture, provided only that the government could link more than one predicate criminal act to virtually any sort of human association. In effect, under the rubric of RICO, federal prosecutors were given enormous discretion to prosecute cases that they felt were inadequately dealt with by existing law, because of jurisdictional or procedural barriers, or inadequate sanctions.

In principle, this grant of discretion is highly objectionable. A penal statute drafted so broadly that it allows the executive branch to override a wide range of normally applicable procedural and jurisdictional rules, to increase the maximum possible penalty for most serious crimes, and to take certain financial penalties outside the scope of judicial sentencing discretion, essentially whenever it chooses, raises seri-
ous problems of legality and fair notice, and creates a strong potential for abuse.

In practice, however, our sample of cases does not show a pattern of abuse of the statute. Most of the RICO cases we have examined involve serious, repeated misconduct. Moreover, although the Justice Department’s official guidelines for the use of RICO give little precise guidance on selecting cases for RICO treatment, the pattern of actual use of the statute reveals that RICO is invoked most commonly in a few, rather easily defined settings, in each of which it is strongly arguable that previously existing federal criminal statutes are inadequate. Thus, among the apparently unanticipated accomplishments of Congress in enacting RICO have been the further expansion and simplification of federal criminal jurisdiction over corruption by state and local officers; dramatic expansion of the penalties, and particularly of the financial penalties, available for business frauds and labor corruption; and the waiver, in cases that can loosely be described as involving ongoing, organized criminal activity, of obstacles to prosecution presented by various rules of jurisdiction and venue, joinder, statutes of limitations, and evidence. The latter effect, in particular, raises serious theoretical questions about our traditional concepts of substantive criminal law and criminal procedure.

Isolation of these effects, and of the costs and benefits of achieving them through RICO, permits some cautious suggestions for reformers of federal and state penal codes. First, many of the benefits to law enforcement provided by RICO can be achieved without the breadth and imprecision of the existing RICO statute—and indeed, without using the “racketeering” and “enterprise” concepts at all. Virtually all of the public corruption cases in which RICO has proved so attractive to prosecutors could have been brought successfully under ordinary rules of procedure, without defining new substantive crimes, and without permitting prosecutors to decide when and how to invoke expanded penalties, simply by making corrupt payments to state and local officials a federal crime whenever interstate commerce is affected. I believe this would be a desirable step. But even those who think that such a statute would be an unwarranted extension of federal jurisdiction, and a potentially dangerous intrusion into state autonomy, must recognize that RICO has essentially accomplished precisely this effect, completing the work begun by the Travel Act and by innovative use of the extortion and mail fraud statutes, without serious congressional attention to its desirability. A more specific statute at the very least would make its effect on federal-state relations explicit, without the cover provided by a purported attack on organized crime.

Second, RICO has been valuable in a large number of cases, principally in the areas of white-collar crime and labor racketeering, because it permits the expansion of penalties beyond those normally available for crimes such as mail fraud and violations of the Taft-
Hartley Act. The effective use of RICO sanctions in such cases demonstrates that the maximum penalties for these offenses are not commensurate with their danger to society or with their potential profitability for criminals. Congress has already begun the process of increasing these sentences, and both Congress and the United States Sentencing Commission should explore whether the financial sanctions attached should be increased further, whether by additional fines, or by the expanded use of restitution and forfeiture.

Third, the value of the RICO forfeiture sanction suggests that increased use of this sort of penalty should be seriously considered. The RICO forfeiture as originally conceived is not an ideal model for expanded applicability of the forfeiture concept. As we have seen, the original purpose of the RICO forfeiture remedy was the antitrust-type goal of extruding the racketeer from the legitimate enterprise he had infiltrated. This purpose has resulted in several problems that more general forfeiture remedies should avoid:

(I) The extent of the RICO forfeiture was originally measured by the extent of the defendant’s interest in the affected enterprise, and forfeitures of this type remain available under the statute. As prosecutors and courts soon learned, however, this concept is inapplicable to most kinds of crime; by judicial interpretation and eventual amendment, RICO forfeitures measured by the defendants’ profits eventually became available. Moreover, measuring the forfeiture by the extent of the defendant’s interest in a legitimate enterprise perhaps far larger than the scope of the criminal activity creates the possibility of penalties that are disproportionately severe. Forfeitures calculated exclusively in proportion to the harm or profit caused by the crime would not present these problems.

(2) The mandatory nature of RICO forfeitures also seems to be a product of its original conception as a preventive rather than punitive measure. While it might be desirable to make forfeiture of the fruits of crime a presumptive consequence of conviction, forfeiture as a sanction should not be mandatory, but should be viewed as one of a number of available financial sentences, to be coordinated with restitutionary remedies and fines.

(3) The notion that forfeiture aims to separate the infiltrator from a legitimate business he has invaded requires the forfeiture of highly specific property. This results in difficulties in identifying the specific property constituting the fruit of the racketeering activity, as well as potentially affecting the interests of others in that property. Tying the forfeiture penalty to the concept of profit rather than to infiltration should result in the use of a general in personam judgment of forfeiture.

of a particular sum of money, rather than of particular assets, simplifying administration and reducing the collateral consequences of the remaining in rem aspects of RICO forfeiture. 218

Fourth, separately addressing the various law enforcement problems to which aggressive prosecutorial use of RICO has called our attention strips away some of the side-effects of RICO and enables us to address directly the more serious challenge to our traditional notions of law and procedure presented by the massive illegitimate enterprise prosecutions that have become RICO's principal legacy. To my mind, the question of whether we should countenance the crime of being a racketeer, and if so, whether the concept can be captured in terms less all-encompassing than the present RICO statute is to a considerable extent an open one. For the reasons discussed above, I am inclined to the conclusion that those of the RICO illegitimate enterprise prosecutions have identified both a genuine weakness in our usual procedural and evidentiary rules and a distinctive form of harm to society that can appropriately be dealt with by a penal sanction.

But the problem of definition remains. While I am not certain that a statute can be drafted that criminalizes membership in a criminal organization without the overbreadth and imprecision characterizing RICO, it seems worthwhile to make the attempt. Any such statute must strive to capture the essential characteristics of the structured, diversified criminal organization that is its target, while preserving RICO's insistence that such membership be evidenced by concrete criminal behavior. I have set forth above some tentative thoughts about drafting such a statute.

Finally, the continued utility of sections 1962(a), (b), and (d) should be reassessed. Section 1962(b) essentially duplicates existing prohibitions of extortion and loan-sharking—a fact that presumably accounts for its desuetude. 219 Since proving a violation of section 1962(a) requires proof of a series of acts that are already criminal, and the acquisition of an interest in a legitimate business with the proceeds of crime—unlike, for example, the operation of a criminal syndicate—does not appear to be a distinct and graver harm to society than the commission of the crimes themselves, I would be inclined to omit section 1962(a) as well from a revised penal code, subject to some more general treatment of the subject of money laundering. It should not be a separate crime to conspire to operate a criminal enterprise, as now pro-

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218. This shift in the nature of forfeiture would also avoid the problem of forfeiture of bona fide attorneys' fees, and the bizarre possibilities of multiple forfeitures, created by the present in rem forfeiture and the "relation back" doctrine. See Lynch, supra note 1, at notes 220–25 and accompanying text.

219. The only additional prosecutorial advantage from the use of RICO instead of the Hobbs Act and the loan-sharking provisions is the possibility of forfeiture of the business interest acquired by the crime. If this is thought desirable, it is simpler to accomplish it by attaching a forfeiture provision to those statutes themselves.
vided by section 1962(d), because the distinctive crime identified by section 1962(c) or any reformed variant is intrinsically a conspiratorial harm, and providing additional offenses only aggravates the problem of prosecutorial power already inherent in RICO.

In short, careful analysis of the actual uses of RICO shows that adoption of a more limited statute prohibiting membership in a criminal organization, coupled with some modest adjustments in federal jurisdiction and sentencing provisions, would accomplish most of what RICO has accomplished, without the dangerous amorphousness of that statute. In addition, a proposal for such a package of statutes would permit debate on the merits of the different effects of RICO to proceed separately, with particular attention to the necessity and propriety of its most radical features—a debate that has never really taken place in Congress.

Realistically, however, it is probably too much to hope for serious discussion in Congress about such a radical overhaul of RICO. As Professor Bradley reminds us, no federal antiracketeering law has ever been repealed.220 The present political and social climate seems particularly ill-suited to the consideration of penal legislation that cannot be portrayed as increasing the "toughness" of criminal laws. Moreover, any effort to replace the criminal provisions of RICO necessarily will implicate the debate over civil RICO, which has developed its own political constituency (as well as its own critics).221 Pending another effort to recodify the federal penal code completely, I fear my suggestions for change in federal RICO are, for want of a better word, academic.222

I am more hopeful that some serious pause might be taken in the rush of state legislatures to adopt "little RICOs."223 The above survey of the history and operation of the federal RICO statute demonstrates clearly that the statute's form evolved from concerns with infiltration of legitimate business that are remote from the mafia-busting prosecutions that presumably have attracted the eye of state prosecutors and legislators. Moreover, the value of RICO to federal prosecutors has

221. Lynch, supra note 1, at note 15.
222. Lest this assessment seem too pessimistic, I should add that the recodification of federal penal law may well return to the active agenda in the foreseeable future. Any serious effort by the Sentencing Commission to base its sentencing guidelines on a coherent ranking of the gravity of different offenses will inevitably collide with the incoherent penalty structure and offense definitions of title 18, and a two-tier penal code in which title 18 contains its present jumbled format for the definition of offenses while a separate code of sentencing regulations superimposes a wholly different set of offense gradations and definitions for sentencing purposes will surely exceed even the American tolerance for legal chaos.
223. More than half of the states have now adopted statutes modeled on RICO, most of them in the last few years. See Lynch, supra note 1, at note 296.
consisted largely of its avoidance of specific problems of federal jurisdiction, penalty structure and procedure that are unlikely to exist in the states—given their plenary criminal jurisdiction and the adoption by most of them of penal laws derived from the Model Penal Code—and that in any case can be attacked, where they do exist, directly. RICO's revival of the concept of forfeiture and its authorization of prosecutions that present a broader picture of the activities of criminal organizations may be valuable ideas, but they should be debated in state legislatures on their own terms. If they prove attractive, there is no particular reason to enact them in forms derived from a statute that was drafted and has been interpreted in light of a whole other set of concerns.

Even here, however, the momentum of RICO is probably too strong to be overcome. While state legislatures may well be persuaded to adopt modifications of RICO such as those proposed by the ABA—it is easier to extract such changes in draft legislation as the price of adoption than to persuade Congress to modify an existing statute—legislative drafters are likely to prefer a proven model, complete with a body of case law and ringing endorsements from satisfied prosecutorial customers, over a more streamlined but untried design.

I have written about RICO at such great length because I believe it has challenged our concepts of criminal law in ways that no other recent penal legislation has come close to doing. I have been critical of the expansiveness of the statute; I have argued for its replacement by a series of simpler statutes; and I have at least questioned whether one of its most important manifestations is consistent with principles that have been implicitly taken as fundamental to our notions of just criminal punishment. But these criticisms should not obscure the conclusion.

224. Research on the patterns of use of state criminal and civil RICO statutes would be extremely interesting, although many of the "little RICOs" are too recent for their effectiveness to be fully evaluated. One might hypothesize that the existence of state RICO statutes closely modeled on the federal act in such places as Idaho and North Dakota is unlikely to reflect careful thought about the precise weaknesses of existing state legislation in dealing with organized crime groups.

225. Only a few states have departed significantly from the RICO model in recent legislation against organized crime. California, for example, has adopted a statute authorizing forfeiture of criminal proceeds in RICO-like cases, but without creating new RICO crimes. Calif. Penal Code § 186 (West 1987). Kentucky and Texas have adopted statutes more similar to the statutes prohibiting participation in organized criminal enterprises recommended above, see supra notes 209–15 and accompanying text, than to RICO. Ky. Rev. Stat. Ann. § 506.120 (Baldwin 1984); Tex. Penal Code Ann. §§ 71.01-.05 (Vernon Supp. 1987).

that RICO has not been frequently abused in application, that it has served a valuable function by permitting prosecutors to avoid some serious gaps in the federal penal code, and that, while it challenges us to expand our ideas about the nature of criminal law, the challenge should be welcomed, for RICO has identified an important fact about crime that may not be sufficiently recognized by traditional models. I hope that I am right about these favorable conclusions, because it is certain that we will not soon see the end of RICO.