Restricting RICO: Narrowing the Scope of Enterprise

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Passed in 1970 as part of the Organized Crime Control Act, the Racketeer-Influenced and Corrupt Organizations Act (RICO) affords prosecutors a new means of attacking organized crime and sophisticated criminal syndicates. Unlike traditional law enforcement measures that focused solely on the acts committed, RICO attacks the organization itself. To secure a criminal conviction, prosecutors must prove both a "pattern of racketeering activity" and an "enterprise." An enterprise is defined as any legal entity (such as a corporation) or informal association-in-fact. However, the broad language in the statute allows prosecutors to apply RICO to loosely-affiliated criminal groups, so-called "illicit associations-in-fact." In particular, § 1962(c) prohibits persons "employed by or associated with any enterprise," including a handful of small-time criminals, from participating in the affairs of the enterprise through a pattern of racketeering activity. This provision of the statute thus allows broad application of RICO to persons other than traditional organized criminals. Despite the lesser threat they present, members of such illicit associations-in-fact still face RICO's heightened penalties for activities punishable under existing state or federal law.

This article focuses on the enterprise element of RICO which permits expansive application of criminal RICO — particularly associations-in-fact — beyond the policies and purposes underlying the statute. Despite RICO's broad definition of enterprise, courts should construe associations-in-fact narrowly.

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2 See 18 U.S.C. § 1962(a)-(d) (1988). These "substantive" provisions of RICO do not criminalize previously legal acts. Instead, the statute provides that if a person commits two or more "predicate acts" (all of which are illegal under either state or federal law), a "pattern of racketeering activity" may be established. 18 U.S.C. § 1961(5) (1986). When this pattern is coupled in some form with an enterprise, prosecutors may secure significantly greater sanctions and penalties.

3 Id. § 1961(4).

in order to promote a reasoned application of the statute. Moreover, Congress should relieve courts from having to choose between applying RICO literally and applying it sensibly by amending its definition to attack the statute's true target: organized crime.

Part I describes the overbreadth problem as created by Congress and perpetuated by the courts. Section A discusses RICO generally to provide a framework for the article. In Section B, an exploration of Congress' focus on organized crime— not loosely-affiliated criminals— highlights the rift between RICO's statutory language and its legislative history. Section C examines judicial application of the association-in-fact concept and concludes that courts have interpreted RICO too broadly. Section D discusses different judicial attempts to restrict RICO to illicit associations-in-fact and congressional efforts to revise RICO.

Part II considers the "enterprise" concept from a policy perspective and sets forth recommendations for Congress, the courts, and prosecutors. Section A provides a framework for the prescription by clarifying the concept of association-in-fact. Section B discusses the roles and functions of the enterprise requirement, concluding that enterprise is important because of what it achieves, not because of what it means. Section C advances public policy arguments in favor of strictly construing associations-in-fact when dealing with defendants not traditionally considered organized criminals. Section D explains what prosecutors, courts and Congress should do to restrict RICO's breadth by limiting enterprise. Congress must intervene and modify the definition of association-in-fact to apply only to organized criminals.

I. DESCRIPTION OF RICO — WHAT CONGRESS AND THE COURTS HAVE DONE

A. THE RICO STATUTE

RICO attacks organized crime in a novel way by focusing on the concept of enterprise rather than either the commission of acts or explicit agreements among criminals. RICO allows private civil actions and treble damages for violations of the statute. The statute initially sets forth the terms essential to

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5 This article focuses on criminal, not civil RICO.
its application. RICO defines "racketeering activity" exclusively by the delineation of numerous state and federal criminal offenses.\(^6\) Prosecutors must allege the commission of at least two "predicate acts" within ten years of each other in order to establish the necessary "pattern of racketeering activity" to convict a defendant.\(^7\)

RICO defines "enterprise" as any legal entity, such as a corporation, partnership, or individual, or "any union or group of individuals associated in fact although not a legal entity."\(^8\) This broad definition of enterprise permits prosecutors to attack both legitimate entities, such as businesses, and wholly criminal associations. Enterprise provides the focus for RICO prosecutions because it allows the targeting of an organization in addition to the alleged predicate acts. Lastly, RICO defines "person" as any individual or entity capable of holding a legal or beneficial interest in property,\(^9\) which is important because RICO's substantive provisions are directed at "persons."

Section 1962 describes the "predicate acts." First, § 1962(a) prohibits investing in a legitimate business with money earned from a pattern of illegal activities. Similarly, § 1962(b) prohibits acquiring or maintaining an interest in an enterprise through a pattern of racketeering activity. The latter section targets acquisition of an enterprise through unlawful means, whereas § 1962(a) regulates investment that would be lawful but for the illicit source of the funds. These two provisions generally apply where the enterprise is a legal entity, most commonly a business or labor organization.

Section 1962(c), the most controversial substantive provision of the statute, prohibits anyone "employed by or associated with any enterprise from conducting or participating in the conduct" of the enterprise's affairs through a pattern of racketeering activity.

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\(^6\) 18 U.S.C. § 1961(1) (Supp. 1991). The proscribed racketeering activities include violent crimes such as murder, arson, and kidnapping; crimes involving illicit goods and services, such as narcotics, pornography, and counterfeiting; crimes involving payments and loans to labor organizations; and commercial fraud, including securities fraud, mail fraud, and wire fraud.


\(^9\) Id. § 1961(3).
activity. Unlike the previous two provisions, § 1962(c) addresses the uses of the enterprise concept. This provision applies to both legitimate and illicit enterprises, although the person-enterprise rule limits its application to the former. Applied to an illicit association-in-fact, the section prohibits that enterprise — the group of criminal "confederates" — from engaging in the proscribed pattern of racketeering activity. This provision can be recklessly applied to illicit associations-in-fact because, in many cases, the prosecutor defines the enterprise not by its structure, but by the acts constituting the pattern.

RICO provides virtually no limitation as to whom may be prosecuted if the pattern and enterprise elements exist. Convictions under RICO result in imprisonment of up to 20 years in addition to heavy fines. The statute also authorizes criminal forfeiture of both the interest in the enterprise and any proceeds derived from the pattern of racketeering activity. This forfeiture provision is a valuable tool not usually available in traditional efforts to attack crime. This basic framework should assist the reader to understand the use of enterprise in criminal prosecutions against illicit associations-in-fact.

B. RIFT BETWEEN TERMS OF STATUTE AND LEGISLATIVE HISTORY

RICO clearly applies to illicit associations-in-fact, regardless of whether the association is a well-organized criminal syndicate or a loosely-organized group of criminals. The statute provides no clear limitation on the scope of enterprise. An association-

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10 Followed by a majority of circuits, the person-enterprise rule requires that the enterprise be distinct from the culpable "person employed by or associated with any enterprise." In other words, where legitimate entities are involved, the defendant cannot be both the person and enterprise under § 1962(c). See Miranda v. Ponce Fed. Bank, 948 F.2d 41 (1st Cir. 1991). But see Haroco, Inc. v. American Nat'l Bank and Trust Co., 747 F.2d 384 (7th Cir. 1984).

11 Potential limits on criminal prosecutions are set out in the Department of Justice Guidelines for RICO cases. See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-110.000 to -111.700 (1990) [hereinafter GUIDELINES].


13 Id.

14 Lynch acknowledges the broad reach of RICO's terms: RICO could be read as imposing drastic sanctions not only on the
in-fact is delineated, in large part, by the predicate acts that its members commit. If courts find an association-in-fact enterprise in every pattern, then ordinary criminals will fall as squarely within the statutory coverage as the organized criminals whom RICO sought to constrain.

The legislative history of RICO, however, suggests that RICO's chief proponents intended to limit the statute's reach to traditional organized crime. Although Congress did not explicitly reject the application of RICO to ad hoc conspiracies, it did not exhibit great concern about federalizing small-time criminals. Regardless of how Congress ultimately approached the problem, congressional proceedings and studies suggest that the chief concern was the organization behind organized crime.

Bills proposed prior to RICO's passage bolster this conclusion. In 1965, Senator John McLellan introduced Senate Bill 2187, which sought to prohibit membership in organized crime generally, and particularly in the Mafia. Although Congress took no action on Senate Bill 2187, due in part to doubts

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15 S. 2187, 89th Cong., 1st Sess. (1965). In principal part, S. 2187 reads: "Whoever . . . after the date of enactment . . . knowingly . . . becomes or remains a member of (1) the Mafia, or (2) any other organization having for one of its purposes . . . violation[s] of the criminal laws . . . relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering, with knowledge of the purpose of such organization, shall be guilty of a felony . . . .

Id. § 2(a).
about its constitutionality,\textsuperscript{16} § 1962(c) incorporated much of the spirit of this bill.\textsuperscript{17}

Following the 1967 report of the President's Commission on Law Enforcement and the Administration of Justice,\textsuperscript{18} Senator Roman Hruska proposed two bills addressing the infiltration of legitimate organizations by organized crime. Senate Bill 2048\textsuperscript{19} would have outlawed the investment of certain unreported income to "establish or operate" business enterprises, and Senate Bill 2049\textsuperscript{20} would have prohibited participants in certain crimes from investing their proceeds in "any business enterprise."\textsuperscript{21} Shortly thereafter, Hruska proposed Senate Bill 1623,\textsuperscript{22} which adopted the key features of the prior bills, including use of the term "business enterprise."\textsuperscript{23}

The Commission Report supports the proposition that Congress limited its focus to organized criminal syndicates. One of the cornerstones of the Report was sociologist Donald Cressey's analysis of the nature of criminal organizations. Cressey's observation that an "organized criminal" is one who has committed a crime while occupying an organizational position for committing that crime\textsuperscript{24} bolsters the argument that Congress was not concerned with loosely confederated criminal activities.

\textsuperscript{16} S. 2187 facially appeared to criminalize status rather than conduct. In addition, critics expressed concern about the risk of guilt by association, the hazards of "large mass conspiracy trials," and the fear that evidence of the Mafia as an entity could inherently prejudice defendants. See Michael Goldsmith, \textit{RICO and Enterprise Criminality: A Response to Gerald E. Lynch}, 88 COLUM. L. REV. 774, 783 n.72 (1988).

\textsuperscript{17} According to Michael Goldsmith, RICO created an indirect way of attacking organized crime through pattern and enterprise, rather than unconstitutionally prohibiting membership in the Mafia. \textit{Id.} at 784.


\textsuperscript{19} S. 2048, 90th Cong., 1st Sess. § 2 (1967).

\textsuperscript{20} S. 2049, 90th Cong., 1st Sess. § 3 (1967).

\textsuperscript{21} See Goldsmith, \textit{supra} note 16, at 777.

\textsuperscript{22} S. 1623, 91st Cong., 1st Sess. § 3 (1969).

\textsuperscript{23} See Goldsmith, \textit{supra} note 16, at 777.

\textsuperscript{24} Cressey, \textit{supra} note 18, at 59. Cressey sought to attack organized crime (while avoiding S. 2187's shortcomings) by "[d]efining illicit business in organizational terms" and making "participation in such divisions of labor a violation of criminal law." \textit{Id.} at 57.
Restricting RICO's Enterprise

Perhaps this gap between legislative intent and the language of RICO is a result of the different opinions the statute's drafters attempted to incorporate. Viewing the statute as a political compromise, however, is erroneous. Instead, RICO's curious approach is attributable to the difficulty in defining organized crime. Because Congress could not simply outlaw membership in a criminal organization, Congress defined organized crime in terms of conduct: the commission of predicate acts. The enterprise concept served the purpose of limiting the application of RICO to situations where an entity was exploited or created to commit the predicate acts. Because Congress did not tailor this enterprise element narrowly, courts applying RICO have extended it far beyond its intended purposes.

C. Judicial Application of "Enterprise" to Associations-in-Fact

This section examines judicial treatment of § 1961(4) "associations-in-fact." Early case law addressing the scope of illicit associations-in-fact construed RICO broadly, including a significant amount of criminal activity within its reach. For example, the Fifth Circuit in United States v. Elliot upheld the district court's finding of an association-in-fact comprised of several defendants who combined to commit various crimes. The predicate offenses included arson, murder, counterfeiting titles for stolen cars, stealing a truckload of Hormel meat and other assorted goods, and attempting to influence the outcome of a trial. The government named six defendants, each of whom participated in all or some of the predicate offenses. Defendants argued on appeal that the crimes did not further the affairs of an "enterprise," since the defendants committed only isolated criminal acts without formal agreement or structure. Al-

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25 "[RICO] implicitly defined organized crime by what it did rather than by what it was, by listing a variety of crimes to which the prohibitions of the act applied." See Lynch, supra note 14, at 683.


27 Id. at 884-95.

28 As the court noted: "According to the defendants, what we are dealing with is a leg, a tail, a trunk, an ear — separate entities unaffected by RICO's proscriptions. The government asserts ... that we have come eyeball to eyeball with a single creature of behemoth proportions." Id. at 884.
though they broke the law, they did not do so as an enterprise, but rather as a collection of individuals who occasionally acted in concert.

The Fifth Circuit disagreed, likening the confederation of criminals to a "large business conglomerate." The common thread tying the alleged activities together "was the desire to make money." An enterprise, according to the court, can be a wholly illicit organization, one with "an amoeba-like infrastructure that controls a secret criminal network." After noting that RICO does not target "sporadic activity" but rather "highly sophisticated" organized crime, the court held that the prosecution had proven "the existence of an enterprise — a myriopod criminal network, loosely connected but connected nonetheless." Despite its discussion of the limited purposes of RICO, the court applied the statute to a loosely-organized "confederation" of criminals, precisely the type of loose organization punishable under existing law. The Fifth Circuit further underscored the expansive scope of enterprise and its role in RICO prosecutions, noting that "the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.

In 1981, the Supreme Court issued the seminal decision defining associations-in-fact. In *United States v. Turkette*, the Court defined an association-in-fact as a "group of persons associated together for a common purpose of engaging in a

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29 Id. at 898. The court, "metaphorically speaking," referred to one defendant as "chairman of the board," and noted the presence of executive committees in charge of counterfeit titles/amphetamine sales and thefts from interstate commerce. Id. This approach is correct, except that the court inferred more structure and organization into the defendants' affairs than actually existed.

30 Id.

31 Id.

32 Similarly, the court started its opinion by addressing the threat caused "when groups of people, through division of labor, specialization, diversification, complexity of organization, and the accumulation of capital, turn crime into an ongoing business." Id. at 884. Strangely enough, it seems difficult to characterize the activity engaged in by the Elliot defendants as evidencing the above criteria.

33 Id. at 899.

34 Id. at 903.

course of conduct." According to the Court, in order to prove an association-in-fact, the government must present evidence of "an ongoing organization, formal or informal," and evidence that "the various associates function as a continuing unit." The Court emphasized that although the proof used to establish the separate elements of pattern and enterprise could coalesce, "proof of one does not necessarily establish the other." By stressing that pattern and enterprise are distinct elements of a RICO offense, the Court sought to assuage fears that applying § 1962(c) to illegitimate associations would cause the two requirements to collapse into one another.

Turkette's facts, however, suggest that the Court did allow the two elements to blend together. The government alleged four arson schemes, in two of which Turkette hired his acquaintance Landers, to burn down houses in return for a fee. In the other two, Turkette arranged to burn two cars so that he and an associate could recover insurance proceeds. Different participants figured in each act of arson. Turkette and several others, including Landers, also robbed pharmacies and distributed the drugs they stole. Only Landers and Turkette participated in any of the arson schemes. Although Turkette was clearly a criminal, his "enterprise" or criminal gang consisted of a group of people with whom he committed crimes, with no systematic overlap of members. Turkette and his "associates" clearly were not organized criminals, and it is not clear how they constituted an illicit association-in-fact when they lacked true continuity or structure.

The Supreme Court adopted the Turkette test to restrict the potentially limitless application of RICO to criminal associa-

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36 Id. at 583. This definition applies to both legitimate and illicit associations-in-fact.
37 Id.
38 Id.
39 But see David Vitter, The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View, 62 TUL. L. REV. 1419, 1424 (1988) ("In rejecting the view that [pattern and enterprise] are the same, the Supreme Court merely attacked a straw man. . . . For if one's definition of these terms means that, in concrete cases, the existence of a pattern almost always necessitates the existence of an enterprise, the question still remains whether such an interpretation of the Act is satisfactory.").
40 The facts of the case are set out in the First Circuit's opinion, United States v. Turkette, 632 F.2d 896, 908-09 (1st Cir. 1980).
41 See Lynch, supra note 14, at 704.
tions-in-fact. Although the test purports to require an ongoing organization and continuity, these elements are quite hollow in § 1962(c) prosecutions, where enterprise and pattern often coalesce.\textsuperscript{42} If the enterprise is defined in part, if not exclusively, by the predicate acts its "members" commit, Turkette's first two elements are established simply by proof that the crimes occurred over a prolonged period.

D. RESTRICTIONS ON RICO

1. Judicial Reluctance to Limit RICO

The RICO statute offers no general limitations on RICO's breadth. In order to limit RICO, courts must either strictly construe the Turkette elements of association-in-fact or devise other limits on the breadth of the enterprise concept. This section discusses the various judicial attempts to restrict the broad application of RICO associations-in-fact.

One way that federal courts may avoid broadly applying RICO to criminal associations-in-fact is by narrowly construing Turkette's elements: an ongoing organization/common purpose,\textsuperscript{43} a continuing unit, and proof that the enterprise is separ-

\textsuperscript{42}A hypothetical illustrates how much the test will permit. Assume A sets fire to B's business, at B and C's request, to collect insurance money. C assists B in covering up the arson and collecting the proceeds. Over the next few years, A commits a variety of crimes, usually by himself, some of which fall within § 1961(1)'s list of racketeering activities. B is involved in one of these crimes. Three years later, A again commits arson, this time for E and with E's assistance, when C recommends A's services. Under Turkette, A arguably masterminds a criminal association-in-fact, with C in charge of solicitation. The ongoing organization and continuity requirements are established by the fact that the predicate acts occurred over a five year period. In addition, under Turkette proof of the enterprise (A and C's structure) is arguably separate and distinct from proof of the pattern (the commission of crimes). Why should A and C face RICO's heightened sanctions? This article argues that such loose confederations should not face prosecution under RICO. Although A may be a career criminal, he is not part of a sophisticated criminal network unassailable under existing state or federal law. He does not pose the same sort of threat RICO seeks to redress.

\textsuperscript{43}Although Turkette used the term "ongoing organization," subsequent courts have seized upon the opinion's "common purpose" language, given that proof of such a common purpose, by nature, satisfies the ongoing organizational requirement. See Thomas O'Neill, Functions of Enterprise, 64 NOTRE DAME L. REV. 646, 713 (1989); United States v. Griffin, 660 F.2d 996, 1000 (4th Cir. 1981) ("Critical to the charge and proof of the existence of an associated-in-fact
rate and distinct from the pattern. It is not difficult to prove that a common purpose or an ongoing organization existed: the state only has to prove something as general as a desire to make money. In United States v. Perholtz, for example, the prosecutor alleged that the enterprise "associated in fact to unjustly enrich themselves" by obtaining government contracts through bribery and fraud. Most criminal conspiracies involve a desire to make money.

The Third Circuit in United States v. Riccobene stated that to prove an ongoing organization, the prosecutor must show that a "structure exists within the group for the making of decisions, whether it be hierarchal or consensual. There must be some mechanism for controlling and directing the affairs of the group on an ongoing, rather than an ad hoc, basis." Despite this language, thus far, courts have not rigidly interpreted Turkette's ongoing organization element.

Similarly, courts have not used the continuing unit element of Turkette to narrow the definition of an association-in-fact. Prosecutors can prove this requirement by showing the presence of the organization over a period of time. Since the pattern and enterprise tend to coalesce in § 1962(c) illicit association cases, the continuing nature of the unit may be inferred from the fact that the predicate acts occurred over a period of time. If the association committed the predicate offenses over time, then there was a continuing unit.

In addition, the continuing unit element does little to restrict RICO's breadth because an association-in-fact may substantially change its membership over time and still function enterprise under § 1962(c) is charge and proof of a common purpose for which the individuals alleged to constitute the enterprise associated themselves.

45 See O'Neill, supra note 43, at 713.
48 Id. at 222.
49 See O'Neill, supra note 43, at 713; see also United States v. Mazzei, 700 F.2d 85 (2d Cir. 1983) (associates functioned as a continuing unit during 1978-79 Boston College basketball season); United States v. DeRosa, 670 F.2d 889 (9th Cir.) (continuity proven by length of association and recruitment efforts), cert. denied, 459 U.S. 993 (1982).
as a continuing unit. People within the association can change roles, as long as the overall enterprise remains intact in general form and purpose. The Eighth Circuit, in United States v. Bledsoe, elaborated on the ability of an association-in-fact to evolve over time:

What is essential... is that there is some continuity of both structure and personality. For example the operatives in a prostitution ring may change through time, but the various roles which the old and new individuals perform remain the same. But if an entirely new set of people begin to operate the ring, it is not the same enterprise as it was before.

In restricting RICO's breadth, courts most frequently hold that the proof of the pattern and enterprise must be separate and distinct from that of the pattern of racketeering in which it engages. Turkette explained that the proof of pattern and enterprise may overlap, but that "enterprise at all times remains a separate element which must be proved by the Government."

Courts have interpreted this requirement in varied ways. Some permit the proof of pattern and enterprise to coalesce to a significant degree. For example, in United States v.
Bagaric, the Second Circuit essentially collapses the two elements into one:

We have upheld application of RICO to situations where the enterprise was, in effect, no more than the sum of the predicate racketeering acts. . . . [I]t is logical to characterize any associative group in terms of what it does, rather than by abstract analysis of its structure.

However, other courts have followed Turkette more faithfully and demanded that the evidence of the enterprise be more distinct from that used to prove the pattern. For example, the Bledsoe court stated that "the enterprise must be more than an informal group created to perpetrate the acts of racketeering." The court explained that absent a stringent "separate and distinct" requirement, the enterprise element would be read out of the statute:

[A]n enterprise cannot simply be the undertaking of the acts of racketeering, neither can it be the minimal association which surrounds these acts. Any two criminal acts will necessarily be surrounded by some degree of organization and no two individuals will ever jointly perpetrate a crime without some degree of association apart from the commission of the crime itself.

The Eighth Circuit stated a third necessary element of an association-in-fact: an ascertainable structure separate and distinct from the structure inherent in the commission of predi-

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58  Id. at 55-56 (citations omitted); see Vitter, supra note 39, at 1426 (describing the Second Circuit position as the extreme version of the majority approach to the separate and distinct requirement).
60  Bledsoe, 674 F.2d at 663.
61  Id. at 664. The court also reasoned that the relatively more serious penalties imposed by RICO suggested that the statute was not intended to apply to "simple conspiracies to perpetrate the predicate acts of racketeering." Id.
cate offenses. A prosecutor could prove structure with evidence of a diverse pattern of crimes or an infrastructure or system of authority beyond that needed simply for the commission of the acts. As an example, the court cited the command structure of a Mafia family and the hierarchy and division of profits within a prostitution ring. 62

The *Bledsoe* court found no enterprise distinct from the individual cooperatives used to perpetrate the predicate offenses. Requiring such truly distinct proof would both prevent "enterprise" from being read out of the statute and ensure that RICO's application to illegitimate enterprises would be restricted to sophisticated organized crime. Although the government's proof revealed "loose and discontinuous patterns of associations and agreements," there was no evidence of the requisite structure, continuity, or common purpose. 63 Many of the defendants performed tasks for several of the cooperatives, but these roles did not constitute the pieces of a larger structure apart from the pattern of racketeering activity.

*Bledsoe* relied on a prior Eighth Circuit decision, *United States v. Anderson*, 64 in placing significant limits on the application of RICO to associations-in-fact. In *Anderson*, the court required that an alleged enterprise delineate an association "substantially different" from the acts underlying the pattern. 65

What constitutes "substantially different"? How much in addition to the organization inherent in the commission of predicate acts is necessary to satisfy the "ascertainable structure" element? *Anderson* held that enterprise would include only associations with ascertainable structures existing to maintain operations "directed toward an economic goal" apart from the predicate acts. 66 *Anderson* represents perhaps the farthest that a court has gone in trying to restrict the application of RICO to associations-in-fact. 67 *Anderson* essentially reads enterprise to encompass only legitimate entities by requiring an economic goal distinct from the pattern. *Bledsoe* only required an ascertainable structure distinct from the pattern.

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62 Id. at 665.
63 Id. at 667.
64 626 F.2d 1358 (8th Cir. 1980), cert. denied, 450 U.S. 912 (1981).
65 Id. at 1365.
66 Id. at 1372.
67 For a discussion of the differences within the minority view on the "separate and distinct" requirement, see generally Vitter, *supra* note 39.
Under Anderson, however, criminals who developed an hierarchical decision-making structure would not constitute an enterprise if the organization existed solely to commit the predicate acts. This decision is a dead letter after Turkette, especially considering that it would exclude many associations-in-fact from prosecution.

Another Eighth Circuit decision, United States v. Lemm, read another twist into Turkette's language. In Lemm, several defendants were convicted of conspiracy to violate RICO and of mail fraud for their participation in an arson ring. In finding that an enterprise existed distinct from the pattern, the court stated that the arson ring could have operated in the absence of the predicate acts of mail fraud: "if we eliminate . . . the predicate acts . . ., the evidence still shows an on-going structure which [sic] engaged in legitimate purchases and repairs of property as well as acts of arson." Thus, instead of focusing on the ascertainable structure that Bledsoe spoke of, the court addressed the nature of activity outside the predicate acts. This approach is proper insofar as it looks to what would remain in the absence of the predicate acts. However, if it requires remaining criminal activity outside the predicate acts, as one observer has suggested it does, it would drastically restrict RICO's reach to criminals who are well-organized, albeit for a single criminal purpose.

Most courts have rejected the stringent Eighth Circuit requirements of enterprise, relying largely on Turkette's liberal tone and interpretation of RICO and its legislative history. These courts establish that all that is needed to prove an association-in-fact is an informal criminal network, not the more formal ascertainable structure envisaged by Anderson. For example, Riccobene noted that although an association-in-fact need not have a function completely unrelated to the pattern, it must have:

69 Id. at 1201.
70 Vitter, supra note 39, at 1434-36.
an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.\footnote{United States v. Riccobene, 709 F.2d 214, 224 (3d Cir.), cert. denied, 464 U.S. 849 (1983). Although this requirement of a separate existence falls short of Anderson's "economic goal," Riccobene does mandate more than the majority rule enunciated in Turkette and applied in cases such as Mazzei and Errico.}

Aside from elaborating on the basic Turkette criterion, some courts have devised other limitations on the scope of associations-in-fact. One such criteria is "enterprise continuity," a requirement previously adopted by the Second and Fifth Circuits. The requirement originates in Sedima's "continuity plus relationship" interpretation of pattern.\footnote{Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985). Actually, enterprise continuity first appeared in United States v. Moeller, 402 F. Supp. 49 (D. Conn. 1975), where the court noted that "even if 'enterprise' could be interpreted to include an unlawful venture, [it would] connote a requirement of continuing activity." \textit{Id.} at 60.} In \textit{Beck v. Manufacturer's Hanover Trust Co.},\footnote{820 F.2d 46 (2d Cir. 1987), cert. denied, 484 U.S. 1005 (1988).} the Second Circuit dismissed a complaint for lack of "enterprise continuity." The alleged enterprise had only "one straightforward, short-lived goal": the commission of the fraud giving rise to the predicate acts.\footnote{\textit{Id.} at 51. Similarly, the Fifth Circuit in \textit{Montesano v. Seafirst Commercial Corp.}, 818 F.2d 423 (5th Cir. 1987), adopted an enterprise continuity requirement.} The court approved this new element because within the Fifth Circuit, two predicate acts were still deemed sufficient to establish a pattern,\footnote{See R.A.G.S. Couture, Inc. v. Hyatt, 774 F.2d 1350 (5th Cir. 1985).} thus, enterprise continuity limited RICO's application where pattern, as interpreted, could not.\footnote{See O'Neill, supra note 43, at 670 n.101, 672.}

Thomas O'Neill clarifies the difference between enterprise continuity and Turkette's continuing unit/ongoing organization requirements:

Nothing in \textit{Turkette} says the enterprise must be a continuing unit. It simply must function like a continuing organization for the duration of the pattern. The
RICO enterprise was meant to address the idea of organization . . . . If the organization terminates upon completion of the pattern of racketeering activity, it has nonetheless functioned as a continuing unit for the time of the predicate acts.\(^7^6\)

Enterprise continuity would do more than simply require ongoing organization. It would mandate a sort of perpetual life that would effectively restrict the application of RICO to traditional organized crime, which clearly retains continuity of enterprise.\(^7^9\)

Given the uncertainty underlying this limitation, the Second Circuit reversed its position in *United States v. Indelicato*\(^8^0\) and *Beauford v. Helmsley*.\(^8^1\) Both cases confirmed that continuity is properly an aspect of a pattern of racketeering, not a RICO enterprise. Nevertheless, proof of an enterprise may be used to establish the continuity of the pattern.\(^8^2\) Thus, the enterprise continuity requirement survives only in the Fifth Circuit;\(^8^3\) an overwhelming majority of jurisdictions hold that continuity refers only to the pattern of predicate acts.\(^8^4\)

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\(^7^6\) *Id.* at 672 n.109.

\(^7^9\) *Id.*

\(^8^0\) 865 F.2d 1370 (2d Cir.), cert. denied, 493 U.S. 811 (1989).

\(^8^1\) 865 F.2d 1386 (2d Cir.), vacated, 492 U.S. 914 (1989).

\(^8^2\) See *id.* at 1391.

\(^8^3\) See Parker & Parsley Petroleum Co. v. Dresser Indus., 972 F.2d 580, 583 (5th Cir. 1992); Manax v. McNamara, 842 F.2d 808, 811 (5th Cir. 1991) ("This association . . . lacks the continuity required of RICO enterprises. The association as alleged has one short-term goal — the destruction of [plaintiff's] medical practice — and presumably will disband upon the attainment of that goal. There is, as a result, nothing linking the members of the association to one another except the commission of the predicate criminal acts.").

\(^8^4\) Another criterion adopted by several courts is the requirement of a profit-seeking purpose. This limitation is not terribly significant, as the financial purpose can be related to *either* the enterprise or the pattern of racketeering activity. *See* United States v. Ivic, 700 F.2d 51 (2d Cir. 1983). However, this limitation does little to prevent the application of RICO to ad hoc criminal conspiracies, as all such criminal confederations will engage in predicate acts producing economic gain, unless the acts are purely political in nature.

Another limitation is the "person-enterprise" rule that prohibits the defendant from being the same entity as the enterprise in § 1962(c) cases. However, the rule as developed has no applicability to ad hoc conspiracies, as associations-in-fact are not considered persons for purposes of the rule. In
Recently, the Supreme Court narrowed the scope of § 1962(c) by conditioning liability under that provision on participation in the operation or management of the enterprise itself. More importantly, the Court indicated a move away from reliance on RICO's limitless language in the face of clearly contrary legislative history. In addressing RICO's liberal construction clause, the Court stated:

This clause obviously seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended.

This approach supports the position asserted herein that courts should strictly construe associations-in-fact under § 1962(c) by referring to the purposes Congress sought to further.

2. Legislative Efforts to Restrict RICO

In addition, Congress has considered steps to revise RICO, although it has not fundamentally changed the statute. Periodically, proponents for reform call for Congress to amend RICO. Most of the criticism focuses on civil RICO, where the greatest abuses are perceived. This does not mean that criminal reform is unimportant, however, because every civil RICO charge requires an underlying criminal violation. That is, any suit that a private plaintiff could bring could also be prosecuted by the government. If private citizens can bring abusive civil suits, so may federal prosecutors. Thus, despite the prevailing focus on civil RICO, issues pertaining to criminal RICO remain as important.

The most relevant proposed amendments were raised in 1991, when Representative William D. Hughes (D.-N.J.) pro-

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- Id. at 1172.


posed modifications to the definition of "pattern of racketeering activity." The bill, which passed the House Judiciary Committee, but was never voted on or discussed by the full House, would have changed two things. First, it would require that the two acts of racketeering activity be "related to one another or to a common external organizing principle and constitute or pose a threat of continuing racketeering." Second, it would add that two or more acts which are part of a single episode constitute a single racketeering act.

These amendments clearly would have promoted the position advanced by this article by indirectly restricting the scope of enterprise. By requiring a "common external organizing principle" and a continuing threat, the amendments would restrict the statute's reach. Turkette requires an ongoing organization or common purpose, continuity of structure, and separateness of pattern and enterprise. The proposed amendments appear to incorporate all of these elements. Further, the proposed bill would properly prevent one incident during which several predicate offenses occurred from constituting more than one racketeering act.

II. PRESCRIPTION — WHAT COURTS AND CONGRESS SHOULD DO

A. ROLES AND FUNCTIONS OF ENTERPRISE

The enterprise concept serves several crucial roles and functions. According to Thomas O'Neill, "enterprise" serves four distinct roles in RICO litigation: perpetrator, victim, prize, and instrument. When prosecutors allege an illicit association-in-fact, the enterprise is usually the perpetrator, or the entity committing the pattern of racketeering activity. When in-

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90 Id. at 2.
91 Id.
92 If a defendant murdered three people at once, the killings would comprise only one racketeering activity, not three.
93 See O'Neill, supra note 43, at 673-77.
94 However, the perpetrator may also be a legitimate entity. See, e.g., Petro-Tech, Inc. v. Western Co. of N. Am., 824 F.2d 1349 (3d Cir. 1987) (enterprise invested money it received from its own pattern of racketeering activity back into its own operation).
stead the enterprise is a victim,\textsuperscript{95} prize,\textsuperscript{96} or instrument,\textsuperscript{97} the RICO count is based on sections 1962(a) or 1962(b). These latter roles are implicated when organized crime infiltrates legitimate enterprises. In contrast, because illicit associations-in-fact are formed to commit certain acts, it is unlikely that they will serve any of these roles.

In addition, the enterprise concept promotes three key prosecutorial objectives: federal jurisdiction, joinder of offenses and parties, and the selection of appropriate remedies.\textsuperscript{98} Federal jurisdiction will exist where the enterprise and pattern of racketeering activity affect interstate commerce.\textsuperscript{99} Since many of the predicate offenses are state law offenses, achieving federal jurisdiction is one of RICO's more troubling aspects.\textsuperscript{100} RICO can apply to defendants who commit only common law crimes, so long as some informal illicit organization sufficient to comprise an association-in-fact exists. This far-reaching power of federal courts to enter areas traditionally left to state law

\textsuperscript{95} An enterprise is a victim when it is harmed by the pattern of racketeering activity, as in Sun Sav. & Loan v. Dierdorff, 825 F.2d 187 (9th Cir. 1987), where the savings and loan institution sued as a victim under § 1962(c), alleging that its president had run its affairs through a pattern of racketeering activity, namely mail fraud. \textit{See also} United States v. Porcelli, 865 F.2d 1352, 1362 (2d Cir.) (noting that enterprise can serve as a victim), \textit{cert. denied}, 493 U.S. 810 (1989).

\textsuperscript{96} When an enterprise is captured or infiltrated through a pattern of racketeering, the indictment will include § 1962(a) or § 1962(b) charges, with the enterprise serving the "prize" role. \textit{See, e.g.,} United States v. McNary, 620 F.2d 621 (7th Cir. 1980) (defendant used status as mayor to channel funds illegally into several businesses he owned, which served as the enterprise in a § 1962(a) count).

\textsuperscript{97} An enterprise becomes an instrument or tool when it permits the defendant to commit the predicate acts comprising the pattern. \textit{See United States v. Webster, 639 F.2d 174 (4th Cir.)} (tavern employed to disguise defendant's illegal activities), \textit{cert. denied}, 454 U.S. 857 (1981).

\textsuperscript{98} \textit{See} O'Neill, \textit{supra} note 43, at 677-704.

\textsuperscript{99} This impact on interstate commerce is required since RICO is a federal criminal statute. \textit{See} 18 U.S.C. § 1962(a)-(c) (all substantive offenses require that interstate commerce be affected). This impact need not be significant. \textit{See United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981)} ("A minimal effect on interstate commerce satisfies this jurisdictional element."). \textit{cert. denied}, 456 U.S. 962 (1982).

\textsuperscript{100} \textit{See} 18 U.S.C § 1961(1)(A) (1988), which lists as racketeering activity "any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law . . . ."
enforcement arguably violates well-established principles of federalism. Thus far, prosecutors have not employed RICO in such an abusive manner;\textsuperscript{101} prosecutions typically reach only cases where at least one of the charged predicate acts is a federal offense.\textsuperscript{102}

A second function enterprise serves is the joinder of parties and offenses. Joinder of persons is permissible under current federal law,\textsuperscript{103} but RICO effectively broadens these provisions. In particular, in criminal cases, § 1962(c) permits joinder of any person "employed by or associated with" the enterprise.\textsuperscript{104} Not only does the enterprise concept allow for joinder of parties as defendants under a RICO count, but it may allow joinder of non-RICO defendants in the same indictment.\textsuperscript{105} The 5th Circuit

\textsuperscript{101} In fact, the Department of Justice in its official guidelines counsels against such far-reaching application of RICO. \textit{See} GUIDELINES, supra note 11, § 9-110.200 ("One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned."); \textit{id.} § 9-110.330 (RICO indictments should not issue where the predicate acts consist of only state law offenses).

\textsuperscript{102} Section 1961 enumerates federal laws whose violation may serve as the predicate acts in a pattern of racketeering activity. \textit{See} 18 U.S.C. § 1961(1)(B)-(E) (1988). However, in United States v. Licavoli, 725 F.2d 1040 (6th Cir.), \textit{cert. denied}, 467 U.S. 1252 (1984), the charged predicate offenses were solely state offenses. In Licavoli, an organized crime leader and his accomplice were charged with conspiracy to murder and the actual murder of a rival gang leader, both state law offenses. Without RICO's enterprise, the defendants could not have been tried in federal court.

\textsuperscript{103} In criminal cases, the Federal Rules of Criminal Procedure allow joinder of defendants only when the parties participate "in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." \textit{Fed. R. Crim. P.} 8(b).

\textsuperscript{104} This standard is broader than Rule 8(b) of the Criminal Rules. Indeed, claims based on § 1962(c) loosen "the statutory requirements for what constitutes joint criminal activity. . . . Congress limited the force of Rule 8(b) in such situations." United States v. Castellano, 610 F. Supp. 1359 (S.D.N.Y. 1985).

\textsuperscript{105} Although RICO defendants may be joined by virtue of the language of § 1962(c), non-RICO defendants may be included in the indictment if the crimes they allegedly committed were in connection with the enterprise. [A] defendant . . . not named in a . . . RICO count . . . may be charged in a separate count, in the same indictment, if he is alleged to have participated in the same series of acts or transactions that constituted the . . . RICO offense, despite the fact that his participation may have been too limited to permit his being included as a . . . co-racketeer.

in *United States v. Elliot*\(^{106}\) recognized the breadth of joinder possible — in fact, intended — under RICO:

In enacting RICO, Congress found that "organized crime continues to grow" in part "because the sanctions and remedies available to the government are unnecessarily limited in scope and impact." . . . Against this background, we are convinced that, through RICO, Congress 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.\(^{107}\)

Under § 1962(d), RICO's conspiracy provision, the prosecution must still establish an overall objective, which is satisfied if a particular defendant knew of the general nature of the enterprise and the fact that it extended beyond his individual role.\(^{108}\) The breadth of joinder is especially significant in association-in-fact cases, where a defendant need only be "employed by or associated with" the enterprise. Although *Turkette* requires proof of a "common purpose" to establish an association-in-fact, this does not entail an explicit agreement to violate RICO's substantive agreements. Instead, establishing a common purpose is as simple as alleging that the associates hoped to make money\(^{109}\) or sought to commit the predicate acts charged.\(^{110}\) As *Elliot* recognized, the primary tool for achieving joinder of persons is the "enterprise" requirement in RICO's substantive offenses.

Similarly, enterprise allows joinder of offenses.\(^{111}\)

\(^{106}\) 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978).

\(^{107}\) *Id.* at 902.

\(^{108}\) See *United States v. Rastelli*, 870 F.2d 822 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989); see also *United States v. Young*, 906 F.2d 615, 619 (11th Cir. 1990) (RICO conviction where individual did not know all co-conspirators or details of the enterprise, and failed to participate in all of enterprise's activities).


\(^{110}\) See *United States v. Aleman*, 609 F.2d 298, 302 (7th Cir. 1979) (burglars comprise enterprise as association-in-fact, the purpose of which was "to plan and commit robberies, to carry away stolen goods and to divide them among themselves . . . "). *cert. denied*, 445 U.S. 946 (1980).

\(^{111}\) Joinder of offenses is made possible by the "acquisition, establishment,
Although current federal rules permit joinder of offenses, the broad definition of "enterprise" assures joinder in illicit enterprise cases because the predicate acts underlying the enterprise will fall within "the same series of acts or transactions." The enterprise concept binds together wholly separate offenses committed by the same defendant or group of defendants. The enterprise, whether a legitimate entity or an illegitimate association, furnishes the keystone for relatedness.

A last role that enterprise serves is the prosecutorial selection of remedies. RICO's sanctions are far-reaching. For example, violation of a substantive RICO provision may result in significant fines and a 20-year prison term. RICO's more innovative remedies — criminal forfeiture and civil injunctive relief — also flow directly from the enterprise requirement.

What is surrendered under RICO's criminal forfeiture provisions depends on how the prosecutor frames the indictment. Although the interests implicated by sections 1963(a)(1)(3) are not limited solely to interests in an enter-

or operation" language of § 1962(a), the "acquire or maintain" language of § 1962(b), and the "conduct the affairs" language of § 1962(c). See O'Neill, supra note 43, at 688.

112 See FED. R. CRIM. P. 8(a) (offenses must be of the same character or based on the same act or transaction, or of multiple acts connected together or comprising a common plan); FED. R. CIV. P. 18(a) ("A party asserting a claim to relief . . . may join . . . as many claims . . . as he has against an opposing party.").

113 See United States v. Neapolitan, 791 F.2d 489, 501 (7th Cir.) ("RICO is capable of providing for the linkage in one proceeding of a number of otherwise distinct crimes and/or conspiracies through the concept of the enterprise conspiracy."); cert. denied, 479 U.S. 939 (1986).

114 18 U.S.C. § 1963(a) (1988). In civil cases, such a violation may result in treble damages payable to any person injured in his business or property by reason of a § 1962 violation. 18 U.S.C. § 1964(c).
prise,\textsuperscript{115} identifying the exact relation between the enterprise and the ill-acquired interest facilitates effective forfeiture.

The enterprise concept also facilitates application of RICO's expansive civil remedies contained in § 1964(a). Among the powers granted to courts under that section are: ordering the divestiture of any interest in an enterprise; imposing restrictions on the future activities of a person, including prohibiting him from engaging in the same type of conduct the enterprise engaged in; and ordering dissolution or reorganization of the enterprise.\textsuperscript{116} All of these powers require the prosecutor to carefully frame the enterprise. Since the enterprise element is easy to satisfy, § 1964(a) could permit the dismantling of a criminal infrastructure, or whatever entities the defendants have infiltrated or exploited.\textsuperscript{117}

Examining the roles that enterprise plays does more than afford insight into prosecutorial strategy and RICO's intricacies. It suggests that the enterprise concept is not an inevitable way of addressing crime, that its inclusion in the statute reflects

\textsuperscript{115}See Rusello v. United States, 464 U.S. 16 (1983) (holding that § 1963(a)(1) "interest" refers to any interest, whether or not an enterprise, so long as it was acquired in violation of RICO's substantive provisions). Under Rusello, an enterprise could be the interest forfeited under § 1963(a)(1) (such as where the enterprise is acquired as a prize), but it is more likely to divest the convicted defendant of his interests obtained through the pattern of racketeering activity. On the other hand, § 1963(a)(2) addresses the enterprise, not the pattern of racketeering activity. See, e.g., United States v. Horak, 833 F.2d 1235, 1243 (7th Cir. 1987) (Section 1962(a)(2) "focuses on the enterprise, not the specific racketeering activity.... It would therefore seem irrelevant.... whether (a)(2) interests were directly related to the racketeering activity of which the defendant was convicted.").


\textsuperscript{117}For example, in United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411 (E.D.N.Y.), aff'd, 879 F.2d 20 (2d Cir. 1988), the government, alleging ten separate enterprises, sought to divest the family members of their interests in those enterprises and to enjoin their subsequent association with the enterprises and among themselves. \textit{Id.} at 1419. The district court refused to dismiss based on defendant's objections to the government's request for relief, noting the broad discretion granted to trial courts in exercising § 1964(a) and (b)'s equitable powers. \textit{Id.} at 1453. \textit{Bonanno} indicates RICO's unrealized remedial potential, as well as the central role enterprise could play: By breaking down the Bonanno Family's alleged operations into identifiable enterprises..., the government might be able to eradicate the entire range of activities of a mob family. Without the flexibility of the RICO enterprise concept, the government could not undertake such an ambitious legal maneuver.

what it does, not what it means. Enterprise is the linchpin that allows prosecutors to achieve jurisdiction, joinder and far-reaching remedies. Given the difficulty in defining organized crime, enterprise as applied to legitimate businesses and entities furnishes prosecutors with a target that facilitates their efforts. By including legal enterprises in RICO, Congress did much more than express its concerns about organized crime infiltration of legitimate society. Instead, it sought to provide something as verifiable as a corporation or a labor union to provide direction for prosecutorial efforts against criminal syndicates.

The enterprise requirement clearly helps prosecutors attack organized crime in a manner that they could not before, but in the process pulls "ordinary" criminals within the statute's reach. In the absence of the enterprise requirement, loosely-affiliated criminal groups would face prosecution only under existing state or federal law. A large portion of RICO cases involving § 1962(c) and illicit associations-in-fact deal with "strikingly ordinary criminal conspiracies." Furthermore, § 1962(c)'s broad language permits joinder of parties who are merely "associated" with the enterprise, which in turn may be established by an agreement to commit the predicate acts alleged.

B. POLICY ARGUMENTS IN FAVOR OF CONSTRUING "ENTERPRISE" NARROWLY

1. Organization

Legislative history suggests that Congress hoped to attack traditional criminal syndicates because of the danger inherent in their organization. However, stating that Congress sought to attack "organization" without addressing the dangers of structure that warrant federalization of criminal offenses is not enough. What makes organized crime more dangerous than loosely-affiliated criminal groups?

One answer is the economic impact of organized crime when it infiltrates legitimate businesses and acts as a drain on the economy. When organized criminals acquire interests in or conduct their affairs through legitimate enterprises (as anticipated by §§ 1962(a) and (b)), they may conduct or encourage

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inefficient business operations. One study prepared for the President’s Commission on Organized Crime in 1986 cites higher prices and underpayment of taxes as the primary negative impacts of organized crime on the U.S. economy.\textsuperscript{119} Higher prices — which result in greater profits for the tainted businesses — are often caused by threats and coercive tactics. Furthermore, the study suggests that individuals associated with organized crime report only forty percent of their income, forcing ordinary citizens to bear a disproportionate tax burden.\textsuperscript{120} The study concludes that organized crime reduced aggregate U.S. output by $18.2 billion, reduced employment by over 400,000 jobs, increased consumer prices 0.3%, and decreased per capita income by seventy-seven dollars.\textsuperscript{121}

Donald Cressey, whose views were influential in the drafting of RICO, also emphasized the importance of organization in crime. He distinguished organized criminals from their less structured counterparts: "the ordinary criminal is wholly predatory, while the man participating in crime on a rational, systematic basis offers a return to the respectable members of society."\textsuperscript{122} Cressey also noted the tendency of individual criminal entrepreneurs to confederate with others and stressed the specific problems incidental to organization of criminal activities:

By joining hands, [criminals] (a) cut costs, improve their markets, and pool capital, (b) gain monopolies on certain of the illicit services provided in a specific geographic area . . . , (c) centralize the procedures for stimulating the agencies of law enforcement and administration of justice to overlook the illegal operations, and (d) accumulate vast wealth which can be used to


\textsuperscript{120} \textit{Id.} at 486.

\textsuperscript{121} \textit{Id.} at 487.

\textsuperscript{122} Cressey, \textit{supra} note 18, 23, at 29. Cressey contends that organized crime thrives because of the desired goods and services it provides individuals. Furthermore, government efforts to abolish organized crime are often half-hearted, Cressey argues, because of conflicting commitments to preserving the wishes of citizens who demand the right to purchase illicit goods and to adhering to traditional notions of due process towards organized criminals. \textit{Id.}
attain even wider monopolies on illicit activities, and on legal businesses as well.\textsuperscript{123}

In fact, Cressey's entire analysis addressed the organizational structure of both Sicilian and American organized crime. His proposals for combatting organized crime require that it be defined precisely and attacked structurally, rather than by focusing on the individual criminal activities. Former FBI Director William Webster described the "badge" of organized crime as the "effort to obtain an edge — not necessarily and most often to the contrary, a legitimate edge."\textsuperscript{124}

Furthermore, proponents of the bill feared that racketeers could seize monopoly power through illegitimate means, which would carry serious anti-competitive economic consequences.\textsuperscript{125} Cressey noted:

The real danger is that the trend [of infiltration] will continue to the point where syndicate rulers gain such a degree of control that they drive supporters of free enterprise and democracy out of "business" and then force us to pay tribute in the form of traditional freedoms.\textsuperscript{126}

Arguably, this fear of infiltration prompted Congress to use "enterprise" to prevent organized crime monopolization. Section 1961(4) defines enterprise largely by reference to legal entities; arguably this signifies Congress' understanding that crimes

\textsuperscript{123} Id. at 30. Lynch asserts that the acquisition of a legitimate business interest, even with dirty money, is "morally neutral, or even beneficial": The harm to society is not in the act of infiltration — the investment of criminal proceeds — but in the acts of racketeering that precede and follow it. Society is injured by the narcotics and gambling businesses that are the source of criminals' profits, not by the use of those profits to buy a laundry; any harmful result of the latter comes not directly from the investment itself, but from the predicted operation of the laundry by criminal means.

Lynch, supra note 14, at 689-90.

\textsuperscript{124} Hearings, supra note 88, at 42.

\textsuperscript{125} Lynch, supra note 14, at 676 (discussing Senator Hruska's characterization of the purpose of the bill). Hruska also expressed fear that businesses operated by racketeers would employ "all the techniques of violence and intimidation" for which [they were] renowned. Id.

\textsuperscript{126} See Cressey, supra note 18, 23, at 25-26.
committed through such organizations are significantly more serious than the same crimes committed on an individual basis.

All crime reduces economic efficiency, but due to organized crime's scale and its infiltration of legitimate businesses, it poses a much greater threat than loosely organized criminals. Association-in-fact enterprises prosecuted under § 1962(c) have not infiltrated legitimate businesses, and are thus unable to wreak as much economic havoc as traditional organized criminals. Furthermore, an organized crime infrastructure permits its members to commit crimes with the benefit of institutional support. As the President's Commission on Organized Crime noted in its report:

Organized crime is the result of the commitment, knowledge, and activities of three components: the criminal groups, each of which has at its core persons tied by racial, linguistic, ethnic or other bonds; the protectors, persons who protect the group's interests; and specialist support, persons who knowingly render services on an ad hoc basis to enhance the group's interests.127

The organized crime network derives its strength not solely from the acts of its criminal confederates; organized crime benefits from the support of corrupt public officials, attorneys, and businessmen.128 The same is not true for loosely-affiliated criminals such as those prosecuted under RICO in Elliot.

From a prosecutorial point of view, this is precisely the shortcoming of traditional law enforcement: pre-existing law did not prohibit involvement in an illicit organization unless a broad conspiracy existed or each individual defendant engaged in the commission of the crimes.129 Substantive and procedural law prior to RICO inadequately allowed for widespread prosecution of traditional organized crime and well-developed criminal infrastructures.130 In the absence of indi-

127 Hearings, supra note 88, at 25.
128 Id. at 29-32.
130 United States v. Castellano, 610 F. Supp. 1359 (S.D.N.Y. 1985), exemplifies the type of case that could not have been prosecuted prior to RICO because of its "multi-faceted" nature. For a discussion of Castellano, see
vindicated proof linking each defendant to the acts committed, pre-existing law focused on agreement, in contrast to enterprise, which addresses structure. Applying RICO's far-reaching remedies against loosely organized criminal conspiracies is difficult to justify, given the statute's legislative history and the relatively minor threat that such organizations pose to society. Ad hoc conspiracies simply do not offer the sort of complex criminal infrastructures that RICO should attempt to dismantle.

2. Adequacy of Existing State and Federal Law

Existing law is sufficient to prosecute ad hoc associations-in-fact. As a result, RICO threatens principles of federalism. Many of the predicate acts listed in § 1961(1) are state law crimes that RICO allows to be tried in federal court if they meet the federal jurisdictional hurdle of affecting interstate commerce. However, the interstate commerce requirement is easily satisfied. As a practical matter, the potential for abuse in RICO's application to purely state law offenses may not be troubling, as it does not appear that state sovereignty has been infringed. On a theoretical level, however, the ability of prosecutors to drag into federal court cases long in the exclusive domain of state courts is dangerous.

In some cases, prosecutorial discretion is the only thing preventing federal involvement in state law offenses. Although the Department of Justice Guidelines state that RICO charges should not lie if the predicate acts "consist solely and only of


133 See United States v. Robinson, 763 F.2d 778, 781 (6th Cir. 1985) ("Enterprise need only have a minimal impact upon interstate commerce.").
134 See Lynch, supra note 14, at 715 ("Overfederalization of law enforcement does not appear to be a pressing political concern, nor is it apparent that prosecution of RICO offenses by federal officials threatens either rights of individual defendants or the remaining sovereignty of the states."). Indeed, Lynch notes that many states have adopted their own versions of RICO "to get in on the action." Id. at 715 n.236.
135 But see United States v. Frumento, 563 F.2d 1083 (3d Cir. 1977) (RICO forbids racketeering, which is defined partially by reference to state law; this does not mean that the statute punishes same conduct as reached by federal law), cert. denied, 434 U.S. 1072 (1978).
state offenses," the Guidelines permit an exception where local officials "are unlikely to investigate and prosecute otherwise meritorious cases in which the federal government has significant interest." The meaning of this exception is unclear. Furthermore, the Guidelines make no provision for bringing RICO charges where a single federal offense is charged along with a host of state offenses. RICO does not bar such a prosecution, even though the state offenses and the single federal violation could be tried separately. In such cases, RICO's application would preclude states from determining for themselves how to enforce their laws and punish those who violate them.

For example, in United States v. Aleman, two defendants were tried under RICO for committing three robberies in Indiana and Illinois. Federal jurisdiction existed because the defendants transported robbery proceeds across state lines. Although trying the case in federal court was proper under RICO, the statute allowed prosecution by federal authority of the robberies illegal under state law, despite the fact that state officials possessed a significant interest in prosecuting the cases themselves. Federal officials still could have vindicated their interests by prosecuting the defendants for violations of federal law, while leaving the robbery prosecutions to the states whose laws were violated. However, RICO permits the federalization of these state law offenses through its jurisdictional and joinder provisions.

Aside from federalism concerns, in most association-in-fact cases existing federal or state law is sufficient to prosecute defendants. RICO provides the prosecutorial benefit of trying all the offenses together, which allows them to cast the shadow of the mysterious criminal enterprise over all the individual defendants. As already suggested, this approach is justified when diverse criminal syndicates are responsible for crimes because existing procedural and substantive law is unable to handle such trials. An example is United States v. Ruggiero, where members of the Bonanno organized crime family were charged under RICO for violations of various state laws.

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136 GUIDELINES, supra note 11, § 9-110.300.

137 609 F.2d 298 (7th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

138 Id. at 301-02. Additionally, federal firearms charges were available against one of the defendants. Id. at 301.

and federal offenses, including gambling, narcotics, murder and theft. Achieving a unified prosecution to attack the organization would have been impossible without RICO, and prosecutors would have to settle for piecemeal trials at the state and federal levels. In such cases, RICO is applied to further the purpose of eradicating organized crime networks and restricting their infiltration of legitimate entities.¹⁴⁰

However, in § 1962(c) cases where enterprise is defined by the predicate acts of its members — as in Turkette — existing law suffices for prosecution. Even if a variety of offenses are committed, they can be tried under the state or federal statutes that make them criminal in the first place. Where requirements for joinder are satisfied — that is, when the events are related to each other — some of the offenses may be tried in conjunction. Even without such joinder, nothing prevents either state or federal authorities from proceeding against all or some of the defendants for violations of their laws. In the absence of any true organization, defendants in such association-in-fact cases should be punished for the crimes they have committed, whether federal narcotics offenses or state murder charges. They should not face megatrials in federal courts solely because imaginative prosecutors cast them as a criminal association-in-fact under Turkette's potentially hollow test.

3. RICO’s Resemblance in Application to a Status Crime

Furthermore, given how little it takes to be "employed by or associated with" an enterprise,¹⁴¹ § 1962(c), as applied to wholly illegitimate associations, looks frighteningly like a status crime. By being associated with persons who commit the charged predicate offenses, a defendant who participates in only a few of the less significant offenses may be tried in conjunction with the others and be subject to the same penalties.¹⁴² Gerald Lynch, an outspoken critic of RICO, argues that the statute criminalizes the status of being a gangster, whether in traditional organized crime or in a more "loosely-affiliated criminal


¹⁴¹ See Elliot, 571 F.2d at 903.

¹⁴² See Lynch, supra note 14, at 703.
combine." Lynch asserts that RICO violates the deeply ingrained transaction-based model of crime. Sections 1962(a)-(b) satisfy this requirement as they involve discrete transactions with ascertainable enterprises. Section 1962(c) as applied to illegitimate associations, on the other hand, does not address specific acts but rather a course of conduct over an extended period of time. In effect, a jury in a RICO case is determining much more than whether certain criminal acts occurred; "it is being asked to impose a conceptual construct on the events that it finds took place." Because the predicate acts are already subject to prosecution under existing law, participation in the enterprise is the sole basis for the enhanced penalties under RICO. In essence, membership in a criminal association, whether traditional organized crime or an ad hoc organization, constitutes a new substantive offense under RICO.

This is not to say that in most cases RICO punishes mere status, because a defendant still must engage in some activity sufficient to satisfy RICO's requirements. "Status" implies both a condition or state beyond one's control, such as alcoholism, and the absence of affirmative conduct. Membership in an organized crime family or a well-developed criminal syndicate involves neither. To be convicted under RICO, one must be associated with a pattern of racketeering activity consisting of at least two predicate acts. RICO penalizes activity, not status.

The fear of RICO punishing status is greater, however, in the criminal association-in-fact context. If courts allow the enterprise and pattern elements to coalesce, the enterprise giving rise to RICO liability is little more than the predicate acts constituting the pattern. In addition, the ease with which § 1962(c)'s "employed by or associated with" standard can be met allows people on the periphery of the "organization" to be prosecuted to the same extent as traditional "gangsters." Applied in this manner, RICO comes perilously close to criminalizing association with criminals. In addition, unlike conspiracy law, RICO does not require proof of a single agreement. Nor need the defendant be aware that he was participating in the

143 Id. at 706.
144 See id. at 932-45.
146 Lynch, supra note 14, at 943.
affairs of an enterprise. This also fosters the danger of "guilt by association." 

Furthermore, § 1962(c) criminal prosecutions permit lesser participants in the course of conduct to be punished as heavily as the masterminds. Clearly associations-in-fact may change their personnel, so that a defendant who participated in a few predicate acts early on in the enterprise's existence may be prosecuted under RICO because other defendants continued to commit crimes through the enterprise. Joinder would prejudice such peripheral defendants when the other members of the enterprise have committed more serious predicate offenses. Prosecutors may try to lump all the members of the enterprise together in a common prosecution, which might create the impression of a vast criminal gang, even though certain defendants were only bit players. In a sense, prosecutors may impute the actions of all the defendants to even the smallest player in the enterprise.

4. RICO's Recidivist Nature

Another criticism of RICO as applied to illegitimate associations-in-fact is that it acts as a recidivist statute. It does this by imposing far-reaching penalties on conduct already prosecuted under existing state and federal law where the pattern of racketeering is conducted through the affairs of an enterprise. Prosecutors may try defendants under RICO where convictions have already been secured for the charged predicate offenses that establish the pattern. Courts have recognized that "Congress, in enacting RICO, sought to allow the separate prosecution and punishment of predicate offenses and a subsequent RICO offense based in large part on those predicate offenses." The threat of recidivism is greatest in the context of illicit associations-in-fact, where the pattern and enterprise elements

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148 United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982).
149 See Lynch, supra note 14, at 703.
tend to merge. In *United States v. Bledsoe*, the Eighth Circuit warned of this potential implication:

> We are satisfied that RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes. The Act was not intended to be a catchall reaching all concerted action of two or more criminals involving two or more of the designated crimes.\(^{152}\)

Nonetheless, RICO allows prosecutors to incorporate prior convictions as part of the substantive offense under § 1962(c). The pattern is established by predicate acts, for some of which the defendant may have served time. As already suggested, in § 1962(c) criminal association-in-fact cases, the enterprise is defined by reference to the acts committed by its members, not by any formal or informal organization. Thus, in such cases, RICO creates a "new" offense of racketeering that has the effect of allowing convictions of a defendant for conduct for which he has already been punished.\(^{153}\)

5. *Erosion of Distinction Between Pattern and Enterprise*

Underlying many of the above arguments is the danger of allowing the distinction between pattern and enterprise to erode in association-in-fact cases, despite *Turkette*’s protests to the contrary. Even though *Turkette* warned of the danger of this erosion, its facts suggest that the Court misapplied its own standard. As Gerald Lynch observed:

> The actual evidence in *Turkette* . . . suggests something a good deal less organized [than required by *Elliot*].

\(^{152}\) 674 F.2d at 659.

\(^{153}\) As one commentator notes:

RICO was not intended to be merely a recidivist statute; rather, its greatly heightened penalties are justified by the particularly sophisticated, organized brand of economic crime that the statute targets. If an enterprise is found with every pattern, however, "garden variety" criminals will face RICO’s heightened penalties for merely committing two or more crimes rather than for committing them in a particularly organized or routinized, and thus more dangerous, manner.

Granted that Turkette himself had made crime into a full-time livelihood, his "organization" seems to have consisted of a couple of people with whom he committed robberies from time to time, and a few others he recruited to help when he was asked to arrange a few fires. It is not immediately clear why Turkette and his cronies should be subject to any greater punishment . . . [than] any other criminals guilty of multiple crimes.\footnote{See Lynch, supra note 14, at 705.}

Where the association-in-fact is defined in terms of the predicate acts committed by its members, \textit{the enterprise is what the enterprise does}.\footnote{One student observer noted that "an association-in-fact is what the pleader makes it, so long as the Turkette requirements are met." See O'Neill, supra note 43, at 664.} The predicate acts need not be related to any single transaction or event as long as they are committed through the affairs of an ongoing organization, either formal or informal.\footnote{See Lynch, supra note 14, at 703.} This "organization" in turn can be interpreted very loosely. The glue that binds the members of the association-in-fact is the pattern of racketeering activity, for this pattern defines the association's purpose.\footnote{See, \textit{e.g.}, Elliot, 571 F.2d at 895, where the purposes of the alleged enterprise were the commission of the predicate acts charged.} In addition, a broad interpretation of association-in-fact essentially removes that element from the statute, meaning that the prosecution focuses only on the predicate acts constituting the pattern. As a result, RICO can apply to nearly anyone who commits the predicate acts with other people, even if they are not organized in any detectable manner. Courts can mitigate the problems addressed above by simply stating the Turkette test and allowing the two elements to coalesce.

C. \textsc{How to Limit "Enterprise" and RICO's Breadth}

1. \textit{Prosecutorial Discretion}

Congress and the federal courts have done little to restrict RICO's application to traditional organized crime or sophisticated criminal conspiracies. Generally, prosecutors have not...
abused RICO's applicability to loosely-affiliated criminal enterprises. Given the limited government resources and the relatively lesser amounts that can be captured through criminal forfeiture from ad hoc conspiracies, prosecutorial discretion serves as an extremely valuable check on the broad application of RICO. As Justice Marshall noted in dissent in Sedima:

[Congress] chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted.\(^{158}\)

The Department of Justice has published RICO Guidelines to assist district attorneys in deciding when to bring criminal charges.\(^{159}\) The Preface to the Guidelines states that the "primary responsibility for enforcing state laws rests with the state concerned."\(^{160}\) The Guidelines note that Congress' primary concern was the infiltration of organized crime into the national economy, and that prosecutions should not be brought if far afield from congressional purposes.\(^{161}\) More specifically, as a matter of illustration, the Guidelines state that RICO charges may be appropriate where "a diversified course of criminal conduct involving division of labor and functional responsibilities exists, for which other conspiracy statutes are inadequate . . . ."\(^{162}\)

Responsible use of prosecutorial discretion is necessary. It is not sufficient, however, to ensure the virtually limitless application of RICO. The Guidelines are not binding, but serve merely an advisory function.\(^{163}\) As administrators and attitudes within the Department of Justice change, prosecutors may be more willing to pursue suits against loosely organized criminal associations-in-fact. In addition, convictions against small-scale associations-in-fact may be easier to achieve than convictions against traditional organized crime. As such, prosecutors might proceed against loosely-affiliated criminal groups to

\(^{159}\) See GUIDELINES, supra note 11.
\(^{160}\) Id. § 9-110.200.
\(^{161}\) Id.
\(^{162}\) Id. § 9-110.311.
\(^{163}\) Id. § 9-110.200.
improve their won-lost records. Therefore, it is incumbent upon the courts and Congress to restrict the scope of enterprise.

2. What Courts and Congress Should Do

Courts attempting to restrict RICO's breadth may find themselves straining to limit its reach given the statute's broad language and liberal construction clause. The proper course is to construe Turkette's elements strictly. This is not sufficient, however, because Turkette does not restrict RICO's application to organized crime. Thus, the best course is for Congress to intervene and recast the statute according to its original intent. Even if members of Congress favor RICO's broad application, they should restrict the statutory definition of association-in-fact for the reasons discussed previously: the importance of organization, the adequacy of existing law, RICO's potential to criminalize status, RICO's recidivist nature, and the tendency of pattern and enterprise to coalesce in § 1962(c) criminal association-in-fact cases.

If the problem is the excessive scope of illicit associations-in-fact, Congress should amend § 1961(4)'s definition of enterprise directly, instead of redefining pattern. This is not to say that the recent proposed amendments to pattern are unwise, but that more fundamental modifications to the enterprise concept are required. The better approach would be to codify Turkette's requirements, with particular emphasis on the "separate and distinct requirement." Congress should consider the approach taken in United States v. Bledsoe, where the court focused on an ascertainable structure distinct from the pattern of activity. If the defendants created some sort of hierarchal decision-making structure or financial structure, or developed a division of labor, these organizational aspects would exist in addition to the mere commission of the predicate acts. Most of the problems outlined in this article would be mitigated if Congress forced federal courts to prevent the concepts of enterprise and pattern to coalesce.

However, the problems underlying RICO run deeper than its definition of association-in-fact. What the statute lacks is a workable definition of organized crime. Attacking organized

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164 As Gerald Lynch testified before Congress, "I doubt that most [members of Congress] want to go back to their districts and face opponents who say that they voted for the Pro-Racketeering Act . . . "). *Hearings, supra* note 88, at 25.
crime is exceptionally difficult when defining organized crime in the first instance is so troublesome. Intuitive notions about what constitutes organized crime provide only limited assistance in drafting and implementing a statute. "Enterprise," particularly in § 1962(c) prosecutions, represents an attempt to attack the structure that organized criminals erect or infiltrate in order to perpetrate predicate offenses. Congress correctly perceived organization in any form — legitimate or illicit — as the true danger of organized crime. Pattern, on the other hand, signifies Congress' attempt to define organized crime by what it does. The predicate offenses listed in § 1961(1) are characteristic of organized crime, but they are also committed by common criminals on a regular basis. The delineation of predicate acts is therefore bound to be overbroad. As such, RICO depends on a reasoned application of its enterprise element to prevent the prosecution of ordinary criminals under § 1962(c). Thus, when courts construe enterprise broadly, they read out of the statute precisely what it is designed to attack.

Is it possible to draw the line between organized crime and loosely-affiliated criminal associations any more clearly? This article has already advocated codifying Turkette, with particular emphasis on the separate and distinct requirement. By doing so, Congress would move closer to targeting the structure and organization that make criminal syndicates so dangerous. Developing a paradigm structure that would support a finding of enterprise is difficult, given that criminals will not always arrange their affairs in a predictable manner.

One way Congress might address this is by drafting a non-exhaustive list of factors that would weigh in favor of finding an association-in-fact. This list would represent an attempt to move towards the Eighth Circuit's minority approach. Among the factors indicative of an infrastructure might be a defined division of tasks and roles, presence of cash flow and financial structure, well-developed plans, consensual or hierarchal decision-making methods, regularized meetings, records of any sort, routinization of affairs, diversity of operations, and capital investment. None of these factors appear necessary, although some — such as any type of permanent decision-making structure — might be sufficient depending on the circumstances. This list focuses not on the nature of the acts committed, but on

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165 Several of these factors are analyzed in Vitter, supra note 39, at 1438-43.
the organization that facilitates that criminal activity. If Congress adopted these elements in defining organized crime, it would essentially analogize criminal associations-in-fact to legitimate businesses. Such an analogy is apt; "[O]rganized crime is a substantial threat to our society not only because it infiltrates big business but also because it is big business."

Another attribute of traditional organized crime is size. Congress should impose a minimum floor on the number of people who must be involved in the enterprise. At least three or four core members or masterminds should exist, and they should be supported by a substantial cast of regularized participants. Any numerical limit requires arbitrary line-drawing. But the factors listed above imply that more than a handful of people are required to develop an ascertainable structure that presents the sort of dangers at which RICO aims. This is not to say that two confederates could not organize their criminal activity, but absent infiltration of legitimate entities, such a small operation is not any more dangerous than the sum of its predicate acts. In other words, "[W]hatever the imprecision in our concept of organized crime, three burglars don't make it."

Congressional efforts which seek to modify the definition of pattern are not the answer. The current list of predicate offenses in § 1961(1) is a fairly accurate characterization of the types of crimes organized criminals commit. However, many ordinary criminals commit the same acts, but are distinguished by their lack of organization. Thus, enterprise is the statutory section that must clarify what types of criminals are targeted. If Congress would modify its definition of association-in-fact, courts would evaluate illicit criminal activities in terms of the structure underlying the predicate acts. Where this structure is present — as evidenced by a stricter interpretation of Turkette's requirements and a consideration of the factors listed above — RICO's heightened sanctions are warranted.

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166 Id. at 1437.
167 Lynch, supra note 14, at 974-75.
168 However, efforts that increase the number of predicate acts required serve to promote the requirement of continuity and regularity of operations which is indicative of organized crime.
CONCLUSION

RICO is a valuable prosecutorial tool in attacking organized crime; however, the statute's broad language permits its application to loosely-affiliated criminal groups. The courts have little justification in interpreting associations-in-fact broadly to apply to such defendants. Ad hoc affiliations lack the requisite organization that establishes organized crime as a danger warranting special attention. Therefore, there is little reason to invoke RICO's broad penal and remedial provisions. Moreover, existing state and federal law sufficiently allow for the prosecution of such individuals. In addition, when association-in-fact is liberally construed, RICO looks like a status offense, making unlawful the "association" with criminals. Such interpretations also have a recidivist effect, making a defendant's past criminal activity part of the substantive offense.

To prevent RICO from being applied to ad hoc criminal affiliations, courts should require that prosecutors prove an enterprise separate and distinct from the pattern of racketeering. Although courts profess to apply this principle, they often allow proof of the two elements to coalesce. Congress must therefore intervene and amend the definition of enterprise. Congress should incorporate a list of factors characteristic of organized crime into its definition of illicit associations-in-fact. In addition, Congress should impose a numerical minimum for applying RICO to illicit enterprises. Such definitional modifications would prevent prosecutors from using RICO against small-time criminal networks, while permitting them to continue attacking RICO's true target: organized crime.

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