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Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law

Partnership in crime poses a greater potential threat to society than do individual offenses.¹ Criminal groups can undertake larger and more complex crimes, strengthen the resolve of flagging associates, capitalize on opportunities to diversify criminal operations, and sometimes cover their tracks more effectively.² Group crime also presents special problems for the prosecution, particularly in proving substantive offenses. Proving all the elements of a complex crime in any one person's conduct, or even determining principal responsibility for the crime, may pose significant problems.

The common law employed conspiracy and complicity doctrines to attack group crime. Conspiracy law permits the dissolution and punishment of criminal groups before they reach their objective. It also permits prosecuting individual conspirators in a successful criminal scheme whose commission of the substantive crime may not be easily provable. Complicity does not require proof of agreement, but liability does not attach unless the principal actually commits the crime.³

RICO,⁴ with its emphasis on the enterprise⁵ and pattern⁶ of

1 Paraphrasing Justice Frankfurter in *Callanan v. United States*, 364 U.S. 587, 593 (1961).

2 *See, e.g.*, 364 U.S. at 593-94; *Krulewitch v. United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring). *See also* THE PRESIDENT'S COMMISSION OF JUSTICE TASK FORCE REPORT: ORGANIZED CRIME app. C, at 81 (1967) [hereinafter cited as TASK FORCE REPORT]. *But see* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 413-14 (1959).

3 *But see* *Standefer v. United States*, 447 U.S. 10 (1980), in which the Supreme Court upheld a conviction of aiding and abetting, even though the principal had been found not guilty in an earlier trial. To prove complicity the government still had to prove the principal's guilt. The Court simply denied that the principal's earlier acquittal estopped the government from relitigating the issue in the complicity trial. *Id.* at 21-26.

4 RICO is an acronym for the Racketeer Influenced and Corrupt Organizations title (18 U.S.C. §§ 1961-1968 (1976 & Supp. IV 1980)) of the Organized Crime Control Act of 1970 (Pub. L. No. 91-452, 84 Stat. 922 (1970)). RICO attacks enterprise criminality through enhanced criminal penalties, criminal forfeiture, public and private injunctive relief, and treble damages in private actions. The statute defines three substantive offenses: 1) 18 U.S.C. § 1962(a) (1976) makes it unlawful

for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establish-

rackeering activity,⁷ is the most modern weapon against group crime. As a practical matter, RICO attacks group crime through its substantive provisions,⁸ since more than one person⁹ is usually charged in relation to any given enterprise. RICO aims specifically at inchoate group crime through its conspiracy provision, 18 U.S.C. § 1962(d).¹⁰

All reported section 1962(d) cases except one¹¹ have charged a conspiracy to violate the same RICO substantive offense, section 1962(c).¹² Specifically, they have involved conspiracy to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. This note's discussion of section 1962(d) will be limited accordingly.¹³

ment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

2) 18 U.S.C. § 1962(b) (1976) makes it unlawful

for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

3) 18 U.S.C. § 1962(c) makes it unlawful

for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"Enterprise," "pattern," and "racketeering activity" are defined terms. "Enterprise" is defined by example to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (1976). *See also* note 104 *infra*. "Pattern" means "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." 18 U.S.C. § 1961(5) (1976). *See also* note 111 *infra* and accompanying text. "Racketeering activity" is defined by a list of federal and state offenses, among them mail fraud, bribery, arson, extortion, murder, gambling, robbery, and drug dealing. 18 U.S.C. § 1961(1) (Supp. IV 1980). For a more extensive introduction to RICO, see Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009 (1980).

5 *See* note 4 *supra*.

6 *Id.*

7 *Id.*

8 18 U.S.C. § 1962(a)-(c) (1976), quoted in part at note 4 *supra*.

9 "Person" includes "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1976).

10 "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." 18 U.S.C. § 1962(d) (1976). For the content of subsections (a), (b), and (c), see note 4 *supra*.

11 *United States v. Loftin*, 518 F. Supp. 839 (S.D.N.Y. 1981), involved a conspiracy to violate § 1962(a). *See* note 96 *infra*.

12 *See* note 4 *supra*.

13 "RICO conspiracy" and "section 1962(d)" will be used as a shorthand to refer to this

This note examines RICO conspiracy against the backdrop of traditional conspiracy law. Part I sketches in the backdrop; Part II places RICO conspiracy on the stage, describing its debut and development in the court systems; and Part III analyzes the elements of RICO conspiracy as it plays in the circuits.

In discussing traditional and RICO conspiracy, this note follows the mode of analyzing criminal offenses which the United States Supreme Court applied in *United States v. Bailey*.¹⁴ The proposed Criminal Code Reform Act of 1981¹⁵ incorporates this analytical method. The proposed act breaks down the elements of any crime into three categories: conduct, existing circumstances, and result.¹⁶ It then assigns a required state of mind to each element for which no state of mind is specified in the statutory definition of the offense.¹⁷

single variety of RICO conspiracy. This note's analytical approach, of course, would also apply to RICO conspiracies with other RICO objectives.

14 444 U.S. 394, 402-15 (1980).

15 S. 1630, 97th Cong., 2d Sess. (1982).

16 *Id.* at § 101 (proposed 18 U.S.C. § 102).

17 When an element of an offense is described without specifying a required state of mind, the state of mind that must be proved for conduct is "knowing," for existing circumstances is "reckless," and for result is "reckless." *Id.* at proposed 18 U.S.C. § 303(b). Jurisdictional, venue, grading, and legal matters, however, require no particular state of mind. *Id.* at proposed 18 U.S.C. § 303(d). The Act provides four terms for describing state of mind, which it defines as follows:

- (a) "INTENTIONAL".—A person's state of mind is intentional with respect to—
- (1) his conduct if it is his conscious objective or desire to engage in the conduct;
- or
- (2) a result of his conduct if it is his conscious objective or desire to cause the result.
- (b) "KNOWING".—A person's state of mind is knowing with respect to—
- (1) his conduct if he is aware of the nature of his conduct;
 - (2) an existing circumstance if he is aware or believes that the circumstance exists; or
 - (3) a result of his conduct if he is aware or believes that his conduct is substantially certain to cause the result.
- (c) "RECKLESS".—A person's state of mind is reckless with respect to—
- (1) an existing circumstance if he is aware of a substantial risk that the circumstance exists but disregards the risk; or
 - (2) a result of his conduct if he is aware of a substantial risk that the result will occur but disregards the risk;
- except that awareness of the risk is not required if its absence is due to self-induced intoxication. A substantial risk means a risk that is of such a nature and degree that to disregard it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.
- (d) "NEGLIGENT".—A person's state of mind is negligent with respect to—
- (1) an existing circumstance if he ought to be aware of a substantial risk that the circumstance exists; or
 - (2) a result of his conduct if he ought to be aware of a substantial risk that the result will occur. A substantial risk means a risk that is of such a nature and degree

This scheme greatly facilitates the analysis of complex crimes such as RICO conspiracy, whether for purposes of prosecution, defense, judicial decisionmaking, or legislative drafting.

I. Traditional Conspiracy

RICO conspiracy inherits the jurisprudence of "traditional" common law and statutory conspiracy.¹⁸ Thus, any RICO conspiracy discussion must begin with a brief discussion of the current state of conspiracy law in general: the elements of the offense; its procedural, evidentiary, and substantive implications; and criteria for determining whether particular facts show one conspiracy or several.

A. *The Elements of Conspiracy*

Conspiracy, like any other offense, breaks down into conduct, existing circumstances, result, and corresponding states of mind. The gravamen of conspiracy, and the basic conduct required, is an agreement. Common law conspiracy requires an agreement between two or more parties to achieve, by concerted action, an unlawful object, or to achieve a lawful object by unlawful means.¹⁹ A tacit agreement, which may be inferred from the conspirators' conduct, will suffice.²⁰ The agreement may be ongoing, with parties joining at different times.²¹ Each defendant, however, must join the agreement

that to fail to perceive it constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation.

Id. at proposed 18 U.S.C. § 302.

18 The term "traditional" conspiracy, as used in this note, embraces common law and pre-RICO statutory conspiracy. For a discussion of traditional conspiracy, including conspiracy under the Model Penal Code, see Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy* (pt. 2), 61 COLUM. L. REV. 957 (1961).

19 See, e.g., *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111, 123 (1842), whose definition of conspiracy was adopted by the Supreme Court in *Pettibone v. United States*, 148 U.S. 197, 203 (1893).

20 Since conspiracies are by nature secretive, the prosecution can rarely present direct evidence of the agreement. The rule has necessarily developed that the agreement may be shown by circumstantial evidence. See *Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939); *United States v. Elam*, 678 F.2d 1234, 1245 (5th Cir. 1982). *Grunewald v. United States*, 353 U.S. 391, 399-406 (1957), limits this rule: the conspiracy is presumed to terminate when the central object is achieved, and no agreement can be inferred from attempts to avoid apprehension. The presumption, however, can be rebutted. See *Forman v. United States*, 361 U.S. 416, 422-24 (1960).

21 See, e.g., *United States v. Grande*, 620 F.2d 1026, 1033 (4th Cir.), *cert. denied*, 449 U.S. 830, 449 U.S. 919 (1980). Once the existence of the conspiracy is shown, only slight evidence is necessary to prove the participation of any given individual. *United States v. Brooklier*, 685 F.2d 1208, 1219 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1013). This rule, however, is no longer the law in the Fifth Circuit, at least for

with the appropriate state of mind. The state of mind required for conduct should be higher than that for most substantive offenses: the evidence should show that the defendant intended to cooperate in bringing about the conspiratorial objective.²²

RICO conspiracies. *United States v. Malatesta*, 590 F.2d 1379, 1381-82 (5th Cir.) (en banc), cert. denied, 440 U.S. 962, 444 U.S. 846 (1979). The *Malatesta* court was specifically addressing the slight evidence rule as a standard of review.

22 The Supreme Court applied the intent standard in *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943), holding that the intent "to further, promote, and cooperate in [the illegal enterprise] . . . is the gist of conspiracy." The issue of whether the agreement must be made with intent or merely with knowledge of the illegal objective is frequently clouded by problems of proof. In *Direct Sales*, for example, the defendant pharmaceutical wholesaler must have known that a doctor who regularly purchased large quantities of controlled drugs was distributing them illegally. This knowledge, plus the defendant's encouragement of and stake in quantity transactions, was sufficient to prove intent. The facts of *Direct Sales* contrast with those of *United States v. Falcone*, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940), where suppliers of sugar, yeast, and cans to illegal distillers had been convicted of a bootlegging conspiracy. Judge Hand wrote in reversing the district court, "It is not enough that [the accused] does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome." 109 F.2d at 581. The Supreme Court affirmed the reversal, but on the grounds that the government had not shown knowledge of the conspiracy's existence. 311 U.S. at 210-11. See also *Direct Sales*, 319 U.S. at 708-11.

In *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), a Sherman Act conspiracy case, the Supreme Court treated the possible meanings of "criminal intent." It noted that "intent" has traditionally embraced both purpose and knowledge:

"[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result."

Id. at 445 (quoting *W. LAFAVE & A. SCOTT, CRIMINAL LAW* § 28, at 196 (1972)). It then concluded:

The business behavior which is likely to give rise to criminal antitrust charges is conscious behavior normally undertaken only after a full consideration of the desired results and a weighing of the costs, benefits, and risks. A requirement of proof not only of this knowledge of likely effects, but also of a conscious desire to bring them to fruition or to violate the law would seem, particularly in such a context, both unnecessarily cumulative and unduly burdensome. Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent.

Id. at 445-46.

Thus the Supreme Court's position on the state of mind for the conspiratorial agreement remains unclear. In *Direct Sales*, it required intent, and stated that intent meant more than knowledge. 319 U.S. at 713. Its statement in *United States Gypsum* that knowledge suffices may be limited to the antitrust context. In later dictum, it affirmed the intent standard. *United States v. Bailey*, 444 U.S. 394, 405 (1980).

A related question is whether the conspirator must know that the conspiracy's objective is illegal. *People v. Powell*, 63 N.Y. 88, 92 (1875), introduced the requirement that "[t]he confederation must be corrupt." This view has found "general acceptance." *Developments in*

In addition to the act of agreement, the general federal conspiracy statute,²³ some special federal conspiracy statutes,²⁴ and some state statutes²⁵ require that one of the co-conspirators commit an overt act in furtherance of the conspiracy. Other conspiracy statutes and the common law do not require an overt act.²⁶

The existing circumstances necessary to convict an individual of conspiracy are: 1) the unlawfulness of the conspiracy's object or means; 2) the existing circumstances required for the substantive offense(s) constituting the conspiracy's objective; and 3) the existence of a co-conspirator.²⁷ The corresponding states of mind should be: 1) strict liability as to illegality;²⁸ 2) the state of mind required by the

the Law—Criminal Conspiracy, 72 HARV. L. REV. 920, 936-37 (1959). See also note 128 *infra*. Some federal courts have rejected this view. Judge Learned Hand, for example, wrote in dictum for the Second Circuit:

Starting with *People v. Powell* . . . the anomalous doctrine has indeed gained some footing in the circuit courts of appeals that for conspiracy there must be a "corrupt motive". . . . Yet it is hard to see any reason for this, or why more proof should be necessary than that the parties had in contemplation all the elements of the crime they are charged with conspiracy to commit.

United States v. Mack, 112 F.2d 290, 292 (2d Cir. 1940).

The Model Penal Code rejects *Powell*. MODEL PENAL CODE § 5.03 comment at 115-16 (Tent. Draft No. 10, 1960). The Supreme Court has not faced this issue. See 1 THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS WORKING PAPERS 387-88 (1970).

23 18 U.S.C. § 371 (1976).

24 Besides the general conspiracy provision, title 18 of the United States Code contains more than twenty other conspiracy provisions. S. REP. NO. 307, 97th Cong., 2d Sess. 172 n.53 (1982). Many of these follow the common law in requiring no overt act.

25 For a compilation of selected state conspiracy and complicity statutes, see 3 G.R. BLAKEY, TECHNIQUES IN THE INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME: MANUALS OF LAW AND PROCEDURE, *Conspiracy* app. (1980).

26 See notes 100-01 *infra* and accompanying text.

27 This requirement has led to the general rule that the acquittal of all persons with whom the defendant allegedly conspired precludes his conviction or requires its reversal. See, e.g., *Feder v. United States*, 257 F. 694, 696 (2d Cir. 1919). This rule has two limitations. In *United States v. Musgrave*, 483 F.2d 327, 332-33 (5th Cir.), *cert. denied*, 414 U.S. 1023, 414 U.S. 1025 (1973), the court held that the rule does not apply unless the alleged co-conspirators are tried jointly. In *United States v. Goodwin*, 492 F.2d 1141, 1144-45 (5th Cir. 1974) (citing *Rogers v. United States*, 340 U.S. 367, 375 (1951), which held that "one person can be convicted of conspiring with persons whose names are unknown"), the court upheld one defendant's conspiracy conviction even though charges against codefendants were dropped, where the evidence showed the existence of another unindicted co-conspirator. A better approach would be to require that the defendant agreed with someone who he believed was a co-conspirator. This approach is consonant with the principle that guilt is individual, and with the Supreme Court's analysis of state of mind for existing circumstances in *United States v. Bailey*, 444 U.S. 394, 402-15 (1980). Compare MODEL PENAL CODE § 5.03(1) (Proposed Official Draft 1982). For a decision upholding this principle in an aiding and abetting case, see note 3 *supra*.

28 See note 17 *supra*.

target offense(s) for its existing circumstances;²⁹ and 3) knowledge of at least one co-conspirator's existence.³⁰

B. *Procedural, Evidentiary, and Substantive Implications
of a Conspiracy Charge*

Because a single conspiracy may involve many conspirators, and agreements far-reaching in space and time, a conspiracy charge often has important implications for joinder, jurisdiction and venue, and statutes of limitations. Alleged co-conspirators can generally be tried jointly.³¹ Venue exists for all defendants in any district where the agreement was made or an overt act was committed.³² The statute of limitations runs from the conspiracy's termination, either by the achievement of its object, or by the abandonment of the scheme.³³

The co-conspirator declaration exception to the hearsay rule³⁴ helps obviate the difficulties of proving conspiratorial agreements. Under this exception, declarations by one conspirator made during and in furtherance of the conspiracy can be used at trial against co-conspirators.³⁵ If the declarant testifies at trial, of course, there is no hearsay problem; and the federal rule is that a conviction may rest on the uncorroborated testimony of a co-conspirator.³⁶

29 See *United States v. Feola*, 420 U.S. 671, 686-96 (1975). See also note 22 *supra*.

30 Though the proposed Criminal Code Reform Act of 1981 would require only recklessness, see note 17 *supra*, it seems logically impossible to agree with another party without knowing of his existence. "Knowledge" of another conspirator's existence does not necessarily imply the actual existence of a co-conspirator; the defendant could satisfy the state of mind requirement by agreeing with someone whom he *believed* to be a co-conspirator. See note 27 *supra*.

31 FED. R. CRIM. P. 8. The rule's application to conspiracy is discussed in *United States v. Sutherland*, 656 F.2d 1181, 1190 n.6 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451, 102 S. Ct. 1617 (1982).

32 *Hyde v. United States*, 225 U.S. 347, 367 (1912) (district where overt act committed); *Hyde v. Shine*, 199 U.S. 62, 76-77 (1905) (district where conspiracy formed). An overt act will satisfy this rule even if the conspiracy provision does not require an overt act. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402-03 (1927) (dictum) (Sherman Act conspiracy).

33 *United States v. Kissel*, 218 U.S. 601, 610 (1910). The last overt act starts the running of the statute. *Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). The day of the overt act, however, is excluded from the limitations period. *United States v. Guerro*, 694 F.2d 898, 903 (2d Cir. 1982).

34 FED. R. EVID. 801(d)(2)(E).

35 Out-of-court confessions made after the declarant's arrest do not fall within this exception, as they are not made during and in furtherance of the conspiracy, and they cannot be used against co-conspirators. *Wong Sun v. United States*, 371 U.S. 471, 491 (1963).

36 See, e.g., *United States v. Elliott*, 571 F.2d 880, 895 & nn.13-14 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978), where the court disagreed with defendant J.C. Hawkins's motto that "[o]ne on one ain't worth a s—." J.C.'s belief that the uncorroborated testimony of an ac-

Since conspiracy is a crime separate from any substantive offense it aims to bring about, a conspirator may be indicted, convicted, and sentenced on both substantive and conspiracy counts.³⁷ Substantive acquittal does not bar conviction for conspiracy.³⁸

The Supreme Court in *Pinkerton v. United States*³⁹ stated that a member of a continuing conspiracy incurs not only conspiracy liability, but also vicarious substantive liability for offenses committed during the conspiracy and in furtherance of it by co-conspirators. Liability exists if the act was within the foreseeable scope of the agreement which the defendant intentionally joined, even though he did not agree to—or even know about—the particular act.⁴⁰ The *Pinkerton* rule rests on the same principle as substantive liability for accomplices, which the *Pinkerton* Court described as agency.⁴¹

C. *Single Versus Multiple Conspiracies*

Conspiratorial agreements can have many tiers, ranging from an overall objective which many individuals explicitly or tacitly embrace, to detailed arrangements among a few individuals to commit some subsidiary act. Thus a single broad conspiracy may include several smaller subsidiary conspiracies. Because of the procedural, evidentiary, and substantive implications of conspiracy described above, it is usually in the government's interest to charge as broad a conspiracy as possible, consistent with the principle of individual guilt. It is in the defendant's interest to argue that the evidence shows, at most, multiple smaller conspiracies, and that in some of them he played no part.⁴²

complice would not convict him apparently dictated the structure of his criminal operation. *Id.* at n.14.

37 *Iannelli v. United States*, 420 U.S. 770, 777-79 (1975). An exception to this is Wharton's Rule, followed by some courts, which precludes punishing conspiracy in addition to the offense when the offense requires the willing cooperation of two or more persons and only that required minimum of actors is involved in the actual crime. In federal law Wharton's Rule operates only as a rule of statutory construction, and has no force in the face of contrary legislative intent. *Id.* at 785-86.

38 Collateral estoppel, however, may bar retrying common issues of fact. *See, e.g.*, *Sealfon v. United States*, 332 U.S. 575 (1948). In *Sealfon*, the Supreme Court held that a defendant who had been acquitted on a conspiracy charge could not then be convicted of aiding and abetting on substantially the same facts. *Id.* at 580.

39 328 U.S. 640, 645-48 (1946).

40 *Id.* at 647.

41 *Id.* at 646.

42 Charging one conspiracy and proving several may constitute a variance requiring reversal even if no evidence was improperly admitted against a defendant. *Kotteakos v. United States*, 328 U.S. 750, 771-74 (1946). In *Kotteakos*, the indictment charged one large conspiracy, and the government proved eight smaller conspiracies. The Court concluded, "The dan-

The conceptual difficulties of establishing a complex, multi-party agreement, when proof usually depends largely on inference, have led the courts to adopt two functional metaphors for describing the requirements for a single conspiracy: the wheel and the chain. "Wheel" conspiracies involve independent individuals or groups, the "spokes," dealing with a common figure, the "hub."⁴³ A single wheel conspiracy requires some interaction among the spokes, or at least knowledge that other spokes exist, and commitment to a common goal.⁴⁴ The chain metaphor describes an illegal chain of distribution.⁴⁵ Such a "chain" constitutes one conspiracy if the "links" are interdependent.⁴⁶

Some recent decisions, finding that wheels and chains impede rather than facilitate analysis of the single versus multiple conspiracy issue, have forsaken mechanical metaphors and reiterated the basic principles of conspiracy law.⁴⁷ Abandoning wheels and chains may signal a shift in conventional conspiracy doctrine away from the fo-

gers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Id.* at 774. The situation is different when the defendants belong to the same conspiracy: "When many conspire, they invite mass trial by their conduct." *Id.* at 773.

43 The Supreme Court originated the wheel metaphor in *Kotteakos v. United States*, 328 U.S. 750, 755 (1946). See note 42 *supra*.

44 See, e.g., *United States v. Levine*, 546 F.2d 658, 663 (1977): "If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the 'wheel' is incomplete, and two conspiracies rather than one are charged." The *Levine* court required that the spokes "must have been aware of each other and must do something in furtherance of some single, illegal enterprise," *id.*, though it is hard to read the court's apparent requirement of an overt act by each spoke as more than an evidentiary standard.

45 The chain metaphor grew out of the facts of *Blumenthal v. United States*, 332 U.S. 539 (1947). See also *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

46 In *Blumenthal*, the government proved a scheme to sell whiskey at illegal prices involving middlemen who had no contact with each other and who did not know the identity of the owner. The operation was such, however, that they must have realized they were interdependent links in an illegal chain of distribution, all profiting from the success of the chain as a whole. The Court concluded that the facts revealed one conspiracy of which the various agreements were "essential and integral steps." 332 U.S. at 559.

47 For example, after tinkering for two pages with various metaphorical apparatuses, the Fifth Circuit in *United States v. Perez*, 489 F.2d 51, 59 n.11 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974), concluded that "[c]onspiracies are as complex as the versatility of human nature and federal protection against them is not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical molecular or atomic forms." Echoing *Perez*, the court in *United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982), announced that "[i]f the evidence establishes a common agreement, knowledge of the agreement by the defendant, and that the defendant voluntarily joined the unlawful scheme, conspiracy is proved without regard to its shape or other configurations."

cus on interdependence,⁴⁸ central to both the chain and the wheel metaphors.⁴⁹ Under traditional conspiracy theory, however, courts are still reluctant to find a single conspiracy involving diverse and apparently unrelated crimes.⁵⁰ This reluctance limits the usefulness of traditional conspiracy law in the fight against the most sophisticated criminal organizations.

II. *United States v. Elliott*: Enterprise Conspiracy

The United States Court of Appeals for the Fifth Circuit in *United States v. Elliott*⁵¹ was the first to realize the significance of RICO's conspiracy provision⁵² for complex conspiracy prosecutions. Through RICO, the court stated, "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."⁵³ That is, the essence of RICO conspiracy is not that the defendants agreed to commit various subsidiary criminal acts,⁵⁴ any one of which might involve only a subset of the alleged members of the conspiracy, but rather that all the defendants agreed to the common objective of participating in the enterprise's affairs.⁵⁵ *Elliott*'s language resounds in nearly every major subsequent RICO conspiracy opinion.

This part describes the *Elliott* court's view of RICO conspiracy and its application of section 1962(d) to an illegal association-in-fact enterprise.⁵⁶ It then discusses other circuits' reactions to *Elliott*, and the related question of how *Elliott*'s pronouncements apply to conspiracies involving legal enterprises.

48 Evidence of such a shift is the *Elam* court's observation that "for the purpose of determining whether a single conspiracy exists, a common plan does not become several plans simply because some members are cast in more vital roles than others or because certain members perform only a single, minor function." 678 F.2d at 1246-47.

49 See, e.g., *United States v. Perez*, 489 F.2d at 59 n.11.

50 See *United States v. Elliott*, 571 F.2d at 901-02, where Judge Simpson, who joined the *Perez* opinion, said that the RICO conspiracy would not have met the common objective requirement of conventional conspiracy.

51 571 F.2d 880 (5th Cir.), cert. denied, 439 U.S. 953 (1978).

52 See note 10 *supra*.

53 571 F.2d at 902. For the statutory definition of "enterprise," see note 4 *supra*. The case law interpreting "enterprise" is discussed at note 104 *infra*.

54 See note 4 *supra* for a partial list of "racketeering acts" under RICO.

55 See text accompanying note 62 *infra*.

56 See note 4 *supra* for the statutory basis of association-in-fact enterprises.

A. *The Elliott Decision*

Elliott involved six defendants who had committed a variety of crimes including murder, theft, arson, and narcotics offenses.⁵⁷ Only one defendant took part in every scheme. Not all the defendants knew each other or the full scope of the others' activities, but each defendant held to be a conspirator knew at least that "he was directly involved in an enterprise whose purpose was to profit from crime,"⁵⁸ and that "the enterprise was bigger than his role in it, and that others unknown to him were participating in its affairs."⁵⁹ The enterprise was wholly illegal, "an amoeba-like infra-structure that control[ed] a secret criminal network."⁶⁰ In affirming the conspiracy convictions of five defendants,⁶¹ the court explained:

The gravamen of the conspiracy charge in this case is . . . that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective. What Congress did was to define that objective through the substantive provisions of the Act.⁶²

Other circuits have approved of *Elliott's* insight that section 1962(d) expands the reach of traditional conspiracy law.⁶³ The First

57 571 F.2d at 884-95.

58 *Id.* at 904.

59 *Id.*

60 *Id.* at 898.

61 *Elliott's* conviction was reversed. See note 63 *infra*.

62 571 F.2d at 902-03. *United States v. Sutherland*, 656 F.2d 1181, 1192-93 & n.7 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451, 102 S. Ct. 1617 (1982), reaffirms and elaborates on this interpretation of RICO conspiracy.

63 Judicial approval of *Elliott* contrasts sharply with the criticism of many commentators. See, e.g., Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837, 876-79 (1980) (Congress did not intend to expand the scope of traditional conspiracy law, and in any event *Elliott's* gloss on § 1962(d) violates double jeopardy and other constitutional principles); Marcus, *Co-Conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, From a Criminal Law Perspective*, 7 AM. J. CRIM. L. 287, 320-21 (1979) (state of mind required for RICO conspiracy as interpreted by *Elliott* amounts to strict liability); Tarlow, *RICO: The New Darling of the Prosecutor's Nursery*, 49 FORDHAM L. REV. 165, 245-56 (1980) (state of mind requirement in *Elliott's* interpretation of RICO conspiracy meaninglessly broad; *Elliott* endorses mass conspiracy trials in violation of due process and expands the scope of vicarious substantive liability; legitimate enterprises do not adequately define the scope of a RICO conspiracy); Note, *Elliott v. United States: Conspiracy Law and the Judicial Pursuit of Organized Crime Through RICO*, 65 VA. L. REV. 109 (1979) (*Elliott* defies due process

principles in allowing "enterprise conspiracy" to supply a connection among crimes that would make each defendant liable for the actions of others).

These commentators apparently did not give serious consideration to *Elliott's* assertion that Congress created the enterprise conspiracy "against the backdrop of hornbook conspiracy law." 571 F.2d at 902. To ignore *Elliott's* incorporation of this tradition, and the court's requirement of a knowing and intentional agreement, *id.* at 907, is to defy ordinary principles of interpretation. Tarlow, for example, complained that *Elliott* required the government to show only knowledge of the "essential nature" of the conspiracy, a requirement he interpreted as looser than knowledge of a "common objective." Tarlow, *supra*, at 251 & n.458. Tarlow found preferable the instructions approved in *United States v. Karas*, 624 F.2d 500, 503 & n.3 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981), requiring proof that the predominant "purpose of the conspiracy was to violate the RICO Act." These instructions, according to Tarlow, might enable defendants to argue that they did not intend their activities to further the affairs of an enterprise, but merely to bring them personal gain. Tarlow, *supra*, at 251 n.458. The *Elliott* court stressed, however, that to find membership in a conspiracy to violate RICO, one must be reasonably able to infer that each crime was intended to further the enterprise's affairs, and that a single conspiracy requires an agreement on an overall objective. *See* text accompanying note 62 *supra*. The court reversed the conspiracy conviction of Elliott, who had dealt in drugs and become involved in one stolen meat transaction with a codefendant, holding that these acts did not suffice to show that Elliott "knowingly and intentionally joined the broad conspiracy to violate RICO." 571 F.2d at 907. Tarlow acknowledges Elliott's acquittal, Tarlow, *supra*, at 249 n.452, but appears to have ignored it in assessing the court's opinion. For a discussion of other points raised by the above-noted commentators, see notes 68-81 & 124-39 *infra* and accompanying text.

The American Bar Association also criticizes *Elliott* in its 1982 report on RICO. It recommends repealing § 1962(d) for four reasons. AMERICAN BAR ASSOCIATION SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES 10-12 (1982). First, earlier in the report it recommended requiring a common scheme in the definition of "pattern." *Id.* at 6. If this recommendation were adopted, the ABA argues, the "combination of § 1962(d) and common scheme produces a conspiracy to commit a common scheme, an illogical concept similar to a conspiracy to conspire." *Id.* at 10. This argument does not withstand analysis. With or without the common scheme recommendation, § 1962(d) conspiracy to violate § 1962(c) requires an agreement that two racketeering acts be committed. The relationship between the acts is a question of fact, not a conspiratorial objective. *See* note 106 *infra* and accompanying text.

Second, the ABA worries about multiple punishment for RICO substantive and conspiracy offenses. *Id.* at 11. The principle that one can be punished consecutively for criminal acts and conspiracy to commit them, however, is firmly entrenched in conspiracy jurisprudence, and is not limited to RICO prosecutions. *See* note 37 *supra*. Repealing § 1962(d) would therefore not eliminate the possibility of consecutive punishment for a RICO substantive offense and § 371 conspiracy to violate RICO. Third, the ABA believes there is little difference between RICO substantive offenses and RICO conspiracy. It asserts that "a RICO conspiracy can rarely be proved without establishing the actual commission of two racketeering acts." *Id.* The facts of *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1013), refute this contention. *See* notes 93-95 *infra* and accompanying text.

Finally, the ABA states that repealing § 1962(d) would "have the salutary effect of eliminating the conspiracy doctrines established in [*Elliott*]." *Id.* at 12. It continues, "*Elliott* acknowledges that its contribution [construction?] of § 1962(d) conflicts with traditional conspiracy law, and asserts that RICO was intended to circumvent its limitations." *Id.* These comments reflect a misunderstanding of how RICO changed traditional conspiracy law. It did not extend conspiracy's reach through § 1962(d), but rather through its substantive provisions, by defining complex crimes that may be charged as conspiratorial objectives. *See* text accompanying note 62 *supra*. If the ABA wishes to undo *Elliott*, and prevent the possibility of

Circuit in *United States v. Turkette*,⁶⁴ citing *Elliott*, said that the government can cast a wider net with RICO conspiracy than it could under traditional conspiracy principles. The Second Circuit in *United States v. Barton*⁶⁵ referred to *Elliott* for the proposition that section 1962(d) might apply where the goals of a conspiracy are too far-flung to support a charge under the general federal conspiracy statute. The Fourth Circuit approved *Elliott's* reasoning in *United States v. Griffin*.⁶⁶

B. *Legal and Illegal Enterprises Distinguished*

Elliott involved an illegal enterprise. Courts have distinguished *Elliott*, both explicitly and implicitly, from cases involving legal or half-legal⁶⁷ enterprises. Participation in the illegal affairs of a legal enterprise should not necessarily imply knowledge of other conspirators associated with the enterprise, or agreement on a common objective. Without additional evidence, therefore, this participation should not support the inference of a conspiracy coterminous with the enterprise.

The only court to distinguish the legal enterprise situation explicitly was the New Jersey District Court in *United States v. Cryan*.⁶⁸

consecutive punishment for conspiracy and substantive RICO violations, it should also recommend making § 371 inapplicable to RICO. The ABA objects to RICO conspiracy as interpreted by *Elliott* because it fears that "sensational mass trials involving large numbers of defendants and crimes" might erode the requirement that a defendant's guilt be "individual and personal." *Id.* at 12 (citing *Kotteakos v. United States*, 328 U.S. 750, 772-77 (1946)). See note 42 *supra*.

64 656 F.2d 5, 8 (1st Cir. 1981).

65 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

66 660 F.2d 996 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982). A passage in *Griffin* describing the relationship between substantive RICO offenses, traditional conspiracy, and RICO conspiracy merits quoting at some length:

The illegitimate, associated-in-fact RICO enterprise . . . shares important characteristics with the traditional conspiracy of criminal law. Indeed, one of the avowed purposes of RICO was to relieve some of the deficiencies of the traditional conspiracy prosecution as a means for coping with contemporary organized crime. The increasing complexity of "organized" criminal activity had made it difficult to show the single agreement or common objective essential to proof of conspiracy on the basis of evidence of the commission of highly diverse crimes by apparently unrelated individuals. Congress attempted through RICO to relieve this problem by creating a new substantive offense, association in fact in an enterprise whose affairs are conducted through a pattern of racketeering activity, . . . in which "association" is presumably easier to prove than conspiracy, while at the same time creating a RICO conspiracy offense . . . whose common objective is simply the commission of the substantive associational offense.

Id. at 999-1000.

67 For an example of a half-legal enterprise, see note 70 *infra*.

68 490 F. Supp. 1234 (D.N.J.), *aff'd without opinion*, 636 F.2d 1211 (1980).

The *Cryan* court refused to join two bribery schemes into a single conspiracy just because both involved employees of the same sheriff's office. Otherwise, it noted, the conspiracy would be enormous. The court particularly feared that a conspiracy defined so broadly would incriminate its victims, employees whose raises and benefits were conditioned on annual bribes to the sheriff.⁶⁹

In another legal enterprise case, the Delaware District Court in *United States v. Boffa*⁷⁰ sharply criticized *Elliott*. The *Boffa* court asserted that Congress did not intend section 1962(d) to dramatically alter conventional conspiracy doctrine, and expressed concern that trying individuals together for membership in one conspiracy simply because they were associated with the same enterprise might compromise the right to an adjudication of personal guilt.⁷¹ It held that the defendants could be guilty of RICO conspiracy only if they would be liable under traditional conspiracy law.⁷² The *Boffa* court failed to distinguish the legal from the illegal enterprise. *Elliott's* reasoning—the inference of the scope of the conspiratorial agreement from the scope of the enterprise—and its language do not sweep beyond the illegal enterprise situation. Thus they do not present the dangers feared by the *Boffa* court.

Recent Fifth Circuit cases have also tacitly recognized that a legal enterprise's dimensions may not define the contours of a RICO conspiracy. The court in *United States v. Bright*⁷³ held that an individual conspiring to bribe a sheriff did not thereby participate in a

69 *Id.* at 1243 & n.18. The *Cryan* court concluded that in order to convict the defendants of RICO conspiracy, the government had to show that they committed or authorized the predicate acts charged in the indictment. *Id.* at 1243.

70 513 F. Supp. 444 (D. Del. 1980). The enterprise charged was an association in fact of individuals who were employed by or associated with one or more of nine legally constituted corporations. The enterprise carried out its purpose (making money through interstate labor leasing and motor vehicle leasing) through these corporations. *Id.* at 455-56.

71 *Id.* at 473-74.

72 The jury convicted the defendants of violating § 1962(d) on this theory. The reach of RICO conspiracy was not raised on appeal, where the convictions were affirmed in part and reversed in part for other reasons. *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir. 1982).

73 630 F.2d 804 (5th Cir. 1980). The *Bright* court emphasized that membership in a conspiracy requires an agreement and at least recklessness as to its scope. It noted:

The converse of the proposition that a defendant who embarks on a criminal venture of indefinite outline takes his chances as to its contents and membership, *United States v. Elliott*, 571 F.2d at 904, is that one who embarks on a criminal venture with a circumscribed outline is not responsible for acts of his co-conspirator which are beyond the goals as the defendant understands them.

630 F.2d at 834 n.52 (citing *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944)). This observation finds its widest application in the legal enterprise case, where the defendant may have no reason to suspect that corruption spreads beyond his illegal activity.

larger bribery and extortion scheme operating from the sheriff's office. In *United States v. Stratton*,⁷⁴ the court questioned the propriety of charging a RICO conspiracy centered on a very broad legal enterprise, absent additional evidence of agreement or state of mind.⁷⁵ It did, however, find a RICO conspiracy where various illegal acts and agreements converged in the office of a single judge.⁷⁶ In *United States v. Sutherland*,⁷⁷ the court found that two individuals, independently conspiring with the same judge to fix traffic tickets, were members of different conspiracies. Summing up a lengthy review of *Elliott*, *Bright*, and *Stratton*, the *Sutherland* court emphasized that membership in one conspiracy requires agreement, and to infer agreement requires evidence that the defendants "must necessarily have known" others were involved.⁷⁸ Though *Sutherland* made no explicit distinction between legal and illegal enterprises, it did state that one can draw inferences of knowledge and agreement from "the nature of the conspiracy."⁷⁹

When the conspiracy involves a wholly illegal enterprise, it is easier to infer that any given participant knew he was joining an operation larger than his role, and agreed to its illicit purposes, however diverse or wide in scope. The proof in such a case will focus on the enterprise's existence, its object, and composition.⁸⁰ When the

74 649 F.2d 1066 (5th Cir. 1981).

75 *Id.* at 1073 n.8.

76 The court found it "insignificant" that some individuals paying bribes in the scheme might not have known about all of the other illegal activities. *Id.* Thus a legal enterprise can still define the scope of a RICO conspiracy, as long as the government proves that each alleged conspirator knew of at least some other co-conspirators (putting him on notice that the scheme might involve yet others), and agreement on a common objective. *Stratton* illustrates that these elements are easier to prove for a legal enterprise if it is defined narrowly.

77 656 F.2d 1181, 1194 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451, 102 S. Ct. 1617 (1982).

78 *Elliott* does not stand for the proposition that multiple conspiracies may be tried on a single "enterprise conspiracy" count under RICO merely because the various conspiracies involve the same enterprise. What *Elliott* does state is two-fold: (1) a pattern of agreements that absent RICO would constitute multiple conspiracies may be joined under a single RICO conspiracy count if the defendants have agreed to commit a substantive RICO offense; and (2) such an agreement to violate RICO may, as in the case of a traditional "chain" or "wheel" conspiracy, be established on circumstantial evidence, *i.e.*, evidence that the nature of the conspiracy is such that each defendant must necessarily have known that others were also conspiring to violate RICO.

Id. at 1194.

79 *Id.*

80 The Fourth Circuit in *Griffin*, which involved a wholly illegal enterprise, remarked that proof of a legal enterprise, if there were any doubt, would consist of proving its "legal" existence. Its purpose would be irrelevant. But where the enterprise is an association in fact, "the purpose of the association, along with the composition of the group, would seem essential to

enterprise is legal, the government should have little difficulty proving the enterprise, but it will have to introduce more specific evidence of the agreement and state of mind, especially when the enterprise is defined broadly.⁸¹

RICO conspiracy departs from traditional conspiracy by giving statutory sanction to the inference, *when supported by the facts*, that a single conspiracy might aim to accomplish diverse crimes. It thus extends traditional conspiracy's potential reach. Nonetheless, *Elliott* and its progeny show that RICO does not jettison traditional conspiracy's basic requirements.

III. Elements of RICO Conspiracy

The elements of RICO conspiracy do not differ in principle from those of traditional conspiracy. The conduct requirement is agreement. The conspirators must agree to conduct or participate in the conduct of the enterprise through a pattern of racketeering. The existing circumstances required are: the illegality of the target offense, section 1962(c); the existing circumstances of the target offense; and the existence of a co-conspirator. The conspiracy need produce no result. This section discusses the elements of RICO conspiracy and the state of mind which the government should prove with respect to each element.

A. Conduct

The basic act required for participation in a RICO conspiracy is agreement to the conspiracy's object. All reported RICO conspiracy cases except one⁸² have involved conspiracies to violate section 1962(c), and have had as their object the participation in an enterprise's affairs through a pattern of racketeering activity.

The circuits have split on the extent of the agreement required to violate section 1962(c) through a pattern of racketeering. The confusion stems largely from *Elliott's* emphatic and much-quoted statement that the defendant must have "objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes*."⁸³ The

proof of such an entity's 'separate' existence. Indeed it is only in these two dimensions that such an entity would seem to have any discrete existence." 660 F.2d at 999. Once purpose and membership in the enterprise are established, the facts will usually permit inference of a conspiracy.

81 See note 76 *supra*.

82 United States v. Loftin, 518 F. Supp. 839 (S.D.N.Y. 1981). See note 96 *infra*.

83 571 F.2d at 903 (emphasis in original).

United States Court of Appeals for the First Circuit in *United States v. Winter* laid out the possible interpretations of *Elliott* and the statute as: agreement that someone in the enterprise will commit two racketeering acts, or agreement to commit two acts personally, or the actual commission of two racketeering acts by each defendant.⁸⁴ *Winter* concluded that in order to protect against guilt by association, a RICO conspiracy count must charge that each defendant agreed to commit two acts personally, as well as agreeing to participate in the enterprise's affairs.⁸⁵ The Fourth Circuit in *United States v. Karas*⁸⁶ went further, apparently requiring that each defendant actually commit two racketeering acts in order to manifest his agreement to participate in the enterprise's affairs.⁸⁷

Winter's concern that individuals not be convicted by association does not logically dictate its conclusion that each defendant must have agreed to commit two racketeering acts personally. The court's reasoning contains two flaws. First, RICO does not supersede the federal complicity provision.⁸⁸ Therefore, even though the case law has primarily addressed RICO violations by principals in the first

84 663 F.2d 1120, 1136 (1st Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3607 (U.S. Jan. 22, 1982) (No. 81-1392).

85 663 F.2d at 1136.

86 624 F.2d 500 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981).

87 It is unclear whether *Karas* required that each conspirator commit two racketeering acts, or that two racketeering acts be committed by anyone in the conspiracy. The court's language implies that anyone in the conspiracy may commit the two acts. The court first mentioned the two-act requirement in connection with the general federal conspiracy statute's overt act requirement: the defendant's "main objection is that the trial judge erroneously charged the jury as to a conspiracy under 18 U.S.C. § 371, which requires only one overt act, rather than § 1962(d), which requires two racketeering activities." 624 F.2d at 503. If the two acts supposedly required for a RICO conspiracy are analogous to the overt act required by § 371, then their commission by any conspirator should suffice against all co-conspirators. Thus the court approved the trial judge's instruction that "the appellants could not be convicted under § 1962(d) unless the purpose of the conspiracy was to violate the RICO Act and that at least two racketeering acts had occurred." *Id.* The court's application of the rule to the evidence, however, implied that each conspirator must commit two racketeering acts personally. Thus the defendant Pecora argued that he had made only one bribe and so could not be convicted under § 1962(d). Instead of countering that the racketeering activities of others would support Pecora's conviction, the court found the evidence showed multiple bribes. *Id.* at 504.

Karas's apparent requirement that each conspirator must actually have committed two racketeering acts confuses the standard of liability with the evidence. The *Elliott* court (cited in *Karas*, 624 F.2d at 503) remarked that where the evidence establishes that a defendant actually committed two racketeering acts, one can infer that he agreed to do so. 571 F.2d at 903. This statement addresses the sufficiency of the evidence, however, not the necessary quantum of evidence, and certainly not the standard of liability which the evidence is adduced to prove.

88 The federal complicity statute provides:

degree, aiding and abetting the substantive offense—without actually *committing* two racketeering acts personally—should also violate RICO's substantive provisions. Derivatively, one should violate RICO's conspiracy provision by agreeing to participate in the same substantive offense, without *agreeing to commit* two acts personally. Second, traditional conspiracy doctrine does not require that the defendant agree to commit any acts himself; rather, the defendant must simply agree and intend that the offense be committed.⁸⁹

Congress found that pre-RICO sanctions against group crime were too limited,⁹⁰ and expressly stated that RICO should be liberally construed.⁹¹ In light of this congressional intent, it is perverse to read RICO conspiracy more restrictively than traditional conspiracy. The *Winter* rule directly contravenes a major purpose of RICO by permitting organized crime ringleaders to escape conspiracy liability by forcing their underlings to commit the racketeering acts.⁹² The

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (1976).

This provision applies to RICO by virtue of Congress' explicit pronouncement that "[n]othing in this title [RICO] shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this title." Pub. L. No. 91-452, § 904(b), 84 Stat. 922, 947 (1970).

⁸⁹ See, e.g., *Pinkerton v. United States*, 328 U.S. 640, 645 (1946). See also note 22 *supra*.

⁹⁰ Pub. L. No. 91-452, Statement of Findings and Purpose, 84 Stat. 922, 923 (1970).

⁹¹ RICO is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970). See Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 287 & n.150 (1982) [hereinafter cited as Blakey, *The RICO Civil Fraud Action*].

⁹² Two pre-RICO conspiracy cases illustrate this typical operating style of organized crime leaders. *People v. Luciano*, 277 N.Y. 348, 14 N.E.2d 433 (1938), describes an extensive prostitution ring run by Charles "Lucky" Luciano, the head of the New York syndicate in the late thirties. Luciano himself "did not take an active part in the daily operations of the business." 277 N.Y. at 356, 14 N.E.2d at 434. It would be ironic if a present-day Luciano could not be convicted under § 1962(d) for the prostitution of women, on the grounds that he did not agree to personally perform the crimes constituting the conspiracy's objective. Yet this would be the effect of the *Winter* rule. The facts of *United States v. Aviles*, 274 F.2d 179 (2d Cir. 1960), would present a similar problem under *Winter*. The court in *Aviles* confirmed the narcotics conspiracy conviction of Luciano's successor Vito Genovese. The only evidence was Genovese's presence at a portion of a meeting where drug distribution was discussed, and where drug distributors called him "the right man." The court concluded:

Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy.

Id. at 188. Since there was no proof that Genovese agreed to commit two racketeering acts

more logical reading of the statute is that it requires an agreement that any member(s) of the conspiracy commit two racketeering acts.

United States v. Brooklier,⁹³ a Ninth Circuit case, illustrates the correct understanding of the two-act requirement. The court reviewed evidence showing that: 1) Louis Tom Dragna "retained ultimate control" over the Los Angeles La Cosa Nostra; 2) Dragna's agent arranged certain extortions; 3) Dragna "instructed" another person to make money for the family; 4) he planned and agreed to a murder; and 5) he approved plans for a shake-down.⁹⁴ Since Dragna himself did not commit extortion, murder, or any other specific acts, or agree to perform any of these acts himself, the *Winter* rule would preclude his conviction for RICO conspiracy. The *Brooklier* court concluded that this evidence and the inferences drawn from it sufficed to affirm Dragna's convictions on both section 1962(c) and section 1962(d) charges.⁹⁵ The *Brooklier* reading is essential to convicting high-level organized criminals of RICO violations.⁹⁶

himself, he would be found not guilty under *Winter*'s reading of § 1962(d). These results would be especially ironic since the early work leading up to the drafting of RICO specifically considered the *Luciano* and *Aviles* prosecutions. TASK FORCE REPORT, *supra* note 2, at 4 n.46; app. C, at 82 n.30.

93 685 F.2d 1208 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1013).

94 *Id.* at 1220.

95 *Id.*

96 Faced with a *Brooklier*-type situation in a jurisdiction which follows *Winter*, the government should argue that: the defendant agreed to *participate* in the conduct of the enterprise through the pattern of racketeering, even though he did not agree to commit two acts personally; such participation, if performed, would allow him to be punished under § 2 for violating § 1962(c); therefore, for agreeing to participate he should incur conspiracy liability under § 1962(d); and this situation is to be distinguished from *Winter*, which only considered the liability of principals. This was the government's theory in *United States v. Loftin*, 518 F. Supp. 839 (S.D.N.Y. 1981), a § 1962(a) conspiracy case. The government charged Socolov, an attorney, with § 1962(d) conspiracy to aid and abet the investment of funds derived from racketeering. Socolov could not be charged with conspiracy to violate § 1962(a) as a principal, because he was not involved in the racketeering which produced the funds. The court held that the charge of conspiracy to violate § 1962(a) by aiding and abetting was proper under the statute:

Defendant Socolov would . . . argu[e] that to be a conspirator, one must also have been a principal (or at least an accessory) in the racketeering endeavors and be investing one's own share thereof. However, there is nothing in the legislative history to support such a construction, which is also contrary to the usual construction of conspiracy statutes.

Id. at 854. The court, however, illogically implied that Socolov could not be charged for aiding and abetting a § 1962(a) violation. *Id.* at 853. It also stated that liability under § 1962(d) for conspiring to violate § 1962(a) by aiding and abetting might require knowledge that the investment of racketeering proceeds violated RICO. *Id.* at 855-56. On this point the court cited *Bradley*, *supra* note 63, at 885-86. 518 F. Supp. at 856. See note 133 *infra*. For a discussion of aiding and abetting § 1962(a) violations, see Note, *Aiding and Abetting the Invest-*

The circuits have also split as to whether RICO conspiracy requires the commission of an overt act in addition to the agreement, as does the general federal conspiracy statute, 18 U.S.C. § 371.⁹⁷ The Second Circuit in *United States v. Barton*⁹⁸ and a Third Circuit district court in *United States v. Forsythe*⁹⁹ read the statute literally and held that it does not require an overt act. The *Barton* court compared section 1962(d) to other special conspiracy provisions which mention no overt act.¹⁰⁰ The *Forsythe* court similarly compared section 1962(d) to the Sherman Act conspiracy provision,¹⁰¹ noting that both incorporate the elements of common law conspiracy, not those of section 371. Otherwise, the court concluded, section 1962(d) would be "otiose, as merely repetitious of the general conspiracy statute."¹⁰²

The *Barton* and *Forsythe* courts' well-reasoned refusal to require an overt act for RICO conspiracy contrasts with the Fifth, Ninth, and Eleventh Circuits' practice of requiring an overt act. These circuits have failed to analyze the overt act requirement, but rather have adopted the section 371 requirement without reflection.¹⁰³

ment of Dirty Money: Mens Rea and the Nonracketeer under Section 1962(a), 82 COLUM. L. REV. 574 (1982) [hereinafter cited as Note, *Aiding and Abetting*].

As an alternative, if the facts permit, one might charge that the defendant agreed to personally commit the predicate act(s) of conspiracy, *see* *United States v. Brooklier*, 685 F.2d at 1216 (certain conspiracies qualify as racketeering acts supporting a RICO conspiracy charge); this argument is weaker, as it is more open to abuse. Finally, one might be able to charge the defendant under § 1962(c) with actually committing two racketeering acts of conspiracy. *See* *United States v. Weisman*, 624 F.2d 1118, 1123-24 (2d Cir.) (conspiracy to commit certain predicate offenses qualifies as a racketeering act supporting a substantive RICO charge), *cert. denied*, 449 U.S. 871 (1980).

97 *See* note 23 *supra* and accompanying text.

98 647 F.2d 224 (2d Cir.), *cert. denied*, 454 U.S. 857 (1981).

99 429 F. Supp. 715 (W.D. Pa.), *rev'd on other grounds*, 560 F.2d 1127 (3d Cir. 1977).

100 The *Barton* court cited *Singer v. United States*, 323 U.S. 340-42 (1945), in which the Supreme Court distinguished the general federal conspiracy statute from one such special conspiracy provision, the Selective Training and Service Act of 1940, ch. 720, § 11, 54 Stat. 885, 894-95 (1940) (codified at 50 U.S.C. § 311 (expired Mar. 31, 1947)). 647 F.2d at 237. The Senate Judiciary Committee's express reference to *Singer* in its report on § 1962(d), S. REP. NO. 617, 91st Cong., 1st Sess. 159 (1969) (cited in 647 F.2d at 237), makes *Barton's* holding persuasive.

101 Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209 (current version at 15 U.S.C. § 1 (1976)).

102 429 F. Supp. at 720 n.2.

103 For example, *Elliott* implied that the overt act need not be a crime. 571 F.2d at 887 n.5. The *Stratton* court said that the overt acts alleged in the indictment were sufficiently connected to the overall scheme. 649 F.2d at 1073 n.8. The earliest Fifth Circuit case clearly to announce the overt act requirement was *Sutherland*, 656 F.2d at 1186 n.4, which cited as authority, with no explanation, a § 371 conspiracy case, *United States v. Fuiman*, 546 F.2d 1155, 1158 (5th Cir.), *cert. denied*, 434 U.S. 856 (1977). *Sutherland*, in turn, was cited without comment on this point in *United States v. Phillips*, 664 F.2d 971, 1038 (5th Cir. 1981), *cert.*

B. *Existing Circumstances*

The existing circumstances which the government must prove to establish a RICO conspiracy are twofold. First, it must prove those existing circumstances required for the target offense, section 1962(c). It must also prove the existence of another conspirator.

The existing circumstances required to violate section 1962(c) are: 1) the existence of the enterprise;¹⁰⁴ 2) the defendant's employment by or association with the enterprise;¹⁰⁵ 3) the pattern;¹⁰⁶ 4) the

denied, 102 S. Ct. 2965, 103 S. Ct. 208 (1982), and *United States v. Marcello*, 537 F. Supp. 1364, 1379-80 (E.D. La. 1982).

The Ninth Circuit in *United States v. Zemek* implied an overt act requirement in its statement that the overt act need not be criminal. 634 F.2d 1159, 1173 n.18 (9th Cir.), *cert. denied*, 450 U.S. 916, 450 U.S. 985 (1980), 452 U.S. 905 (1981). The Eleventh Circuit in *United States v. Hartley* simply approved jury instructions requiring an overt act, again without comment. 678 F.2d 961, 974-75 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (U.S. Jan. 25, 1983). The *Hartley* court expressed the state of mind requirement for the overt act as "knowingly." *Id.* at 974.

104 For the statutory definition of "enterprise," see note 4 *supra*. The Supreme Court has added that the "enterprise" "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). The Eighth Circuit further requires that the enterprise have a structure distinct from that inherent in conducting the pattern of racketeering. See *United States v. Lemm*, 680 F.2d 1193, 1200-01 (8th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3509 (U.S. Jan. 11, 1983); *United States v. Bledsoe*, 674 F.2d 647, 664-65 (8th Cir. 1982). It appears to have reduced this criterion to a formality in *Lemm*: "legitimate" purchases of property (for burning) and repairs of property (for insurance fraud) by an ongoing structure showed that "[c]learly, the enterprise alleged by the government has not been impermissibly equated with the predicate acts of racketeering [arson and insurance fraud]." 680 F.2d at 1197, 1201. Other attempts to restrict the broad statutory definition have proved unsuccessful. Thus possible enterprises do include governmental entities, see *United States v. Thompson*, 685 F.2d 993, 995-1000 (6th Cir. 1982) and cases collected therein; and illegal associations in fact, *United States v. Turkette*, 452 U.S. at 580. For the most recent and comprehensive discussion of entity types which have been held to be enterprises, and of the role the enterprise can play in the offense, see Blakey, *The RICO Civil Fraud Action*, *supra* note 91, at 296-98 & nn.152-66; 305-23 & nn.174-81.

105 The requirement that the defendant be employed by or associated with the enterprise has been broadly construed. The *Elliott* court, for example, stated:

The substantive proscriptions of the RICO statute apply to insiders and outsiders—those merely "associated with" an enterprise—who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity. Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved with the enterprise.

571 F.2d at 903 (emphasis in original) (citations omitted). As for association with a legal enterprise, the court in *United States v. Starnes*, 644 F.2d 673 (7th Cir.), *cert. denied*, 454 U.S. 826 (1981), noted that:

The participation in the conspiracy of people who were not on the legitimate payroll of [the company] does not mean those people were not participating in its affairs. The nature of racketeering connections to an otherwise legitimate business suggests that elements outside a company may assist in obtaining the company's illegal goals.

conduct of the enterprise's affairs "through" the pattern;¹⁰⁷ and 5) the enterprise's effect on interstate or foreign commerce. Proof of some of these elements may coalesce in some cases,¹⁰⁸ and may overlap with the proof of the agreement.¹⁰⁹ Even so, they should be charged separately.¹¹⁰

In addition to these existing circumstances, the substantive offense also incorporates the existing circumstances required for the predicate racketeering acts. The predicate acts' existing circumstances thus also enter the definition of a RICO conspiracy. These, of course, will differ from case to case. This note's analysis will therefore focus on the existing circumstances peculiar to section 1962(c).

Since conspiracy is an inchoate offense, the government could satisfy the enterprise and employment-or-association requirements by charging a conspiracy to create and become associated with an enterprise. The cases, though, have involved actual association with existing enterprises. The pattern, "through," and commerce requirements, on the other hand, are shaped by conspiracy's status as an inchoate offense. The pattern consists of the agreed-upon racketeering acts.¹¹¹ They need not actually be performed.¹¹² As a conse-

Id. at 679.

106 See notes 4 *supra* and 111 *infra*.

107 An enterprise is conducted "through" racketeering if its affairs are conducted "by means of, in consequence of, by reason of" racketeering. *United States v. Kovic*, 684 F.2d 512, 517 (7th Cir.), *cert. denied*, 103 S. Ct. 304 (1982). Conduct of an enterprise's affairs "through" racketeering does not necessarily mean that the enterprise's affairs were advanced by the racketeering, or that the enterprise authorized the racketeering. *United States v. Scotto*, 641 F.2d 47, 54 (2d Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). Furthermore, the racketeering activity need not play any role in "what might be seen as the usual operations of the enterprise." *Id.* (quoting *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976)).

108 See *United States v. Turkette*, 452 U.S. at 583 (proof of enterprise and pattern of racketeering activity may coalesce).

109 See note 80 *supra*.

110 See *United States v. Turkette*, 452 U.S. at 583 (enterprise is a separate element which the government must prove).

111 *United States v. Starnes*, 644 F.2d at 678 (although RICO conspiracy has only one objective, the separate contemplated racketeering acts constitute the pattern). See also *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2965, 103 S. Ct. 208 (1982). An early district court opinion, *United States v. Stofsky*, 409 F. Supp. 609 (S.D.N.Y. 1973), *aff'd*, 527 F.2d 237 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976) required that the racketeering acts be connected by a "common scheme, plan or motive so as to constitute a pattern and not simply a series of disconnected acts." *Id.* at 614. The Second Circuit has since changed its view on this subject, agreeing with *Elliott*, 571 F.2d at 899 n.23, that requiring the predicate acts to be committed in the conduct of an enterprise provides a sufficient unifying link between them. *United States v. Weisman*, 624 F.2d 1118, 1122 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980). The Seventh Circuit, citing *Stofsky*, says that the racketeering acts must be connected in "some logical manner so as to effect an unlawful end." *United*

quence, the enterprise need not actually have been conducted "through" a pattern of racketeering, as long as such conduct was contemplated.

The requirement that the enterprise affect interstate or foreign commerce is analogous. Most cases will involve an actual effect.¹¹³ Proving an effect on commerce usually presents no difficulty when the enterprise is legal, since the effect of any enterprise activity will suffice, whether or not it is racketeering activity.¹¹⁴ But if the enterprise is an illegal association in fact and the conspiracy fails, the enterprise may never actually affect interstate commerce. In one such case¹¹⁵ involving a sting operation, where a Hobbs Act¹¹⁶ conspiracy served as a predicate racketeering offense, the defendants argued that the Hobbs Act requirement of an interstate commerce nexus was not met because the fictional FBI business targeted could have had no real effect on commerce.¹¹⁷ The court rejected this contention on the ground that factual impossibility is no defense to an inchoate offense.¹¹⁸ The opinion did not make clear whether the attempted extortion of money from the same business also provided the jurisdictional basis for the RICO conspiracy count,¹¹⁹ but the same logic should in any event apply to RICO conspiracy's jurisdictional

States v. Starnes, 644 F.2d at 678. One other district court has stated that the government must prove the "interrelatedness" of the predicate acts. *United States v. White*, 386 F. Supp. 882, 883-84 (E.D. Wis. 1974).

All the conspirators need not agree to the same pattern for the agreement to constitute one conspiracy, as long as they agree to a single overall objective. *See* note 62 *supra* and accompanying text.

112 *See* notes 97-103 *supra* and accompanying text. The Fourth Circuit does require that two racketeering acts be committed. *See* note 87 *supra*.

113 A minimal effect on interstate or foreign commerce satisfies the jurisdictional requirement. *See, e.g.*, *United States v. Bagnariol*, 665 F.2d 877, 892 (9th Cir. 1981), *cert. denied*, 102 S. Ct. 2040 (1982); *United States v. Angelilli*, 660 F.2d 23, 31 n.8 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1442, *reh'g denied*, 102 S. Ct. 1998, 102 S. Ct. 1999 (1982); *United States v. Sutherland*, 656 F.2d 1181, 1198 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451, 102 S. Ct. 1617 (1982).

114 *See, e.g.*, *United States v. Bagnariol*, 665 F.2d at 892-93.

115 *United States v. Brooklier*, 685 F.2d 1208 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3485 (U.S. Dec. 16, 1982) (No. 82-1013).

116 18 U.S.C. § 1951 (1976).

117 685 F.2d at 1216-17.

118 *Id.* at 1217 (citing *United States v. Bagnariol*, 665 F.2d at 895-96, and *United States v. Jannotti*, 673 F.2d 578, 592-94 (3d Cir. 1982) (en banc), *cert. denied*, 102 S. Ct. 2906 (1982).

119 Some other activity of the enterprise, of course, could have supplied RICO's jurisdictional element. This was the situation in *Jannotti*, for example, where at the trial level the defendants successfully contested Hobbs Act jurisdiction on the ground of impossibility, but where legal activities of the enterprise (a law firm) satisfied RICO's jurisdictional requirement. 501 F. Supp. 1182, 1184, 1186 (E.D. Pa. 1980). The Third Circuit en banc reversed the ruling for the defendants on the Hobbs Act jurisdiction issue. 673 F.2d at 592-94. The Third Circuit based the reversal on its view that "the defendants' conduct constituted a suffi-

element. Furthermore, two district court cases have approved the "class of activities" test¹²⁰ for establishing federal jurisdiction where a RICO enterprise had only a local¹²¹ or potential¹²² effect.

The requirement that there be at least two members of the conspiracy figures in only one case. The Fifth Circuit in *United States v. Bethea*¹²³ held that the jury's finding all but two defendants not guilty of conspiracy, followed by the appellate court's reversal of one conviction, required the reversal of the other defendant's conviction as well. The defendant's state of mind as to other conspirators, however, figures crucially on the issue of the conspiracy's scope, and the related question of whether the government has shown one conspiracy or several.

C. *State of Mind*

RICO on its face says nothing about state of mind, either for substantive RICO offenses or for conspiracy. The Second Circuit and one district court in the Third Circuit have concluded that RICO is therefore a strict liability offense.¹²⁴ That is, they have required no state of mind beyond that required for the predicate racketeering acts. Traditionally, however, criminal statutes which are not merely "regulatory"¹²⁵ are interpreted as requiring a culpable state

cient threat to interstate commerce so as to implicate an 'area of federal concern' sufficient to give rise to federal jurisdiction." *Id.* at 592.

120 See note 121 *infra*.

121 *United States v. Vignola*, 464 F. Supp. 1091, 1099 (E.D. Pa.) (citing *Perez v. United States*, 402 U.S. 146, 154 (1971), for the proposition that once Congress finds that a class of activities burdens interstate commerce, and passes a valid statute regulating those activities, if the defendant's conduct falls within the class it has satisfied the commerce requirement), *aff'd without opinion*, 605 F.2d 1199 (1979).

122 *United States v. Amato*, 367 F. Supp. 547, 549 (S.D.N.Y. 1973), a RICO conspiracy case, also cites *Perez* to support the proposition that RICO resembles numerous other statutes "proscribing classes of activities affecting commerce without requiring proof that a particular transaction actually affects commerce."

123 672 F.2d 407, 420 (5th Cir. 1982). Any rule extracted from *Bethea* regarding the impossibility of convicting only one alleged conspirator would be subject to the case law discussed in note 27 *supra*.

124 *United States v. Scotto*, 641 F.2d at 56; *United States v. Boffa*, 513 F.2d at 470-71.

125 See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943) (shipping adulterated or misbranded drugs); *United States v. Balint*, 258 U.S. 250 (1922) (selling opium derivative without required tax form). The *Balint* Court stated that the general rule requiring scienter, even where not explicit in the statute, does not apply to statutes "the purpose of which would be obstructed by such a requirement." *Id.* at 251-52. It explained that "[m]any instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes as in cases of *mala in se*." *Id.* at 252.

of mind, even if they do not say so explicitly.¹²⁶ Since RICO is not a regulatory statute, one should therefore conclude that Congress intended RICO conspiracy to inherit traditional conspiracy's state of mind jurisprudence.¹²⁷

RICO conspiracy opinions articulate three states of mind applicable to the act of agreement, sometimes all three within the same breath: willing, intentional, and knowing.¹²⁸ *Elliott* provides a typical statement that the government must prove "deliberate, knowing, and specific intent to join the conspiracy."¹²⁹ Policy considerations make intent¹³⁰ to bring about the conspiracy's objectives¹³¹ the preferable rule. Mere knowledge is insufficient to separate criminal con-

126 See, e.g., *United States v. United States Gypsum Co.*, 438 U.S. 422, 436-38 (1978). See generally Kolen, *RICO and State of Mind*, in 3 *TECHNIQUES IN THE INVESTIGATION OF ORGANIZED CRIME: MATERIALS ON RICO, SELECTED ESSAYS* 1286, 1293-96 (G. R. Blakey ed. 1980).

127 See note 22 *supra*.

128 The Fifth Circuit in *United States v. Diecidue*, 603 F.2d 535 (5th Cir. 1979), *cert. denied*, 445 U.S. 946, 446 U.S. 912 (1980), for example, approved the following jury instructions on state of mind:

One may become a member of a conspiracy without full knowledge of all of the details of the unlawful scheme or the names and identities of all of the other alleged conspirators. So, if a defendant, with an understanding of the unlawful character of a plan, *knowingly* and *willfully* joins in an unlawful scheme on one occasion, that is sufficient to convict him for conspiracy even though he had not participated at earlier stages in the scheme and even though he played only a minor part in the conspiracy.

Of course, mere presence at the scene of an alleged transaction or event, or mere similarity of conduct among various persons and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy, does not thereby become a conspirator.

Id. at 548 (emphasis added). The court defined "knowingly" and "willfully" as follows:

The word "*knowingly*," as that term has been used from time to time in these instructions, means that the act was done *voluntarily* and *intentionally* and not because of mistake or accident.

The word "*willfully*," as that term has been used from time to time in these instructions, means that the act was committed *voluntarily* and *purposely*, with the *specific intent* to do something the law forbids; that is to say, with *bad purpose* either to disobey or disregard the law.

Id. (emphasis added).

129 571 F.2d at 906 (quoting *United States v. Prince*, 515 F.2d 564, 567 (5th Cir. 1975)).

130 See note 17 *supra* for a definition of intent.

131 Though some courts, like the *Elliott* court quoted at text accompanying note 129 *supra*, speak of intent to "join" the conspiracy, intent that the conspiracy's objectives be achieved expresses the requirement more accurately. *Cf.* *United States v. Malatesta*, 590 F.2d 1379, 1381 (5th Cir.) (en banc) ("intend to join, or associate himself with the objectives of, the conspiracy"), *cert. denied*, 440 U.S. 962, 444 U.S. 846 (1979).

spiracy from innocuous behavior,¹³² while willingness, in the sense of bad purpose, requires too great an incursion into the defendant's subjective motivation and legal expertise.¹³³

As for existing circumstances, the cases most typically discuss the state of mind for the scope of the conspiracy. The scope is a function of three elements of the offense: 1) the other conspirators, and the objectives they have agreed to; 2) the enterprise, and the range of activities it is to engage in; and 3) the fact that the defendant is associated with an enterprise. The courts describe state of mind for scope as knowledge of the general scope,¹³⁴ knowledge that the conspiracy had scope,¹³⁵ or recklessness as to content and membership.¹³⁶ A rule that accounts for the outcome in nearly every case¹³⁷ raising state of mind is: knowledge of some other conspirator(s), plus recklessness as to the existence of a wider membership, the enterprise, the defendant's association with an enterprise, and other illegal enterprise activity.

Recklessness as to membership and enterprise will figure most often in the illegal enterprise situation. A defendant joining an illegal scheme, and knowing its boundaries are uncertain, risks the existence of participants and dimensions beyond his immediate

132 See *United States v. Bailey*, 444 U.S. 394, 405 (1980).

133 See note 21 *supra*. Bradley, *supra* note 63, at 885-87, disagrees with this proposition as it applies to RICO conspiracies. He reasons that investing money in violation of § 1962(a) is not wrong in itself; therefore, conspiracy to violate § 1962(a) should require knowledge of RICO and intent to violate its provisions. Section 1962(d), he proposes, expresses this requirement in the word "violate": conspiring to "violate" a substantive RICO offense, he says, implies knowledge of the law. Thus he reasons that knowledge of the law is an element of RICO conspiracy to violate § 1962(b) and § 1962(c) as well.

As the author of Note, *Aiding and Abetting*, *supra* note 96, at 587 n.73, observes, protecting the nonracketeer does not require this "tortured" reading of the statute. The intent requirement for conspiracy and complicity will guarantee the necessary protection. *Id.* at 584-91.

134 See, e.g., *United States v. Malatesta*, 583 F.2d 748, 759-60 (5th Cir. 1978) ("full knowledge of the general scope and purpose of the conspiracy," but knowledge of entire plan not necessary), *aff'd on rehearing*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 440 U.S. 962, 444 U.S. 846 (1979).

135 See, e.g., *United States v. Sutherland*, 656 F.2d 1181, 1190-91 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1451, 102 S. Ct. 1617 (1982).

136 *Elliott*, 571 F.2d at 904, and several other opinions have quoted *United States v. Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944), that when a person "embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." See also notes 73-81 *supra* and accompanying text.

137 An exception is probably *United States v. Cryan*, 490 F. Supp. 1234 (D.N.J.), *aff'd without opinion*, 636 F.2d 1211 (1980), discussed at notes 68-69 *supra* and accompanying text.

experience.¹³⁸ Recklessness as to membership may also figure in the legal enterprise situation.¹³⁹ If the general corruption of the enterprise is obvious, the defendant risks the existence of schemes and schemers beyond his knowledge. In both the legal and illegal enterprise situations, membership in a wider conspiracy requires at least a conscious risk as to its contours.

No court has explicitly addressed the issue of what state of mind a defendant must have as to whether the agreed-upon racketeering acts constitute a pattern. Reasoning like that invoked for scope would dictate a minimum of recklessness. The government need prove no state of mind as to the effect of the enterprise's activities on commerce.¹⁴⁰

In proving RICO conspiracy's required elements, traditional conspiracy's procedural and evidentiary rules apply.¹⁴¹ RICO conspiracy also inherits the substantive implications of traditional conspiracy: possible consecutive sentencing for conspiracy and the substantive offense,¹⁴² and vicarious substantive liability under *Pinkerton*¹⁴³ for crimes foreseeably committed in furtherance of the conspiracy's object.

IV. Conclusion

RICO conspiracy inherits and augments traditional conspiracy law's power. It reaches beyond the grasp of traditional conspiracy law to criminal schemes with multiple objectives. It carries more severe penalties than conspiracy statutes ordinarily impose,¹⁴⁴ and presents greater potential for consecutive sentencing on conspiracy and substantive charges.¹⁴⁵

138 See note 136 *supra*.

139 See, e.g., notes 74-76 *supra* and accompanying text. See also *United States v. Lee Stoller Enters.*, 652 F.2d 1313 (7th Cir.), *cert. denied*, 454 U.S. 1082 (1981). Stoller, who had bribed a sheriff and his deputies, was held to be a member of the same RICO conspiracy as codefendants who had made towing and prostitution payoffs to the same office. The sheriff's office was the enterprise. The court apparently reasoned that Stoller risked being associated with other lawbreakers when he participated in the office's obviously corrupt operation.

140 See note 17 *supra*. See also *United States v. Feola*, 420 U.S. 671, 696 (1975).

141 See notes 31-36 *supra* and accompanying text.

142 See notes 37-38 *supra* and 144 *infra* and accompanying text.

143 See notes 39-41 *supra* and accompanying text.

144 Violation of § 1962(d) carries a penalty of up to \$25,000 and twenty years imprisonment, plus possible forfeitures. 18 U.S.C. § 1963 (1976).

145 RICO defendants may be sentenced separately for violating § 1962(d) and § 1962(c) and for committing the predicate racketeering offenses. The government may also be able to charge that the same agreement violated both § 1962(d) and § 371, again with cumulative punishment. *United States v. Barton*, 647 F.2d at 235. See Note, *RICO and the Predicate Of-*

RICO's language and legislative history indicate that RICO conspiracy is more powerful than many practitioners and courts have realized. Like traditional conspiracy, it should not require an agreement to commit any acts personally. Nor should it require an overt act. Because it requires no overt act, RICO conspiracy permits the government to halt inchoate criminal activity earlier in its development than the general federal conspiracy statute would allow.

On the other hand, RICO conspiracy is less powerful than some have feared. Courts requiring no state of mind beyond that for the predicate offenses ignore the essence of RICO, the relationship to the enterprise. Because RICO conspiracy permits apprehending conspirators while the crime is still inchoate, the government should prove intent to achieve the conspiracy's objective, conduct of the enterprise through a pattern of racketeering.

Circuit splits and judicial imprecision result from RICO's complexity. RICO conspiracy is two racketeering crimes, wrapped in a substantive RICO offense, shrouded in a conspiracy. The substantive RICO offense incorporates most of the racketeering crimes' elements and adds others. Section 1962(d) incorporates and expands the substantive offense's existing circumstance elements, and adds the conduct requirement of agreement. The 1981 proposed Criminal Code Reform Act provides a model and guidelines for breaking down section 1962(d) into its constituent elements, and assigning to

fenses: An Analysis of Double Jeopardy and Verdict Consistency Problems, 58 NOTRE DAME L. REV. 383 (1982) [hereinafter cited as Note, *RICO and the Predicate Offenses*]. See also Comment, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CAL. L. REV. 724, 728-59 (1982). The authors of the Comment base their discussion of double jeopardy on the premise that RICO, "like felony murder, is essentially a greater-offense statute," *id.* at 744, and argue that Congress did not intend multiple punishment for RICO and the predicate offenses. They concede that "[t]his conclusion is at odds with findings of a number of circuit courts that Congress clearly authorized separate punishments, and such authorization allows prosecutors to bring predicate offense and RICO charges without violating the double jeopardy clause." *Id.* at 745. They argue, however, that some courts' use of the *Blockburger* test supports this conclusion: these courts would not "[r]esort to *Blockburger*" if they were really certain Congress intended multiple punishment. *Id.* at 750. (The Supreme Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), stated that the same evidence may support conviction under two statutes, with no double jeopardy violation, if each statute requires proof of some fact which the other does not.) None of the decisions they cite, however, applied *Blockburger* to uphold defendants' double jeopardy claims. *Id.* at 750 & n.129; 751-52 & n.135. Since the Comment appeared, the Eleventh Circuit in *United States v. Hartley*, 678 F.2d 961 (11th Cir. 1982), *cert. denied*, 51 U.S.L.W. 3552 (U.S. Jan. 25, 1983), addressed this issue. It concluded that under *Blockburger* the predicate offenses arguably had to be included in the RICO offenses. *Id.* at 992. However, since *Blockburger* is merely a rule of statutory construction, it does not apply to RICO, where the legislature clearly intended that the offenses be treated as separate and distinct. *Id.* (citing *Albernaz v. United States*, 450 U.S. 333, 340 (1981)). See Note, *RICO and the Predicate Offenses, supra*, at 392-93, 410.

each an appropriate state of mind requirement. The advocate, of course, need not belabor this entire structure in a brief or before a jury. But a sophisticated understanding of RICO conspiracy will produce more effective arguments on both sides of the courtroom and assist the court in weighing their legal merits.

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