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Stalking the Enterprise Criminal: State Rico and the Liberal Interpretation of the Enterprise Element

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STALKING THE ENTERPRISE CRIMINAL: STATE RICO AND THE LIBERAL INTERPRETATION OF THE ENTERPRISE ELEMENT

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INTRODUCTION

In the twenty-five years since Congress passed the Racketeer Influenced and Corrupt Organizations Act (RICO) in 1970,[1] twenty-nine states, as well as Puerto Rico and the Virgin Islands, have enacted similar legislation, called "Baby RICO" statutes by many commentators.[2] Most, though not all, of these state statutes make it a crime for a person to conduct or participate in an enterprise through a pattern of racketeering activity.[3] Some legal analysts describe the "enterprise" element as that "entity to, from or through which the activities proscribed by RICO operate."[4] None of the state RICO statutes defines enterprise precisely the same way as the federal RICO statute,[5] although most states model their definitions of enterprise on the federal statute with only minor changes.

Several legal commentators have recently argued that the federal and some state definitions of enterprise are too broad, and should be narrowed in order to restrict prosecution only to the most well-developed criminal syndicates of organized crime.[6] This Note will focus exclusively on criminal applications of state RICO statutes and argue that state legislatures should not narrow the state enterprise requirements. Rather, state courts should interpret the enterprise requirements broadly in order to cover the relatively small criminal

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1 Pub. L. No. 91-452, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (1994)).

2 *See, e.g.*, Steven L. Kessler, *And a Little Child Shall Lead Them: New York's Organized Crime Control Act of 1986*, 64 ST. JOHN'S L. REV. 797, 798 (1990) (referring to New York's Organized Crime Control Act as "Baby RICO" or "Little RICO"). *But see* Michael P. Kenny & H. Suzanne Smith, *A Comprehensive Analysis of Georgia RICO*, 9 GA. ST. U. L. REV. 537, 538 n.9 (arguing that the term "Baby RICO" "is misleading, inasmuch as it suggests that [Georgia's RICO Statute] is merely a state analog of federal RICO").

3 *See, e.g.*, OR. REV. STAT. § 166.720(3) (1993). *But see* N.Y. PENAL LAW § 460.20(1)(c) (McKinney 1989) (criminalizing participation in "a pattern of criminal activity").

4 Robert L. Gegios & Deborah M. Jervis, *RICO & WOCCA*, WIS. LAW., Apr. 1990, at 18, 20.

5 The federal RICO statute defines enterprise at 18 U.S.C. § 1961(4) as follows: "'[E]nterprise 'includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

6 *See, e.g.*, Russell D. Leblang, *Controlling Prosecutorial Discretion Under State RICO*, 24 SUFFOLK U. L. REV. 79 (1990) (suggesting multiple procedural and definitional amendments); Jennifer Daley, Note, *Tightening the Net of Florida's RICO Act*, 21 FLA. ST. U. L. REV. 381 (1993) (arguing in favor of amending "enterprise" to include a continuity requirement).

As this Note will demonstrate, critics of both state and federal RICO are not difficult to find. One commentator expressed mild surprise at this fact, noting that only "[o]ccasionally, an article or editorial will defend RICO, an event which occurs less often than one would expect in light of the fact that the statute has produced the federal government's most spectacular successes against organized crime." Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1036 (1990).

organizations and white-collar crime that state legislatures intended to reach by passing state RICO statutes in the first place. Although some state courts have already narrowed the definition of enterprise, such interpretations run counter to recent precedent from the United States Supreme Court.[7] A more appropriate restriction of RICO would focus on the "pattern of racketeering activity" element, requiring prosecutors to prove that the defendant participated in a pattern of specific criminal activity during an association with the enterprise. If, however, state RICO statutes should be restricted at all, it is the legislature, not the courts, that should amend the "pattern of racketeering activity" element to narrow the list of crimes that can count as predicate acts.[8]

In Part I, this Note describes the background of the federal RICO statute, the development in the late 1970s and 1980s of state RICO statutes, and the scope of prosecutorial use of state RICO statutes.[9] There are good reasons why many states have adopted their own RICO statutes, including the familiarity of state prosecutors with local problems of small-scale criminal associations and the ability to enhance the tools of prosecution for those criminals that the federal RICO statute does not reach.[10]

Part II of this Note discusses the efficacy of state RICO statutes, describes the general approach state courts take to interpreting the enterprise element when there is little state court precedent, and analyzes and compares state formulations of the "enterprise" element in a definitional context, including those states that concentrate on a particular form of criminal activity like "street gangs."

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7 *See, e.g.*, National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) (striking down the "economic motive" requirement established by lower federal courts).

8 Among the crimes that various state RICO statutes count as predicate acts are the following: homicide, assault, robbery, kidnapping, forgery, counterfeiting, theft, embezzlement, illegal kickbacks, election offenses, wrongful influence of a public servant, official misconduct, bribery, sports bribery, gambling, usury, loan sharking, coercion, extortion, extortionate extensions of credit, gaming law offenses, credit card crimes, drug trafficking, obstructing justice, perjury, jury and witness tampering, fraud, deceptive business practices, tax offenses, money laundering, and environmental crimes. U.S. DEP'T OF JUSTICE, STATE CIVIL RICO PROGRAMS 11 app. A n.1 (Program Brief 1992) [hereinafter PROGRAM BRIEF].

9 It is important at this point to emphasize what this Note will not do. This Note will not survey how federal courts have interpreted or should interpret the federal "enterprise" element. There are several excellent articles treating this subject. *See* Arthur Patrick Breshnahan et al., *Racketeer Influenced and Corrupt Organizations*, 30 AM. CRIM. L. REV. 847 (1993); David M. Ludwick, Note, *Restricting RICO: Narrowing the Scope of Enterprise*, 2 CORNELL J.L. & PUB. POL'Y 381 (1993); Thomas S. O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989).

The scope of this Note is limited to a survey of state RICO statutes, definitional comparison of the "enterprise" element, and case analysis from selected state court opinions that address the interpretation of "enterprise."

10 *See infra* part I.B.2.

In Part III, this Note selectively analyzes a group of state court cases that illustrate the various approaches state courts take in defining the scope of state RICO statutes. State courts have struggled to establish a workable doctrine for finding associations in fact.

Finally, Part IV looks to the future of state RICO statutes, responds to critics who argue for restricting both the use and scope of state RICO statutes and their enterprise requirements and suggests practical methods of restricting the scope of RICO without limiting the enterprise definition.

I
BACKGROUND

A. The Federal RICO Statute

1. *The Crimes and the Definition*

When Congress enacted RICO in 1970, the statute was hailed as a novel and powerful new tool, allowing prosecutors to target a broad range of organized criminal activity.[11] The federal RICO statute criminalizes four activities: (1) The use or investment of income derived from a pattern of racketeering activity in the acquisition, establishment, or operation of an enterprise;[12] (2) The acquisition or maintenance of an interest in or control of an enterprise through a pattern of racketeering activity;[13] (3) Employment by or association with an enterprise whose affairs are conducted by or participated in by a defendant through a pattern of racketeering activity;[14] and (4) Conspiracy to violate any of the first three parts.[15] In all cases, the enterprise must be engaged in interstate or foreign commerce.[16]

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11 *See* Gerard E. Lynch, *A Conceptual, Practical, and Political Guide to RICO Reform*, 43 VAND. L. REV. 769, 770-76 (1990); *see also* Ludwick, *supra* note 9, at 381 (describing federal RICO as "a new means of attacking organized crime and sophisticated criminal syndicates").

12 18 U.S.C. § 1962(a) (1994).

13 *Id.* § 1962(b).

14 *Id.* § 1962(c).

15 *Id.* § 1962(d).

16 *Id.* § 1962(a)-(d). It is beyond the scope of this Note to examine and compare which of these four offenses state RICO statutes incorporate. To be sure, there is much variation among the states, although most states have adopted at least one of these four offenses. The concern of this Note is definitional, and in such an analysis, it is not necessary to discuss the various offenses a person can commit in association with an enterprise. Of course, it will be necessary to discuss the states' formulations of the RICO enterprise and compare them to the federal definition.

Further, although this Note is concerned with the criminal implications of RICO, it should not be overlooked that in the federal RICO statute and in most state RICO statutes, there is a civil remedy as well. Under federal RICO, a cause of action arises for "[a]ny person injured in his business or property" by a violation of RICO, allowing recovery of treble damages and attorney's fees. 18 U.S.C. § 1964(c) (1994); *see also* Lynch, *supra* note 11, at 792-97 (discussing the purpose and scope of civil RICO). As of 1991, civil RICO

There are several elements a prosecutor must prove in a federal RICO case.[17] This Note focuses primarily on the section of the federal RICO statute that defines enterprise: "'[E]nterprise' includes 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] Some federal courts, discussed below, have grafted structural requirements to the proof of an association in fact, and some state courts have added these structural requirements to their RICO statutes.[19]

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cases amounted to more than 90% of all RICO actions in federal court. *Look Who's Saving RICO*, WALL ST. J., May 24, 1991, at A10.

Some state RICO statutes offer more expansive forms of civil remedy, including personal injury, punitive damages, and private injunctive or other equitable relief. *See* DOUGLAS E. ABRAMS, THE LAW OF CIVIL RICO § 7.1 (1991 & Supp. 1994). In all cases, the enterprise requirement for both criminal and civil variations of state and federal RICO is the same.

17 *See* 18 U.S.C. §§ 1961-1968 (1994).

18 *Id.* § 1961(4).

19 Many legal commentators have argued that Congress intended only to target "organized crime" when it passed RICO in 1970. *See, e.g.*, Kessler, *supra* note 2, at 797 (arguing that "Congress enacted . . . [RICO] to combat the influence of organized crime in interstate and foreign commerce"); Robert S. Murphy, *Arizona RICO, Treble Damages, and Punitive Damages: Which One Does Not Belong?*, 22 ARIZ. ST. L.J. 299 (1990) (describing federal RICO as a congressional response "to an increase in organized crime"); Ludwick, *supra* note 9, at 420 (calling the "true target" of RICO "organized crime").

However, the chief author of the federal RICO statute has argued that "the most powerful myth . . . is that RICO was designed to deal *only* with organized crime." G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?"*, 43 VAND. L. REV. 851, 860 (1990). It is true that federal RICO was designed to deal with organized crime, but the originator of the federal RICO statute has called that a "half truth." *Id.* at 866. RICO was intended to deal with all forms of "enterprise criminality," including white-collar crime. *Id.*

For a detailed analysis of the history of the federal RICO statute, *see* Lynch, *supra* note 11. As Lynch pointed out:

> Congress extensively revised RICO in 1984 and did nothing whatever to cut back on the statute as it had been interpreted in the courts. Instead, it broadened the law in a number of crucial respects, including the controversial forfeiture provisions. By the 1984 revision, the use of both civil and criminal RICO in white-collar and political corruption cases, as well as against organized crime groups, was well established, as was the widespread use of civil RICO. Whether or not Congress knew what it was doing in 1970, it cannot be claimed that by 1984 it was unaware of what its words had accomplished.

Id. at 775.

The United States Supreme Court recently explained that "Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248 (1989).

One interesting state civil RICO case in which organized crime became an issue is Larson v. Smith, 391 S.E.2d 686 (Ga. Ct. App. 1990). In a challenge to the plaintiff's form of pleading, the court held that "it was not necessary that the complaint allege that defendants were 'organized criminal elements.'" *Id.* at 687-88. The court concluded that it was not necessary for a plaintiff to prove any "nexus" with organized crime in order to prevail. *Id.* at 688.

2. *The "Pattern of Racketeering Activity" Element*

Proof of a pattern of racketeering is also critical to any successful RICO prosecution, be it state or federal. The federal RICO statute states that "racketeering activity" consists of predicate acts: violations of certain federal or state statutes or both.[20] The "pattern of racketeering activity" element "requires at least two acts of racketeering activity, one of which occurred after the effective date of [the RICO statute] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[21] Therefore, though a pattern must exist, the particular predicate acts need not necessarily occur one right after the other; they can be separated by as long as ten years.

3. *The Liberal Construction Clause*

The federal RICO statute contains a "liberal construction clause" requiring that its "provisions . . . be liberally construed to effectuate its remedial purposes."[22] This clause has allowed federal courts to interpret the statutory language and definitions broadly.[23] Critics of federal RICO point to the construction clause as evidence that Congress overreacted to enterprise criminality.[24] Some state RICO statutes have a similar liberal construction clause, allowing courts broad latitude to effectuate state legislatures' intent and purpose.[25] Florida, however, enacted a *strict* construction clause, requiring courts to narrowly interpret the state's RICO provisions and offenses in accord with the statutory language.[26]

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20 18 U.S.C. § 1961(1) (1994).

21 *Id.* § 1961(5).

22 See Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970) (codified at 18 U.S.C. § 1961 (1994)).

No other federal statute that imposes criminal penalties has a liberal construction directive like the RICO statute. *See* Jacqueline Dowd, *Interpreting RICO: In Florida, the Rules are Different*, 40 U. FLA. L. REV. 127, 159 n.217 (1988).

23 *See, e.g.*, Russello v. United States, 464 U.S. 16, 27 (1983); United States v. Turkette, 452 U.S. 576, 587-93 (1980).

24 *See, e.g.*, Daley, *supra* note 6, at 395 (noting that critics charge that the liberal construction clause "rendered the rule of lenity inapplicable"). *But see* Craig W. Palm, Note, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 169 (1980) (arguing that critics "misunderstand the nature of statutory ambiguity, flout the congressional directive, and misuse legislative history in their attempt to justify a narrow construction of RICO").

25 Examples include Colorado, Illinois, Indiana, New Jersey, Oregon, Rhode Island, and the Virgin Islands. *See* ABRAMS, *supra* note 16, §§ 7.4, 7.11, 7.12, 7.16, 7.23, 7.26, 7.28a.

26 *See* Dowd, *supra* note 22, at 159-63; Daley, *supra* note 6, at 396.

B. The 1980s: The States Respond

1. *The Development of State RICO*

After the federal RICO statute became effective in 1970, states were initially slow to enact similar racketeering laws because the impact and effectiveness of the federal law was still unclear.[27] The first state to enact a RICO statute patterned after the federal statute was Hawaii, whose law became effective in 1972.[28] Hawaii was followed by Pennsylvania in 1973, Florida in 1977, Arizona and Puerto Rico in 1978, and Rhode Island in 1979.[29] The largest and most rapid growth of state RICO statutes occurred during the 1980s, when twenty-three states enacted RICO statutes generally patterned after the federal version.[30] The newest RICO statute was passed in 1990 by the Territory of the Virgin Islands.[31]

Because the federal RICO statute does not preempt state RICO statutes on the subjects it addresses,[32] other states are likely to pass versions of RICO in the not-too-distant future.[33] As case law interpreting state RICO statutes continues to grow, it is reasonable to believe that other states will be attracted to the advantages that such a powerful prosecutorial tool can offer.

2. *Justifications for State RICO*

Advocates of state RICO statutes have offered a variety of justifications for their co-existence with a federal RICO statute.[34] One scholar

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27 This was due, in part, to federal prosecutors' initial reluctance to charge defendants with RICO violations because of uncertainty as to the potential benefits and advantages of RICO. *See* Ira H. Raphaelson & Michelle D. Bernard, *RICO and the "Operation or Management" Test: The Potential Chilling Effect on Criminal Prosecutions*, 28 U. RICH. L. REV. 669, 672 (1994).

28 Blakey & Perry, *supra* note 19, at 988. There are, however, no Hawaii state appellate court opinions interpreting the "enterprise" requirement of the statute, the subject of this Note. The state legislature amended the definitional section of the RICO statute twice, in 1990 and 1991, but made no changes to the enterprise element.

The only judicial interpretation of the Hawaii RICO statute was made by a federal court in Nakamoto v. Hartley, 758 F. Supp. 1357 (D. Haw. 1991). This case addressed statutes-of-limitations issue in a civil case unrelated to the topic of this Note.

29 Blakey & Perry, *supra* note 19, at 988, 992.

30 *Id.* at 988-1011. These states are: New Mexico (1980), Georgia (1980), Indiana (1980), New Jersey (1981), Utah (1981), Colorado (1981), Idaho (1981), Oregon (1981), Wisconsin (1982), Illinois (1982), Connecticut (1982), North Dakota (1983), Nevada (1983), Louisiana (1983), Mississippi (1984), Washington (1985), Ohio (1986), Tennessee (1986), New York (1986), Delaware (1986), North Carolina (1986), Oklahoma (1988), and Minnesota (1989).

31 *See* ABRAMS, *supra* note 16, § 7.28a.

32 *See id.* § 7.1.

33 For a brief discussion of the Massachusetts effort to pass a state RICO statute, see Leblang, *supra* note 6 nn.3, 28-31, 58 & 85.

34 One Florida commentator offered general justifications for all forms of RICO, state and federal:

recently offered four compelling justifications.[35] First, enforcement of federal RICO is often limited to only the most well-developed criminal syndicates, and states have far greater prosecutorial resources to combat local enterprise criminality.[36] In the long run, it is far more advantageous for states to have the ability to enhance punishment for the relatively large numbers of small-time criminal organizations than it is to focus federal RICO prosecutions exclusively on one or two large syndicates.[37]

> One advantage is that RICO Acts solve the deficiency in other criminal statutes that incarcerate the individual members of the organizations engaged in criminal activity, but rarely eliminate the organizations. Another advantage is that RICO Acts eliminate problems involving evidence gathering and constitutional protections, which prosecutors previously encountered in prosecuting organized crime. Other advantages of RICO Acts include the availability of civil remedies to prosecutors and affected individuals, harsher penalties and new sanctions, injunctions to prevent defendants from using assets gained from racketeering to obtain legal representation or to prepare a defense, and expanded doctrines regarding admissibility of evidence.

Daley, *supra* note 6, at 382 (footnotes omitted).

35 Leblang, *supra* note 6, at 83-84. Leblang offers several methods to control prosecutorial discretion, which this Note will discuss more fully below, but he also makes a strong argument for retaining and strategically utilizing RICO at the state level.

36 As Chief Justice Rehnquist wrote, "Overlapping criminal remedies do not present much of a problem, because state and federal prosecutions tend to work things out on a sensible basis of resource allocation." William Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14.

One RICO manual noted that the U.S. Department of Justice RICO Guidelines provide that "RICO prosecutions will generally be reserved for important cases where there is evidence of organized criminal activity infiltrating and affecting the nation's economy." JED S. RAKOFF & HOWARD W. GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY § 5.04(1)(a) (1994). For a discussion of the RICO guidelines, see *infra* text accompanying notes 265-68.

Statistics also illustrate the degree of federal RICO prosecutions. In 1989, the Criminal Division's Organized Crime and Racketeering Section, responsible for reviewing all potential federal RICO prosecutions, authorized 111 RICO indictments. Coffey, *supra* note 6, at 1038 n.18 (noting that this is within the average number of annual federal RICO prosecutions). Of these, 29 RICO prosecutions involved charges of public corruption. *Id.* at 1040. Because federal RICO prosecutions are more likely to target large and complex criminal organizations, it is not surprising that the 10 cities in which federal RICO prosecutions are most common are Chicago, New York, Philadelphia, Boston, Miami, Newark, Tampa, Los Angeles, Detroit, and Washington, D.C. *Id.* at 1039 n.23.

37 Chief Justice Rehnquist wrote that federal prosecutors "concentrate on the fraudulent schemes that are either too big or too widespread for efficient state prosecution. Garden-variety frauds and swindles are left to the state courts." Rehnquist, *supra* note 36, at A14.

The U.S. Department of Justice Guidelines require that "all RICO criminal and civil actions brought by the federal government must receive prior approval from the Organized Crime and Racketeering Section in Washington, D.C." CRIM. DIV., U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 127 (2d rev. ed. 1988) [hereinafter GUIDELINES]. The manual states that "RICO should only be invoked in those cases where it meets a special need or serves a special purpose that would not be met by prosecution only on the underlying charges." *Id.* at 128. Approval is generally disfavored if RICO indictments rely essentially on violations of state law, unless "there is a legitimate reason for doing so." *Id.* at 129; *see also* RAKOFF & GOLDSTEIN, *supra* note 36, § 5.06 (citing the same requirement). A "legitimate reason" can

Second, states without RICO statutes might be forced to turn a case over to the federal authorities that state authorities would be better suited to pursue. An ongoing investigation by local law enforcement that ultimately reveals evidence that would support a RICO prosecution should be handled by the agencies that have pursued the case from the beginning: state and local prosecutors. The absence of state RICO would likely force prosecutors to choose between merely prosecuting the underlying criminal acts or turning the case over to the U.S. Attorney and washing their hands of the entire case. Neither alternative is satisfactory.

Third, local and state authorities are often far more knowledgeable than their federal counterparts about enterprise criminality in the areas where they have been working for long periods of time. This is particularly true in rural areas where there are no F.B.I. or U.S. Attorney offices, and members of local law enforcement have grown up in the very communities they serve.

Finally, state RICO statutes often provide state prosecutors administrative and evidentiary advantages. In a state RICO prosecution, even though the predicate acts themselves might have been committed in many counties, the case can be consolidated and tried in a single county, eliminating most venue problems. Furthermore, RICO prosecutions often make it easier for juries to see the entire picture of the criminal organization rather than a confusing morass of individual, and seemingly unrelated, criminal acts committed over a long period of time.[38] State RICO prosecutions therefore allow juries to see the connections between multiple crimes rather than a disjointed array of criminal activities.

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usually be found if the following circumstances exist: "(1) Where local law enforcement authorities are unlikely to prosecute crimes in which the federal government has significant interest; (2) Where there is significant organized crime involvement; and (3) Where prosecution of political or governmental fignres may pose special problems for local prosecutors." RAKOFF & GOLDSTEIN, *supra* note 36, § 5.06(1).

38 *See* Rudolph W. Giuliani, *Legal Remedies for Attacking Organized Crime*, *reprinted in* NATIONAL INSTITUTE OF JUSTICE, MAJOR ISSUES IN ORGANIZED CRIME CONTROL 103, 106 (1988). Mr. Giuliani is now the mayor of New York City.

One commentator explained that since the government is able "to indict the entire hierarchy" of an organized criminal associatiou, RICO "is the only criminal statute that enables the government to present a jury with the whole picture of how an enterprise, such as an organized crime family, operates." RAKOFF & GOLDSTEIN, *supra* note 36, § 9.01(2). This permits prosecutors to portray "a defendant's whole life in crime." *Id.*

Most RICO statutes allow prosecutors to reach back in time to pick up predicate acts that did not occur closely in time. One commentator, discussing the federal RICO statute, pointed out that "the [RICO] prosecutor must show little more than two predicate violations over a ten-year period." Charles N. Whitaker, Note, *Federal Prosecution of State and Local Bribery: Inappropriate Tools and the Need for a Structured Approach*, 78 VA. L. REV. 1617, 1646 (1992).

State officials themselves have advanced similar justifications. In New York, former prosecutor Steven Kessler argued that "state prosecutors felt frustrated and short changed by the existing laws."[39] Kessler explained that instead of having the tools to prosecute enterprise criminality themselves, "state authorities were compelled to surrender their cases to federal authorities for prosecution under federal law."[40] As a result, state authorities had to rely almost exclusively on limited federal resources to combat enterprise criminality. By passing state RICO statutes, legislatures have acted to protect local autonomy and restore some control to local law enforcement agencies when violations of state law occur.

Oregon's attorney general, David Frohnmayer, called Oregon's RICO statute "a potent new weapon in the state's arsenal against organized criminal activity."[41] Frohnmayer countered critics who argued that state RICO was not needed when federal RICO existed. He explained that, with few exceptions, the Department of Justice would not authorize a federal RICO count if the predicate acts consisted solely of state offenses.[42] According to Frohnmayer, "[w]ithout state RICOs, the position taken by federal prosecutors with regard to use of the federal RICO would essentially leave criminals free from prosecution under federal RICO so long as they avoided commission of federal predicate offenses."[43] Therefore, Frohnmayer views state RICO as a necessary assumption of state responsibility for instances of enterprise criminality that federal authorities do not have the resources to prosecute.

3. *Narrowly Targeted Variations of State RICO*

At least two states have adopted modified and limited RICO statutes directed toward particular forms of criminal activity. For example, Iowa's Crime Control Act targets "criminal street gangs" and provides an offense for a "pattern of criminal gang activity."[44] Iowa courts have interpreted this statute to reach defendants who are mem-

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39 Kessler, *supra* note 2, at 801.

40 *Id.*

41 David B. Frohnmayer et al., *RICO: Oregon's Message to Organized Crime*, 18 WILLAMETTE L. REV. 1, 20 (1982).

42 *Id.* at 5.

43 *Id.*

44 IOWA CODE ANN. § 723A.1 (West 1993). The Iowa legislature defined "criminal street gang" (the analogue to "enterprise") as follows:

> [A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

As this Note will illustrate, this statute is both broader and narrower than most state RICO statutes. It is narrower in that its application is limited to "criminal street gangs" and not

bers of street gangs and ride along on drive-by shootings.[45] This statute gives prosecutors a powerful tool to combat the increase in criminal activity committed by gangs whose members are rarely willing to point to a fellow member as the perpetrator of a particular crime.[46]

Another state that restricts its RICO statute to "criminal street gangs" is Texas.[47] Unlike Iowa, Texas restricts its RICO statute to a list of particular criminal activities, mostly violent, controlled-substance, or sexual offenses.[48] Texas courts have explained that to be guilty of organized criminal activity, a defendant must commit or conspire to commit one or more of the enumerated crimes with the specific intent of participating in a group of at least five persons.[49] Both of these examples represent states that have significantly departed from the federal RICO model and indicate the potential for state innovation to fashion a RICO statute that best fits the needs of a particular criminal justice system.

Combined with the use of federal RICO against well-developed, interstate street gangs, state RICO can offer a secondary weapon against the criminal activity of these gangs on a local level. The street gangs of the 1990s contain all the elements of criminal syndicates, with members occupying hierarchical positions like the "kingpin,"

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enterprises. It is broader in that it criminalizes patterns of any "criminal acts" rather than allowing only particular types of crime to qualify as predicate acts.

At first, it would seem that this statute violates the First Amendment rights of free association and free speech by using signs and symbols to identify potential predicate acts. However, regarding the right to free association, the Iowa Supreme Court recently held that because "[m]ere association is insufficient" to support a RICO prosecution, the constitutional attack "fails." State v. Walker, 506 N.W.2d 430, 433 (Iowa 1993). The Iowa appellate courts have not yet addressed a First Amendment challenge to the inclusion of signs or symbols in the definition of "criminal street gang."

45 *See, e.g.*, State v. Browne, 494 N.W.2d 241 (Iowa 1992), *cert. denied*, 113 S. Ct. 3051 (1993) (defendant, a member of a gang called the Black Gangster Disciples, yelled to another gang member to "cap the bitch," meaning to "shoot the woman in the window," which the gang member did).

46 It is not surprising that some states see criminal street gangs as particularly dangerous forms of organized criminal activity. According to the executive director of the Chicago Alliance for Neighborhood Safety, "'In some areas, you're getting a transformation from gangs which are not only youth gangs to something much closer to organized crime, they're much more into the drug business.'" William Recktenwald & Jennifer Lenhart, *The Killing Way Weighs Heavily*, CHI. TRIB., Sept. 29, 1992, § 2, at 1, 7.

47 TEX. PENAL CODE ANN. § 71.01 (West 1994). Texas defines "criminal street gang" as "three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities." *Id.*

48 *Id.* § 71.02.

49 *See, e.g.*, Renfro v. State, 827 S.W.2d 532 (Tex. Ct. App. 1992).

The Kentucky legislature designed a similar statute to target "criminal syndicates," which it defines as five or more persons who collaborate to "promote or engage in" any of a list of specified crimes "on a continuing basis." KY. REV. STAT. ANN. § 506.120(3) (Baldwin 1990).

"boss," "lookout," "hawker," "steerer," "runner," and "bang-bang."[50] One student commentator argued that the "sophisticated urban street gang of the 1990s holds a place in society that highly organized criminal organizations like the Mafia have traditionally occupied."[51] Furthermore, although non-RICO statutes targeting street gangs are not a subject of extensive consideration in this Note, it bears noting that some states have "gang statutes" and "criminal syndicate statutes" in addition to their RICO statutes, providing a double-barrelled assault on organized street crime, which prosecutors are beginning to use in tandem with RICO prosecutions by charging forms of compound liability.[52]

It is reasonable to believe that, like federal prosecutors, state prosecutors will soon turn to RICO as their tool of choice to combat political corruption, organized street crime, and a wide variety of white-collar crime.[53] Many of these state RICO statutes are in their infancy, and most states with RICO have few appellate court opinions that focus on RICO provisions, especially the enterprise definition. The next Part will analyze how the states have modeled and departed from the federal RICO statute in drafting their definitions of enterprise, a critical component of any RICO prosecution, and one whose efficacy has been the subject of extensive debate.

II
Definitional Analysis of Enterprise

A. The Federal Enterprise as the Model Definition

The federal RICO statute defines enterprise as including "any individual, partnership, corporation, association, or other legal entity,

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50 Some of the discussion in this paragraph is taken from Lesley Bonney's excellent Comment on RICO prosecutions of street gangs. Lesley S. Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 Cath. U. L. Rev. 579, 601 (1993). Bonney's article provides a thorough analysis of the potential benefits of prosecuting criminal street gangs under federal RICO.

51 *Id.* at 606.

52 *See* Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 Wm. & Mary Bill Rts. J. 239, 273-82 (1993).

53 See Raphaelson & Bernard, *supra* note 27, at 674-75, for a discussion of the slow development of federal RICO prosecution that experienced a sudden boom in the mid-1980s. Federal RICO identified the areas mentioned in the text as probable state RICO areas of focus; *see also* People v. Wakefield Fin. Corp., 590 N.Y.S.2d 382, 389 (Sup. Ct. 1992) (declaring that "the court rejects the suggestion that the Enterprise Corruption statute was not intended to cover 'ordinary white collar crime,' and that it was designed only for the 'Mafia'").

See generally Edwin H. Stier & Peter R. Richards, *Strategic Decision Making in Organized Crime Control: The Need for a Broadened Perspective*, *reprinted in* National Institute of Justice, Major Issues in Organized Crime Control 65 (1988) (discussing the evolutionary process of organized crime from the minor to the major forms of activity and arguing that it is advantageous to stop the development of organized crime in its early stages).

and any union or group of individuals associated in fact although not a legal entity."[54] This definition remains constant throughout the RICO statute and applies to each instance in which the word "enterprise" appears.[55]

An enterprise is basically any entity that a criminal can infiltrate or participate in as an associate. As one scholar stated, "Congress knew that an enterprise could be almost anything."[56] The definition of enterprise is not intended to be close-ended. Instead, the use of the word *includes* indicates that the list that follows is only illustrative.[57] Thus, as one commentator noted, "Congress deliberately chose as broad and vague a term as possible, to cover every possible subject of organized crime penetration, and the definition given to it was equally open ended."[58]

A RICO enterprise can be virtually any legal entity, from the most complex multi-national corporations to sole proprietorships to government entities. As the federal statute's definition indicates, the RICO enterprise can even be an individual if, for example, a relative criminally mismanages a decedent's estate.[59] An enterprise can also include sole proprietorships, partnerships, labor unions, and any other legal entity even if that entity consists solely of a single person.[60]

Apart from legal entities, proof of an association in fact can also satisfy the enterprise requirement.[61] This can be an informal association or collaboration between legal entities or individuals through which a pattern of criminal activity occurs. The United States Supreme Court has held that under the federal RICO statute, an asso-

54 18 U.S.C. § 1961(4) (1994).

55 As this Note will explain in greater detail below, a recent United States Supreme Court opinion, National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994), rejected the argument that a RICO enterprise must be motivated by an economic purpose. *Id.* at 800. The Court noted that though the word enterprise entails functional differences in each type of crime (*e.g.*, acquisition of an enterprise, maintenance of an enterprise, or association with an enterprise), the definition of enterprise remains the same. Thus the meaning and scope of enterprise might shift throughout the different violations, but the definition does not. *Id.* at 804-05.

This Note is concerned with definitional comparison and analysis. Therefore, as a conceptual matter, it is preferable to analyze the RICO enterprise as that entity through which a defendant commits the violative predicate acts or with which a defendant associates to engage in a pattern of racketeering activity.

56 Lynch, *supra* note 11, at 771.

57 *See* GUIDELINES, *supra* note 37, at 27 ("[T]he courts have held that the list of enumerated entities is not exhaustive but merely illustrative.").

58 Lynch, *supra* note 11, at 771.

59 One interesting example of an individual constituting the RICO enterprise can be found in Von Bulow v. Von Bulow, 634 F. Supp. 1284 (S.D.N.Y. 1986). The defendant was convicted of conducting the affairs of his wife through a pattern of racketeering activity.

60 See GUIDELINES, *supra* note 37, at 26-34, for a thorough list of the types of enterprises that federal courts have reviewed.

61 18 U.S.C. § 1961(a) (1994).

ciation in fact enterprise must be an "ongoing organization, formal or informal," whose members "function as a continuing unit" that is separate from the pattern of racketeering activity in which it engages.[62] As this Note reveals below, states do not consistently follow this approach to associations in fact and have adopted various other standards to determine when this type of enterprise exists.[63]

B. The States Draft: Definition and Interpretation

Although states have used federal RICO as a model upon which to base their own RICO statutes, most states did not simply copy the language of the federal statute verbatim. In fact, a majority of states built upon the federal model in order to expand the reach and remedies of state RICO.[64] Most states now regard their RICO statutes as broader than the federal RICO statute in language, scope, and intended criminal targets.[65] Two legal commentators from Georgia have argued that the state statutes are "broader than federal RICO and even more difficult to comprehend."[66]

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62 United States v. Turkette, 452 U.S. 576, 583 (1981). Part III will discuss *Turkette* more fully and focus on how courts have interpreted the enterprise element.

63 It is wise to mention here that RICO associations in fact do not function in the same way as common-law conspiracy. For one thing, members of an association in fact generally do not need to know of the existence of all other members in order be a part of the association. *See, e.g.*, State v. Cheek, 786 P.2d 1305 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990). This Note will discuss the *Cheek* decision in greater detail *infra* part III.D.2.

64 For example, Arizona's RICO statute has been called "one of the broadest state anti-racketeering statutes in the nation." Murphy, *supra* note 19, at 299. AZRAC, as it is called, includes the entire array of federal civil remedies including treble damages, injunctions, forfeiture, divestiture, dissolution of the organization, costs of prosecution, and attorney's fees. ARIZ. REV. STAT. ANN. § 13-2314 (1989). The comparable remedy provisions combined with the elimination of the requirements found in federal RICO that the enterprise affect commerce and that a pattern of racketeering activity be shown make Arizona RICO much broader in scope than federal RICO. Murphy, *supra* note 19, at 299 n.12. For an Arizona case explaining that AZRAC is broader in scope than federal RICO, see State *ex rel.* Corbin v. Pickrell, 667 P.2d 1304, 1310-11 (Ariz. 1983).

65 *See, e.g.*, Wilson v. State, 596 So. 2d 775 (Fla. Dist. Ct. App. 1992); Blalock v. Anneewakee, Inc., 426 S.E.2d 165 (Ga. Ct. App. 1992), *cert. denied*, (Ga. Feb. 5, 1993); State v. Ball, 632 A.2d 1222 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 661 A.2d 251 (N.J. 1995); State v. Cheek, 786 P.2d 1305 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990).

See also G. Robert Blakey & Greg A. Walker, *Emerging Issues Under the Colorado Organized Crime Control Act—Colorado's Little RICO*, 18 COLO. LAW. 2077, 2078 (1989) (arguing that the legislative history shows that "the intent that COCCA apply beyond 'organized crime' is unequivocal"); Daley, *supra* note 6, at 383 ("Florida's current RICO Act now reaches a broader scope of criminal conduct not originally envisioned by the federal RICO Act.").

66 Kenny & Smith, *supra* note 2, at 538. Kenny and Smith go on to suggest, however, that calling state RICO statutes "Baby RICOs" can be misleading, "inasmuch as it suggests that [state] RICO [statutes are] merely . . . state analog[s] of federal RICO." *Id.* n.9 (The authors specifically discuss the Georgia RICO statute, but their comments are applicable to all state RICO statutes.).

Some states have patterned their RICO statutes after both the federal RICO model and models from other states.[67] Not a single state, however, has engaged in wholesale adoption of the federal definitions, particularly the definition of "enterprise." One scholar has suggested that legislatures have changed their state RICO statutes in some cases "to expand the definitions, and in other cases to clarify the definitions in response to federal judicial decisions."[68]

Because many state RICO statutes are still in their infancies, there are often few state appellate court opinions to which a trial court can look for aid in interpretation. As a result, most state courts look to federal court opinions interpreting the language of the federal RICO statute for guidance in interpreting state RICO.[69] Few states, however, regard federal opinions as controlling or even persuasive authority. In some states, like Florida, "[t]he courts have looked to federal decisions interpreting the federal RICO Act for guidance in certain areas, but in other areas have chosen to reject the federal interpretation of the federal Act and to fashion the Florida Act differently."[70]

A Georgia appeals court recently held that "federal circuit court opinions regarding the federal statute, while instructive, do not control our construction or application of the Georgia RICO statute."[71] New Jersey courts will not allow federal court decisions conflicting with state RICO to control because it "would fly in the face of . . . New Jersey legislative intent and would erode the beneficial purposes of the New Jersey Statute."[72] The strongest statement against the controlling effect of federal case law can be found in Pennsylvania. Even though Pennsylvania courts view federal court opinions as "persuasive," a recent court held that "when interpreting our corrupt organizations statute, we are not bound by the mandates of the United States Supreme Court decisions."[73]

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67 *See, e.g.*, Frohnmayer et al., *supra* note 41, at 6-7 (explaining that "the Oregon definition is similar to Florida's"). It is not surprising that Florida RICO is a popular model for other states to follow given that it is one of the most heavily litigated RICO statutes in the nation. *See* Daley, *supra* note 6, at 386-87, 393-94.

In Part II.C, this Note will detail examples of other states that share the same or similar enterprise definitions. Washington adopted a definition almost identical Oregon's definition. Colorado, Georgia, North Carolina, and Tennessee have also closely followed the Florida model.

68 Frohnmayer et al., *supra* note 41, at 7.

69 *See* ABRAMS, *supra* note 16, § 7.1. Abrams explains this phenomenon by arguing that "[f]ederal decisions frequently abound, thus sparing counsel and court the necessity of writing on a blank slate." *Id.*

70 Daley, *supra* note 6, at 395.

71 Blalock v. Anneewakee, Inc., 426 S.E.2d 165, 167 (Ga. Ct. App. 1992), *cert. denied*, (Ga. Feb. 5, 1993).

72 State v. Ball, 632 A.2d 1222, 1239 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 661 A.2d 291 (N.J. 1995).

73 Commonwealth v. Donahue, 630 A.2d 1238, 1245 (Pa. Super. Ct. 1993), *appeal denied*, 645 A.2d 1316 (Pa. 1994).

Though Florida is the only state with a relatively large body of case law reviewing the state RICO statute, it is not surprising that many other states refuse to look to federal case law as dispositive case authority. It is evident from the discussion above that state RICO statutes differ from the federal RICO statute in many ways, particularly when the state statute is targeted toward a specific type of criminal activity. Further, state RICO developed in part because of the limited application of federal RICO. State courts probably interpret their RICO statutes in light of the smaller-scale crimes that they address and that the federal RICO statute is unable to reach. To many state courts, state RICO is simply another state law, and, barring federal constitutional challenges, state courts will interpret it in light of their own development of RICO case law and canons of statutory interpretation.[74] The fact that these are state statutes is, of course, the best and only necessary reason why federal case law is not binding.

Even though in most states (except Florida) case law interpreting state RICO is still in the early stages of development, as the years go by and prosecutors make greater use of the state RICO tool, states will develop their own body of case law to interpret their RICO statutes. One scholar noted that most "[state] courts have not yet reached the bounds of persuasion" in their RICO case law.[75] In other words, many state RICO cases, including those interpreting the definitions of enterprise and pattern of racketeering activity, are cases of first impression. Therefore, the 1990s is quickly becoming the decade in which state courts are breaking a significant amount of new ground in the interpretation of state RICO statutes.

As state RICO prosecutions continue to generate appellate court opinions, state courts might also begin looking to other state courts for persuasive guidance because the nature and degree of criminal prosecutions among the states are more similar than between state

[74] Two recent state court opinions demonstrate the conflict state courts experience when their RICO statutes are in their infancies. In Ferris v. Bakery, Confectionery and Tobacco Union, Local 26, 867 P.2d 38 (Colo. Ct. App. 1993), the Colorado Court of Appeals reasoned that "absent a prior interpretation by our state courts, federal case law construing [RICO] is instructive." *Id.* at 46 (footnote omitted). Therefore, Colorado looks to state court opinions first, but when there are none, resorting to federal case law for assistance is not improper.

Another appellate court gave less deference to federal case law. In Blalock v. Anneewakee, Inc., 426 S.E.2d 165 (Ga. Ct. App. 1992), *cert. denied*, (Ga. Feb. 5, 1993), the Georgia appellate court held that "federal circuit court opinions regarding the federal statute, while instructive, do not control our construction or application of the Georgia RICO statute." *Id.* at 167. Although the court would not completely ignore federal case law, it is clear that federal case law has little or no persuasive authority in Georgia; *see also* Commonwealth v. Dennis, 618 A.2d 972 (Pa. Super. Ct. 1992) (holding that federal case law is instructive but not controlling in the interpretation of Pennsylvania RICO), *appeal denied*, 634 A.2d 218 (Pa. 1993).

[75] ABRAMS, *supra* note 16, § 7.1.

RICO and federal RICO prosecutions. One commentator has even suggested that "courts interpreting federal RICO likewise might be persuaded by decisions interpreting state RICO statutes."[76] Such is not the reality yet, but the body of state case law is growing rapidly, and many of the issues that have already been debated in federal court will soon be resolved in state courts as well. Consequently, in the near future, the body of state case law will itself become persuasive authority in its own right.

C. Comparative Analysis of State RICO "Enterprise"

The most elementary method of comparing the development of the enterprise definition in state RICO statutes is to analyze the different words that are used. Though the basic structure of the definitions are the same, the intended scope and illustrative examples included in the statutory definition vary from state to state. This Part will briefly compare the variations in terminology that the states exhibit in their definitions of enterprise.

Although no state has enacted a definition of enterprise that is identical to the federal RICO definition, some states have defined enterprise in similar ways. Delaware and the Virgin Islands have definitions with exactly the same scope, but slightly different language.[77] Other states with identical scopes, but slightly different language, include Colorado, Florida, Georgia, North Carolina, and Tennessee.[78] Finally, a pair of neighboring states, Oregon and Washington, have almost identical definitions.[79]

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76 *Id.*

77 Delaware's definition: " 'Enterprise' shall include any individual, sole proprietorship, partnership, corporation, trust or other legal entity; and any union, association or group of persons associated in fact, although not a legal entity. The word 'enterprise' shall include illicit as well as licit enterprises, and governmental as well as other entities." DEL. CODE ANN. tit. 11, § 1502(3) (1993).

The Virgin Islands' definition: " 'Enterprise' includes any individual, sole proprietorship, partnership, corporation, trust, or other legal entity, or any union, association or group of persons, associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental as well as other entities." V.I. CODE ANN. tit. 14, § 604(h) (Supp. 1995).

78 *See* COLO. REV. STAT. ANN. § 18-17-103(2) (West 1986); FLA. STAT. ANN. § 772.102(3) (West Supp. 1995); GA. CODE ANN. § 16-14-3(6) (1992 & Supp. 1993); N.C. GEN. STAT. § 75D-3(a) (1990 & Supp. 1994); TENN. CODE ANN. § 39-12-203(3) (1991 & Supp. 1994).

79 The common definition is as follows: "'Enterprise' includes any individual, sole proprietorship, partnership, corporation, business trust or other profit or nonprofit legal entity, and includes any union, association or group of individuals associated in fact although not a legal entity, and both illicit and licit enterprises and governmental and nongovernmental entities." OR. REV. STAT. § 166.715(2) (1990 & Supp. 1994); *see also* WASH. REV. CODE ANN. § 9A.82.010(12) (West 1988 & Supp. 1995) (the only differences being two commas: one after "business trust" and the other after "association").

One important indicator of the scope of a state's enterprise definition is whether the statute uses the operative word *means* or *includes.* In general, use of the word *means* indicates that the following list is inclusive and limited to that list. On the other hand, use of the word *includes* indicates that the following list is illustrative and not close-ended. Of the states that have not limited their RICO statutes to narrow categories of criminal activity, eighteen have used the word *means* in the enterprise definition,[80] and twelve have used the word *includes* in the definition.[81] It is difficult to understand why critics argue that state RICO statutes are modeled directly on the federal RICO statute when less than half of the states with RICO statutes follow the federal model in this critical portion of the definition.[82]

However, the choice of the word *means* or *includes* does not always mean that the scope of that state's RICO statute is narrow or broad. Some states that use the word *means* have a surprisingly complete and expansive laundry list,[83] while some states that use the word *includes* have a more limited, but open-ended list.[84] Therefore, though it is sometimes an important indicator of legislative intent, the legislature's choice between *means* and *includes* does not necessarily correspond to the scope of the enterprise contemplated by the state RICO statute.

The scope of a particular state's definition of enterprise is best ascertained by looking to the breadth of the list included. There are three categories of enterprise that every state RICO statute includes in the definition: corporations, associations that are legal entities, and

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80 These states are Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Louisiana, Minnesota, Mississippi, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, Tennessee, Utah, and Wisconsin.

81 These states are Delaware, Hawaii, Illinois, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, the Virgin Islands, and Washington.

82 The use of the word *means* or *includes* is important because it signals a general legislative and prosecutorial philosophy toward the scope of the state RICO statute.

83 *See, e.g.*, FLA. STAT. ANN. § 895.02(3) (West 1994) defining enterprise as:

> [A]ny individual, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity, or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental, as well as other, entities.

84 *See, e.g.*, HAW. REV. STAT. ANN. § 842-1 (1994) ("'Enterprise' includes any sole proprietorship, partnership, corporation, association, and any union or group of individuals associated for a particularly purpose although not a legal entity"). Note that the Hawaii definition does not explicitly include individuals, persons, other legal entities, trusts (business or otherwise), government entities, and illicit as well as licit organizations.

Puerto Rico uses the word *includes*, has a restrictive list of examples, and has the only RICO statute that explicitly excepts certain types of enterprises from the RICO net. "Enterprise" includes "any partnership, corporation, association or other legal entity, and any union or group of associated individuals, even though it is not constituted into a legal entity, *except* those that are associated mainly for social, family or political purposes." P.R. LAWS ANN. tit. 25, § 971a(f) (Supp. 1991) (emphasis added).

associations in fact.[85] These three entities are the most commonly litigated types of enterprises in the federal courts for both criminal and civil RICO cases, which might partially explain their consistent appearance in state RICO statutes.[86]

Of the states that do not specifically restrict their RICO statutes, twenty of them include either *person* or *individual* in the enterprise definition.[87] One state, Nevada, restricts the scope of *person* to reach only "natural person[s]."[88] A related, but more popular, category is *sole proprietorships*, included in the definitions of twenty-five state RICO statutes.[89] Its greater occurrence in state RICO statutes might be due to its common recognition as a legal entity.[90] Twenty-eight states include *partnerships* in their definitions of enterprise.[91] Twenty-eight states also include *unions* in their definitions.[92] Twenty-nine states include the catch-all phrase *other legal entities* in their enterprise definitions to reach any legally recognized association that the other categories do not cover.[93]

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85 Ohio includes both "association" and "organization" in its definition of enterprise. OHIO REV. CODE ANN. § 2923.31(C) (Anderson 1993). This is a distinction that this author is at a loss to explain.

It is possible that *organization* has a technical legal definition in Ohio. In Ohio's version of the Uniform Commercial Code, a set of laws governing commercial transactions, "organization" is defined as including "a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, or association, two or more persons having a joint or common interest, or any other legal or commercial entity." OHIO REV. CODE ANN. § 1301.01(BB) (Anderson 1993 & Supp. 1994). Ironically, this definition includes many entities that are separately included in the Ohio RICO definition of enterprise.

One Louisiana court stated in rather broad terms that an "enterprise . . . is an entity established for the purpose of engaging in a course of conduct." State v. Nine Sav. Accounts, 553 So. 2d 823, 826 (La. 1989).

86 See GUIDELINES, *supra* note 37, at 26-34, 40-50, for a discussion of the most common federal RICO cases and advice regarding particular difficulties in charging and proof.

87 The states that do not include *person* or *individual* are Arizona, Hawaii, Idaho, Indiana, Minnesota, New Mexico, North Dakota, Puerto Rico, Rhode Island, and Wisconsin.

88 NEV. REV. STAT. § 207.380 (1992).

89 The states that do not explicitly include sole proprietorships are Arizona, Illinois, North Dakota, Pennsylvania, and Puerto Rico.

90 *See infra* part III.B.1 for a discussion of cases holding that a person cannot associate with himself to constitute the RICO enterprise often because there is no identifiable legal entity that is separate from the individual through which the person can commit the pattern of racketeering activity. On the other hand, most states allow a sole proprietorship to constitute an enterprise because it is a legal entity identified separately from the individual owner. However, as this Note will discuss, some states do not allow sole proprietorships to constitute the RICO enterprise if they have no other employees.

91 The states that do not are Connecticut and North Dakota. Ohio also includes in its enterprise definition the category of "limited partnership[s]." OHIO REV. CODE ANN. § 2923.31(C) (Anderson 1993).

92 The states that do not include "unions" are Hawaii and Louisiana.

93 The only state that does not include this phrase is Hawaii. Both Oregon and Washington extend the reach of this clause to include both profit and nonprofit legal entities.

Many states' definitions also include other types of entities. Eighteen states include *trusts* or *business trusts* in the definition of enterprise.[94] Twenty-two states specifically note that their definitions include both *illicit and licit enterprises* to avoid any presumption that the statute only covers legitimate enterprises.[95] Twenty states also include *government entities* in the definition of enterprise.[96] Two states, Idaho and New Mexico, include "business" in the range of enterprises reached by state RICO, though it is unclear why each state's legislature paid special attention to *business* when both statutes reach any *other legal entity*.[97] Three states, Indiana, North Dakota, and Wisconsin, include the *limited liability company* as a unique addition to the enterprise definition.[98] Like other additions states make to the federal model, it is unclear why the enterprise definition would not otherwise cover limited liability companies. Perhaps limited liability companies would be covered, but the state legislatures merely wanted to ensure that courts would not unintentionally exclude certain types of enterprises. Finally, only one state, Pennsylvania, requires the RICO enterprise to be *engaged in commerce*.[99]

New York's RICO statute[100] contains unique elements that merit separate consideration. First, an enterprise must be "an ascertainable structure *distinct* from a pattern of criminal activity."[101] As this Note will demonstrate, in many association-in-fact cases, proof of the pat-

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94 New Jersey includes any "business or charitable trust" in its definition. N.J. STAT. ANN. § 2C:41-1(2) (West 1982 & Supp. 1995). States that do not include any *trusts* in their definitions are Arizona, Hawaii, Idaho, Illinois, Louisiana, Mississippi, New Mexico, New York, North Dakota, Pennsylvania, Puerto Rico, and Rhode Island.

95 States that do not observe this distinction are Arizona, Hawaii, Illinois, Indiana, North Dakota, Pennsylvania, Puerto Rico, and Rhode Island. Oklahoma makes this distinction a bit differently by noting that the enterprise can be engaged in "any lawful or unlawful project or undertaking." OKLA. STAT. ANN. tit. 22, § 1402(2) (Supp. 1995).

Some states have included this phrase in response to the United States Supreme Court decision in United States v. Turkette, 452 U.S. 576 (1981), holding that the term enterprise in federal RICO covered both legitimate and illegitimate enterprises. This resolved an ambiguity in the federal statute. *See infra* part III.A for a more detailed discussion of *Turkette*.

96 The states that do not include governmental bodies are Arizona, Hawaii, Idaho, Illinois, New Mexico, North Dakota, Pennsylvania, Puerto Rico, Rhode Island, and Utah.

97 *See* IDAHO CODE § 18-7803(c) (1987 & Supp. 1995); N.M. STAT. ANN. § 30-42- 3(C) (Michie 1989 & Supp. 1995).

98 *See* IND. CODE ANN. § 35-45-6-1 (West 1994); N.D. CENT. CODE § 12.1-06.1-01(2)(b) (1985 & Supp. 1995); WIS. STAT. ANN. § 946.82(2) (West Supp. 1995).

99 PA. STAT. ANN. tit. 18, § 911(h)(3) (West 1983 & Supp. 1995). Though at first blush, this might seem to exclude many types of criminal associations in fact, it does include criminal enterprises that engage in the sale of illegal drugs. *See* Commonwealth v. Dennis, 618 A.2d 972 (Pa. Super. Ct. 1992).

100 N.Y. PENAL LAW § 460 (McKinney 1994).

101 *Id.* § 460.10 (emphasis added). This is probably in response to federal cases requiring the same element. *See* United States v. Turkette, 452 U.S. 576, 583 (1981) and the discussion *infra* part III.A.

tern of racketeering activity can also be used to prove the enterprise. New York's RICO statute also provides a separate intent element for participation in the enterprise.[102] No RICO prosecution can be brought in one district of New York that includes charges significantly derived from activity occurring in another district without approval by the district attorney in the second district.[103] Finally, whenever a prosecutor files a RICO indictment, he must submit a statement to the court certifying that the charge is consistent with the New York legislature's findings when it originally passed the state RICO.[104] Therefore, even though New York RICO contains a relatively broad enterprise definition, prosecutorial constraints limit the practical effect of the statute.[105]

III
Case Law Analysis of Enterprise

The statutory definitions of enterprise constitute the foundation of state RICO prosecutions. Built on this foundation, however, are state appellate court opinions interpreting the broad definition of enterprise and determining the practical scope of this powerful statute. Since many state courts do not yet have a large body of state RICO case law, it is instructive to first briefly examine the federal case law that has been most influential in the development of state RICO. This Part will then proceed to analyze the development of state case law interpreting various facets of the enterprise definition through specific case examples.

A. Two Significant Federal Cases

Federal case law determining the boundaries of the enterprise element of the federal RICO statute is more developed than state case law interpreting the enterprise elements of state RICO statutes. Two United States Supreme Court cases continue to influence the development of state RICO case law significantly: *United States v. Turkette*,[106] a criminal case interpreting enterprise, and *National Organization for Women, Inc. v. Scheidler*,[107] a recent civil RICO case. These two cases are

102 For a comprehensive discussion of the differences between New York RICO and federal RICO, see Ethan Brett Gerber, Note, *"A RICO You Can't Refuse": New York's Organized Crime Control Act*, 53 Brook. L. Rev. 979 (1988).

103 Leblang, *supra* note 6, at 105.

104 *Id.* at 104.

105 See *infra* part IV for the argument in favor of maintaining broad RICO definitions, but limiting RICO through other methods such as the New York constraints. State legislatures can constrain the reach of RICO without restrictive amendment of the enterprise definition.

106 452 U.S. 576 (1981).

107 114 S. Ct. 798 (1994).

important because some state courts have followed the Supreme Court's general refusal to add requirements to the definition of enterprise.[108]

In *Turkette*, the Court decided "whether the term 'enterprise' as used in RICO encompasses both legitimate and illegitimate enterprises or is limited in application to the former."[109] Turkette was charged with leading a group of individuals associated in fact to engage in drug trafficking, arson, bribing police officers, and corrupting the outcome of court proceedings. On appeal, the defendant argued that "RICO does not make criminal the participation in an association which performs only illegal acts and which has not infiltrated or attempted to infiltrate a legitimate enterprise."[110]

Rejecting the defendant's argument, the Court held that the term enterprise encompassed both legitimate and illegitimate enterprises. The Court explained that "[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact."[111] In a critical phrase, the Court reasoned that the definition "no more excludes criminal enterprises than it does legitimate ones. Had Congress not intended to reach criminal associations, it could easily have narrowed the sweep of the definition by inserting a single word, 'legitimate.'"[112] This statement sigualed the Court's intention to interpret the enterprise requirement to include every type of enterprise that the statute did not specifically exclude.[113]

The Court reached this result without relying on the liberal construction clause because the definition itself was intentionally broad and non-exclusive.[114] The Court recognized that Congress could have easily listed the exclusive entities that could function as the RICO enterprise, but it chose not to restrict the statute's scope because enterprise included any entity that can be infiltrated by or engaged in criminal activity.[115] Even though most states do not have liberal con-

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108 *See infra* part III.D.2, III.D.5.

109 452 U.S. at 578.

110 *Id.* at 580.

111 *Id.*

112 *Id.* at 580-81.

113 The Court's rationale for its ruling was the "broad purposes" of the RICO statute. *Id.* at 589. The Court explained that "[t]he result is neither absurd nor surprising. On the contrary, insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position." *Id.* at 587.

Further, in light of the statute's liberal construction clause, the Court believed that there was no occasion to apply the rule of lenity to this statute as is the usual practice in the interpretation of criminal statutes. *Id.* at 587 n.10. The Court explained that the rule of lenity only applies when there is a need to resolve an ambiguity in a statute, and the Court found no ambiguity in the federal RICO statute.

114 *Id.* at 580-81.

115 *Id.* at 593.

struction clauses in their RICO statutes, most state courts follow the *Turkette* analysis and interpret the enterprise requirement broadly when there are no specific legislative restrictions.[116]

National Organization for Women, Inc. v. Scheidler,[117] a 1994 civil case, followed the reasoning of *Turkette*. *Scheidler* involved a civil suit by a group of health care clinics against the Pro-Life Action Network, a group that organizes protests at abortion clinics. The Court held that proof of a RICO enterprise does not require proof of an economic motive.[118]

Though the suit was brought under § 1962(c), regarding the use of an enterprise as a vehicle through which the racketeering activity is committed, the Court explained that "[n]owhere . . . is there any indication that an economic motive is required."[119] Following *Turkette*, the Court held that a particular kind of enterprise falls within the scope of the enterprise definition as long as Congress has not specifically excluded it.[120]

For purposes of this Note, both of these cases are less important for their specific holdings than for their judicial analysis and philosophy regarding the RICO enterprise definition. Without relying on the liberal construction clause, the United States Supreme Court indicated its unwillingness to graft onto the enterprise definition requirements that do not comport with the ordinary meaning of the statutory language. As this Note will demonstrate, some state courts have adopted this philosophy.[121] Other state courts, however, have subtly asked what the legislature *would* have drafted had it considered the imposition of a certain requirement. As a result, some courts have adopted requirements for proof of the enterprise element that appear nowhere in the statutory definition itself.

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116 *See infra* part III.

117 114 S. Ct. 798 (1994).

118 *Id.* at 803-05. Incidentally, the Court also reaffirmed that the rule of lenity does not apply to federal RICO because the statutory language is unambiguous. *Id.* at 806.

One commentator recently argued that through the *Scheidler* holding, "the Court rendered almost every individual and group a potential RICO 'enterprise' and may have turned RICO into a potent weapon for ideological harassment." Matthew C. Blickensderfer, Note, *Unleashing RICO*, 17 HARV. J.L. & PUB. POL'Y 867, 867 (1994). As the discussion below will demonstrate, this author thinks that this argument overstates the siguificance of the *Scheidler* opinion.

119 *Scheidler*, 114 S. Ct. at 804.

120 *Id.* at 805. One commentator argued that "[i]n all probability . . . the *Scheidler* interpretation is unlikely to remain long intact" because "enterprise" is now "all-encompassing" and RICO will "run amok." Blickensderfer, *supra* note 118, at 893. This argument overlooks the fact that the enterprise definition as interpreted by federal and state case law is not unlimited in scope. Among other limits, courts have developed the "person-enterprise rule" and non-textual requirements for proving associations in fact. *See infra* part III.B.1, III.D.1, III.D.2.

121 *See infra* part III.

B. Individuals and Sole Proprietorships

As the definitional analysis above illustrates, most state enterprise definitions include individuals and sole proprietorships.[122] This Part will demonstrate the problems some states have encountered when applying these enterprise definitions to specific factual situations. Some states have extended the enterprise definition to single-employee sole proprietorships and sole proprietorships that only involve occasional association with others, but other states have resisted this interpretation.

1. *A Person Cannot Associate with Himself*

It is a virtually universal maxim in state RICO case law that a defendant charged with associating with an enterprise to conduct or participate in a pattern of racketeering activity cannot constitute both the defendant and the enterprise. In other words, the state cannot prosecute a person under RICO for associating with himself. A Florida court recently reviewed this issue in *Wilson v. State.*[123] In *Wilson,* the defendant's charges included one count of violating Florida's RICO statute with the enterprise being "composed solely of appellant."[124] The amended information charged that the defendant "Alexander Christopher Wilson was associated with an enterprise, to-wit: Alexander Christopher Wilson, . . . and that the said Alexander Christopher Wilson . . . did conduct or participate directly or indirectly, in the affairs of the said enterprise through a pattern of racketeering activity."[125]

The Florida court held that the defendant could not be both the defendant and the enterprise for RICO purposes. The court explained that Florida RICO requires an "entity *separate* from the [defendant]" in order to satisfy the enterprise element.[126] Without an "identifiable legal or de facto entity which stands apart from the associating person," no "association" exists.[127] However, the court qualified its holding by reasoning that sometimes "a lone actor can be considered an enterprise for RICO purposes when the business is distinct from the individual."[128] In this case, however, the business and the individual defendant were alleged to be the same.

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[122] *See supra* notes 87-90 and accompanying text.

[123] 596 So. 2d 775 (Fla. Dist. Ct. App. 1992).

[124] *Id.* at 776-77.

[125] *Id.* at 780 n.4.

[126] *Id.* at 781 (emphasis added); *see also* Breshnahan et al., *supra* note 9, at 871-73 (discussing the person-enterprise rule as it has developed in federal civil and criminal case law).

[127] *Wilson,* 596 So. 2d at 781.

[128] *Id.*

The *Wilson* court outlined what is known as the "person-enterprise rule." The court stated that Florida RICO requires "a separate and identifiable entity through which criminal activity is conducted."[129] This separability requirement is necessary in order to prevent a state from applying RICO to individuals who merely commit a series of crimes, and it is consistent with the *Turkette* and *Scheidler* analysis. There is no explicit requirement of separability in any of the state RICO statutes.[130] If there were no separability requirement implied in the enterprise definition, however, the scope of RICO would be virtually boundless.[131]

2. *The Effect of Separability on Sole Proprietorships*

The separability analysis is also called the requirement of "distinctness" and has spilled over into cases involving sole proprietorships. In another Florida case, *Masonoff v. State*,[132] the defendant was in the business of leasing automobile telephones. The defendant's business checking account was in the name of "Vincent P. Masonoff d/b/a Communication Connection."[133] The defendant's sole proprietorship had no employees or associates, and the defendant wrote a series of worthless checks on the business account.

The court first held that a sole proprietorship could constitute an enterprise for RICO purposes in Florida because it was specifically included in the definition.[134] However, as the court explained, the more difficult question was "whether the sole proprietorship is a sufficiently separate entity from the sole proprietor, so that the sole pro-

129 *Id.* at 781-82. A case decided in the same district at about the same time reached the same conclusion. *See* Napoli v. State, 596 So. 2d 782 (Fla. Dist. Ct. App. 1992) (explaining that the state made no attempt to establish an association between the defendant and another individual or entity).

130 The *Wilson* court rejected an older Florida opinion that allowed the individual defendant to also constitute the enterprise. *Wilson*, 596 So. 2d at 780-81. In State v. Bowen, 413 So. 2d 798 (Fla. Dist. Ct. App. 1982), *review denied*, 424 So. 2d 760 (Fla. 1983), the court held that RICO applied to an individual associating with himself. The court explained that "[h]ad the legislature not intended to reach individuals such as Bowen, it could easily have narrowed the sweep of [RICO] by supplanting 'any' with 'another'" in the definition of enterprise. *Id.* at 799. Since then, Florida courts have clearly rejected the *Bowen* analysis. *See, e.g.*, Masonoff v. State, 546 So. 2d 72 (Fla. Dist. Ct. App.), *review dismissed*, 553 So. 2d 1166 (Fla. 1989); State v. Nishi, 521 So. 2d 252 (Fla. Dist. Ct. App.), *review denied*, 531 So. 2d 1355 (Fla. 1988).

131 Several other state cases, most of them from Florida courts, have also held that a person cannot associate with himself. *See, e.g.*, Howard v. State, 579 So. 2d 274 (Fla. Dist. Ct. App. 1991) (dictum); Flanagan v. State, 566 So. 2d 868 (Fla. Dist. Ct. App. 1990); Holley v. State, 564 So. 2d 595 (Fla. Dist. Ct. App. 1990); Parsley v. State, 553 So. 2d 730 (Fla. Dist. Ct. App. 1989); Day v. State, 541 So. 2d 1202 (Fla. Dist. Ct. App. 1988), *review denied*, 545 So. 2d 869 (Fla. 1989); State v. Judd, 433 N.W.2d 260 (Wis. Ct. App. 1988), *review dismissed*, 439 N.W.2d 142 (Wis. 1989).

132 546 So. 2d 72 (Fla. Dist. Ct. App.), *review dismissed*, 553 So. 2d 1166 (Fla. 1989).

133 *Id.* at 73. The notation "d/b/a" means "doing business as."

134 *Id.* at 73.

prietor conducts or participates in the enterprise as an employee or associate."[135] The court held that because the defendant had no other employees or associates, the defendant and the sole proprietorship were in fact the same entity.[136] Essentially, *Masonoff* established that a defendant does not create a RICO enterprise simply by operating a business under a different name. Expanding the enterprise definition to include such an entity would be tantamount to allowing a RICO charge against an individual who associates with himself.[137]

Some state courts have also excluded sole proprietorships from the definition of RICO enterprises when the owner's association with others is merely occasional. In *State v. Kuklinski*,[138] a New Jersey case, the state argued that "on occasion," the defendant "recruited others to aid him in planning, soliciting and committing the various substantive crimes."[139] However, the indictment read that "'Richard L. Kuklinski, while engaged in activities which affect trade or commerce, directly or indirectly, did conduct *himself* as an enterprise.'"[140] Not surprisingly, the New Jersey court held that the state had not proven the enterprise element because a person cannot associate with himself. Therefore, even though the defendant operated with others on occasion without maintaining any employees, the court held that the enterprise element was not met because for "the greater part of the time," the defendant "conducted his alleged criminal affairs by himself."[141]

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[135] *Id.* at 74.

[136] *Id.* at 75. Florida is not the only state that adopts this view. In State v. Ivanhoe, 798 P.2d 410 (Ariz. Ct. App. 1990), an Arizona court reached the same conclusion when it held that "[b]ecause defendant and his sole proprietorship are the same entity in fact and law, . . . the indictment failed to allege the existence of an enterprise distinct from defendant." *Id.* at 412 (citation omitted).

In *Ivanhoe*, unlike *Masonoff*, the defendant employed other people in his video store business. However, the court sidestepped this argument on a definitional point because the Arizona RICO statute, unlike the Florida statute, does not include sole proprietorships within its scope. *Id.* at 412. The state also raised the issue of whether the group constituted an association in fact, but the court dismissed this argument hecause the state did not charge an association in fact in the original indictment. *Id.* at 413. Other states that similarly do not include sole proprietorships in their enterprise definitions should follow *Ivanhoe*, but if the sole proprietorship employs other people, it might still constitute a RICO enterprise as an association in fact.

[137] The *Masonoff* court left open the possibility of reaching a one-man sole proprietorship if it is incorporated by the individual. *Masonoff*, 546 So. 2d at 75 n.1.

[138] 560 A.2d 1295 (N.J. Super. Ct. Law Div. 1988).

[139] *Id.* at 1296.

[140] *Id.* at 1297 (emphasis added).

[141] *Id.* at 1297. In a recent civil case on a related, but different, issue, a New Jersey court held that a plaintiff can name both the enterprise and various individual members of that enterprise as defendants because New Jersey's "broader definition of 'person' eliminates the [federal] distinctiveness rule for an action under New Jersey RICO." Maxim Sewerage Corp. v. Monmouth Ridings, 640 A.2d 1216, 1221 (N.J. Super. Ct. Law Div. 1993).

With narrowly defined exceptions, the rule is universal in state RICO that a person cannot constitute both the defendant and the enterprise. This rule of distinctness or separability is necessary in order to avoid applying state RICO to an individual who merely commits a series of crimes without assistance or associates. Further, a sole proprietorship without other employees cannot constitute an enterprise because the defendant and the sole proprietorship are the same entity. At least in New Jersey, a sole proprietorship also cannot constitute a RICO enterprise if the defendant merely associates with others "on occasion,"[142] though it remains unclear what level of associative activity converts such a business into a RICO enterprise.

C. Legal Entities as RICO Enterprises

State RICO statutes also apply to legal entities other than sole proprietorships. As the cases below will demonstrate, the prosecutor's proof of a RICO enterprise becomes relatively easy when there exists a legal entity through which the criminal defendant conducts illegal activities. These legal entities can take many forms, but all of them can constitute enterprises under state RICO statutes.

A classic case of a state prosecutor's appropriate use of a state RICO statute against white-collar crime is the recent Georgia Court of Appeals decision in *Thompson v. State*.[143] In *Thompson*, four defendants were charged with violating Georgia's RICO statute by conducting a scheme through an "assumption business" called Southern Financial Services (SFS).[144] The defendants acquired vehicles from people who were having trouble making their payments, assumed responsibility for the payments, and resold the vehicles to "buyers" with the money ostensibly going to the lienholders. Instead, the lienholder, whom the defendants never paid,[145] repossessed the vehicles, while the defendants kept and divided the money. A joint-venture, limited-partnership agreement established the assumption business, which the defendants used as a deposit for the cash "buyers" and from which defendants would draw and divide the balance.[146]

After their convictions, two of the defendants appealed, alleging various errors including that "they did not have the requisite knowledge of the criminal element of 'enterprise' to sustain their RICO conviction."[147] The court rejected the argument because RICO does not require that each defendant have full knowledge of all of the fac-

142 *Kuklinski*, 560 A.2d at 1296.
143 440 S.E.2d 670 (Ga. Ct. App.), *cert. denied*, (Ga. Mar. 25, 1994).
144 *Id.* at 671.
145 *Id.*
146 *Id.*
147 *Id.* at 673.

ets of the enterprise and all of its members.[148] The court explained that "[a]n 'enterprise' is not a criminal act in itself; it is a description of the entities involved in the RICO violations."[149]

This case presents a paradigmatic white-collar criminal business organization that state RICO statutes are particularly adept at addressing. RICO allows the prosecutor to consolidate the charge into a single count and thus avoid the expense, time, and risk of confusion that would result if the prosecutor had to charge and prosecute these defendants with every predicate act they committed.[150] In *Thompson*, the prosecutor charged each defendant with a RICO violation as well as fifty-four counts of various types of theft.[151] Even when both RICO and the predicate acts are charged, however, RICO allows the prosecutor and the jury to view the entire picture of the organized pattern of racketeering activity that the state has chosen to make an independent crime.

An interesting case of judicial creativity with the enterprise definition is the Indiana decision *Kahn v. State*.[152] The defendant formed a corporation, sold stock to investors for $1,465,200, but only had gross sales of $2,429. At the same time, Kahn paid himself a salary of $489,545.[153] The prosecutor brought RICO charges based on various counts of securities fraud, but encountered difficulties because the Indiana enterprise definition did not include *corporation* at the time.[154]

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148 *Id.* at 673.

149 *Id.* at 673.

Another case involving a small business is Commonwealth v. Yacoubian, 489 A.2d 228 (Pa. Super. Ct. 1985). In *Yacoubian*, the defendant owned a dry cleaning establishment that was used as a front to sell drugs and store stolen property from his burglary ring. *Id.* at 231-32. The court found the evidence sufficient to affirm the guilty verdict on the RICO count, but remanded for a second determination of the amount of fines that the trial court imposed. *Id.* at 235.

150 Many cases involving organized white-collar criminal activity, however, will be unavoidably complex and confusing. In People v. Capaldo, 572 N.Y.S.2d 989 (Sup. Ct. 1991), eight defendants were charged with conducting a criminal enterprise "to control and corrupt the affairs of District Council No. 9 of the International Brotherhood of Painters and Allied Trades," a group of union officials. Each defendant had a personal defense attorney, and the indictment contained 153 counts. The court, noting that New York's RICO statute was intended to be narrower and more precise than federal RICO, held that the statute was not unconstitutionally vague. *Id.* at 992.

151 *Thompson*, 440 S.E.2d at 671.

152 493 N.E.2d 790 (Ind. Ct. App. 1986).

153 *Id.* at 793.

154 "Corporation" was added by amendment in 1984, after the defendant had formed his corporation. *Id.* at 798. The version of the RICO statute in effect at the time of the offense defined enterprise as a:

> (1) sole proprietorship, partnership, business trust, or governmental entity; or
>
> (2) union, association, or group, whether a legal entity or merely associated in fact.

IND. CODE § 35-45-6-1(b) (Supp. 1981) (amended 1984), *construed in* 493 N.E.2d at 797-98.

Nevertheless, the Indiana Court of Appeals had no trouble reading the definition expansively. Citing *Webster's Third New International Dictionary,* the court argued that the definition of "group" would "certainly . . . apply to a corporation."[155] The court reasoned that "the Legislature's original intent in defining 'enterprise' was to include every sort of group or association within that definition."[156] Therefore, the Indiana court took a generous view of the enterprise definition and was willing to broaden its scope beyond the literal terms of the definition.

The Pennsylvania Supreme Court adopted a much less expansive reading in *Commonwealth v. Bobitski.*[157] In *Bobitski,* the defendant was an employee of Thrift Drug and responsible for soliciting bids and awarding construction contracts.[158] Using his position at Thrift Drug, the defendant also solicited bribes from various contractors over a period of six years. Although Thrift Drug's managers were not involved in Bobitski's scheme and the defendant was the only one who benefitted, the defendant could not have solicited bribes without the position he held in that company.

The court framed the issue as whether Pennsylvania's RICO statute applied to "an individual who committed a series of criminal acts for his own benefit while employed by a legitimate enterprise."[159] Instead of focusing on the language of the enterprise definition, the court looked for guidance in the statute's preamble, entitled "Findings of Fact."[160] From this preamble, the court divined that "[t]he express intent [of the legislature] was to prevent infiltration of legitimate businesses by organized crime."[161] That argument enabled the court to differentiate "organized crime" from the "organized criminal"[162] and to conclude that Pennsylvania's RICO statute did not cover the latter. The court then affirmed the quashing of the RICO count by the Court of Common Pleas.

The Pennsylvania Supreme Court incorrectly relied on the legislature's preamble in interpreting the statute's enterprise definition which, standing alone, is similar to other states' enterprise definitions.[163] As a result of its skewed perspective, the court limited an

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155 *Kahn,* 493 N.E.2d at 798.

156 *Id.*

157 632 A.2d 1294 (Pa. 1993).

158 *Id.* at 1295.

159 *Id.*

160 The preamble, in short, speaks repeatedly of "organized crime" and its "infiltration and corruption" of legitimate businesses. The entire preamble can be found in the *Bobitski* decision. *Id.* at 1296.

161 *Id.*

162 *Id.*

163 Pennsylvania's RICO defines "enterprise" to mean "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associ-

otherwise expansive enterprise definition to mean simply and exclusively *organized crime*. However, the defendant in *Bobitski* is the very type of white-collar criminal that most threatens the reputation and credibility of legitimate businesses and provides the perfect target for state RICO statutes. Such criminals are sufficiently small-scale to avoid a federal prosecution, but have committed enough crimes over a period of time (six years in *Bobitski*) that state prosecutors would benefit from the ability to utilize a RICO charge.[164] Even though Bobitski acted alone and was the sole beneficiary of his crimes, the Pennsylvania Supreme Court should have allowed prosecutors to use RICO against this criminal who used a legitimate business enterprise to engage in a pattern of racketeering activity.

D. Associations in Fact

Associations in fact are the most difficult type of enterprise to define and have caused state courts to develop special methods for their identification.[165] State RICO enterprise definitions list associations in fact alongside partnerships, corporations, and unions without comment. Nevertheless, many state courts have followed the lead of federal courts in adding requirements for proof of associations in fact that do not appear in the language of the statutes. These include requirements of continuity, structure, and common purpose, but courts mix and match requirements depending on whether they intend to interpret the state RICO statute broadly or narrowly.[166]

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ated in fact although not a legal entity, engaged in commerce." PA. STAT. ANN. tit. 18, § 911(h)(3) (West 1983).

164 A contrast should be made here between Bobitski's conduct and the criminal conduct of an employee who embezzles funds from his employer. In the latter case, the criminal employee should not be prosecuted under RICO because the individual is acting alone and taking advantage of his position as an employee, but the enterprise itself is still a legitimate business that has not been "infiltrated" by the criminal element. Bobitski's conduct, on the other hand, amounted to taking advantage of his position to conduct his criminal business *through* the enterprise to the general public. Therefore, Bobitski infiltrated a legitimate enterprise, making *the enterprise* more susceptible to criminal corruption. Given the court's findings regarding the legislature's intent, Bobitski's criminal conduct should have satisfied the court's standard. Instead, the court defined the legislature's intent to prevent "infiltration of legitimate businesses," then proceeded to ignore that intention in deciding the actual case.

165 One commentator noted that associations in fact "are more difficult to analyze because the nexus between the individual defendants, their crimes, and their organization is often amorphous; legal concepts such as chains, spokes, wheels, and rims creep into view." Coffey, *supra* note 6, at 1046 n.55.

166 In People v. Cerrone, 867 P.2d 143 (Colo. Ct. App. 1993), *aff'd on other grounds*, 900 P.2d 45 (Colo. 1995), the Colorado Court of Appeals reviewed the defendant's RICO conviction for managing a prostitution ring. Rather than mixing and matching requirements for finding the association in fact, the court held that "the enterprise need not be separate and distinct from the racketeering activity." *Id.* at 149. The court also held that the Colorado RICO statute "does not require that the 'enterprise' and 'person' engaged in racke-

Two cases with similar facts in different states illustrate how different courts approach an alleged association in fact with different methods of judicial analysis and reach opposite results: *Boyd v. State*[167] in Florida and *State v. Cheek*[168] in Oregon.

1. *The Florida Case*

In *Boyd*, the defendant was charged with multiple crimes committed during a two-week crime spree with three other teenagers.[169] Among others, the crimes included multiple armed robberies and auto theft. After the defendant tried to run down a police officer, the officer shot and killed one of the teenagers in the fleeing automobile. The defendant was charged with individual counts as well as a RICO violation, and the trial court denied a pre-trial motion to dismiss the RICO count.

The defendant appealed, arguing that this loose band of criminals did not constitute a RICO enterprise. Looking to the federal courts for guidance, the Florida Court of Appeals explained that "in enacting the RICO statute, Congress did not intend to use RICO to prosecute criminals who merely get together to commit sporadic acts of crime."[170] In order to establish an association in fact, the court explained, the state must prove the existence of "an ongoing organization, formal or informal, with various associates who function as a continuing unit."[171] Therefore, the court required the state to prove structure, continuity, and an existence separate from the pattern of crimes that the defendant actually committed.[172]

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teering activity be different entities." *Id.* As the cases below illustrate, most courts impose at least *some* factors to guide their findings of associations in fact.

167 578 So. 2d 718 (Fla. Dist. Ct. App.), *review denied*, 581 So. 2d 1310 (Fla. 1991).

168 786 P.2d 1305 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990).

169 *Boyd*, 578 So. 2d at 719-20.

170 *Id.* at 720 (observing that the Florida RICO statute is patterned after the federal statute).

171 *Id.* at 721. The next year, the Florida District Court of Appeal reaffirmed this test for finding associations in fact. State v. Russell, 611 So. 2d 1265 (Fla. Dist. Ct. App. 1992). The defendant was involved in a drug ring, but there was "no evidence of an identifiable decision making structure for directing the group as a whole." *Id.* at 1267. The only evidence of an enterprise "consisted of recorded telephone conversations between [defendant] and one of the other defendants which only indicated buy/sell transactions between those two." *Id.* This was not enough.

172 This requires the state to prove an "ongoing, structured, criminal association." 578 So. 2d at 721. The members of the enterprise must also be connected by more than the commission of the predicate acts. *Id.* at 722. This second point follows the analysis that the Court set forth in United States v. Turkette, 452 U.S. 576, 583 (1981).

In Commonwealth v. Donahue, 630 A.2d 1238 (Pa. Super. Ct. 1993), *appeal denied*, 645 A.2d 1316 (Pa. 1994), the court developed a similarly high standard. The court held that "in order to sustain a conviction for corrupt organizations, the Commonwealth must prove that there was an ongoing organization engaged in commerce and that the associates of the organization functioned as a continuing unit." *Id.* at 1245. Though the court did not

The court found that the state failed to meet any of these three requirements. First, the state presented no evidence showing "an identifiable decision-making and control mechanism" within the group of teenagers.[173] Instead, the crimes were sporadic, haphazard, and disorganized; as a result, the court concluded that "the minimal association of these teenagers lacked sufficient structure to constitute an enterprise."[174] Second, the evidence failed to meet the continuity requirement because the crime spree was "sporadic," had a "short duration," and lacked the characteristic of "a continuing threat."[175] Finally, the evidence failed to connect the four teenagers in any way except by the commission of the particular crimes. The court explained that there must be "proof, minimally, of a purposive systematic arrangement between members of the group."[176] This arrangement was nothing more than a group of unconnected adolescents committing a series of crimes in a short period of time.

The court correctly concluded that these teenagers, who "alternatively look[ed] for ways to obtain fast money by force or threat of force, and committ[ed] random acts of violence toward that end," were not the type of criminals that should be subjected to "the heightened punishment of RICO."[177] The Florida court signaled its intention to heighten the standards of proof for associations in fact to require a certain degree of structure and planning that typify the conditions found in enterprise criminality. The distinction is one between organized and disorganized group criminality. What makes the former type eligible for RICO prosecution is the planning, organization, and structure that the legislature proscribes with enhanced forms of punishment.

2. *The Oregon Case*

In *State v. Cheek*, the Oregon court adopted a lower standard of proof for associations in fact, but the particular association in *Cheek* probably would have satisfied the elements of structure and continuity the Florida courts require as well. The defendant in *Cheek* was charged with directing a group of young men to commit a wide variety of crimes including theft, arson, and false claims against insurance companies over a period of about five years.[178] The court framed the

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explicitly require structure, such a requirement can probably be inferred from the language of the standard.

173 *Boyd*, 578 So. 2d at 722.

174 *Id.*

175 *Id.*

176 *Id.*

177 *Id.* at 722-23.

178 State v. Cheek, 786 P.2d 1305, 1306 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990).

issue as "what constitutes an enterprise under ORICO [the Oregon RICO statute] when the alleged enterprise is carried on by an individual."[179] The defendant, following the *Boyd* reasoning, argued that an enterprise must have an "ascertainable structure," a "common or shared purpose," and "[function] as a continuing unit."[180]

The Oregon Court of Appeals followed the defendant's standard in part, but applied it in a looser fashion. The court required that there be "some connection between an individual and an organization" to meet the enterprise requirement.[181] However, the court explained that "[i]t is apparent that the legislature wanted to include *every* kind of enterprise within the definition."[182] Therefore, the Oregon court adopted the standard that the state "must include proof of an on-going organization, however loose, that is distinct from the commission of separate criminal acts by an individual."[183] This stan-

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There are several instructive state court cases in which the defendants were members of relatively loose criminal rings. *See* Koger v. State, 513 N.E.2d 1250 (Ind. Ct. App. 1987) (affirming conviction of defendant involved in a burglary ring when one predicate act was conspiracy and the other predicate act was the theft underlying the conspiracy); Commonwealth v. Murphy, 613 A.2d 1215 (Pa. Super. Ct. 1992) (explaining that defendant was the leader of a group engaged in a lucrative, organized and ongoing narcotics trade, for which numerous people worked); State v. Porto, 591 A.2d 791 (R.I. 1991) (reversing a conviction involving participation in a stolen car ring and requiring that defendant agree to become a member of the enterprise); Renfro v. State, 827 S.W.2d 532 (Tex. Ct. App. 1992) (applying the Texas gang statute which requires the defendant to both agree to participate in the group and to perform an overt act in pursuance of that agreement); Humphrey v. State, 626 S.W.2d 816 (Tex. Ct. App. 1981) (reversing conviction on the sole ground that two of the five requisite members of the organization were undercover agents).

179 *Cheek*, 786 P.2d at 1306. Though the court discussed the issue as if the enterprise were an individual, the court analyzed the issue as if the enterprise were an association in fact.

180 *Id.* at 1306-07.

181 *Id.* at 1307.

182 *Id.* In a case with a tangentially related issue, the Georgia Court of Appeals held that prosecutors only needed to charge an association in fact, without explaining its nature, to satisfy the indictment requirement alleging the enterprise element of RICO. Drewry v. State, 411 S.E.2d 898, 900 (Ga. Ct. App. 1991).

183 *Cheek*, 786 P.2d at 1307.

In State v. O'Connell, 508 N.W.2d 23 (Wis. Ct. App.), *review denied*, 513 N.W.2d 405 (Wis. 1993), the court reviewed the conviction of two defendants who constituted the RICO enterprise. The two defendants lived together and bought and sold antiques together. Finding an enterprise, the court held that "[t]he business needs no infrastructure to be an 'enterprise.' Nor does the statute require that the organization have a trade name." *Id.* at 26.

In Martin v. State, 376 S.E.2d 888 (Ga. Ct. App. 1989), the court was similarly inclined not to require much structure to find a RICO enterprise. The court held that "enterprise" can include informal criminal networks engaged in racketeering activity, that the state is not required to prove that all members of the enterprise knew of each others' existence, and that there need not be an ascertainable structure. *Id.* at 893.

In People v. Wakefield Financial Corp., 590 N.Y.S.2d 382 (Sup. Ct. 1992), the court held that members of the enterprise could come and go so long as the purpose of the group remained constant and that the prosecution did not need to prove a management structure "so rigid as to resemble the formalistic corporate flow chart." *Id.* at 389.

dard clearly reaches a broader range of enterprises than the Florida court was willing to cover. Consequently, the *Cheek* court concluded that because the defendant chose the site of the crimes, planned their commission, instructed the young men on how to commit them, and provided the means to commit them, he acted through an enterprise reachable by the Oregon RICO statute.[184]

An interesting facet of the *Cheek* decision is that all three judges authored opinions. The specially concurring judge advocated a broader standard while the dissenting judge advocated a narrower one. The concurring judge argued that "it is not necessary for the state to prove an ongoing organization in order to establish the existence of an enterprise."[185] Recognizing the broad scope of this statement, the judge explained that "[a]lthough it is possible that ORICO, as I read it, might permit the conviction of an individual recidivist, the plain meaning of the word 'individual' in the statute suggests that the possibility was within the contemplation of the legislature when it enacted this crime-fighting tool."[186] This interpretation far exceeds that of the Florida court, or of any other state court's interpretation for that matter. It would expand RICO's reach to almost limitless bounds and would go beyond the already liberal reading the majority in this case adopted.[187]

The dissenting judge urged the court to require proof of organized criminal activity manifesting a "connection with an organization" in order to cross the RICO threshold from merely a "series of standard

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184 *Cheek*, 786 P.2d at 1307.

185 *Id.* at 1308 (Riggs, J., specially concurring).

186 *Id.* at 1309 (Riggs, J., specially concurring).

187 Other broad interpretations with seemingly limitless bounds can be found in cases willing to infer the existence of an association in fact from the pattern of racketeering activity in which a group engages. In State v. Hill, No. CA-8094, 1990 WL 237485, at *3 (Ohio Ct. App. 1990), *review dismissed*, 574 N.E.2d 1083 (Ohio 1991), the court held that "[t]he network or enterprise need not be explicit as long as its existence can plausibly be inferred from the interdependence of activities and persons involved."

A similar case is State v. Wynne, 767 P.2d 373 (N.M. Ct. App. 1988), *cert. denied*, 767 P.2d 354 (N.M. 1989). The *Wynne* court explained that a RICO enterprise could exist even absent association above and beyond the acts forming the pattern of racketeering activity. *Id.* at 376. These cases define the outer boundaries of permissible grounds on which to find a RICO enterprise.

A case indicating agreement, but not following the strong holding of inferring the enterprise solely from the pattern of racketeering activity is People v. Cantarella, 606 N.Y.S.2d 942 (Sup. Ct. 1993). In *Cantarella*, the court explained that some structure must be proven and that "the structure of the enterprise must be greater than the sum of the roles played by its members . . ., but the scope of the enterprise may be defined by the pattern of its criminal activity." *Id.* at 947.

But see State v. McGrath, 749 P.2d 631 (Utah 1988), in which the court held that "the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'. . . While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." *Id.* at 637 (quoting United States v. Turkette, 452 U.S. 576, 583 (1981)).

crimes."[188] The dissent recognized that the statute is limitless if "[t]aken by itself," but argued that in order to give effect to legislative intent, the trial court should have accepted the defendant's statement of the law.[189] Nevertheless, the dissenting judge believed that "[t]here was evidence to support a conviction" under the defendant's statement of the standard.[190] Therefore, though all three judges agreed that RICO could reach the defendant's conduct, they all disagreed on the proper standard that the state must meet to satisfy the enterprise requirement.

3. *The Lines Drawn by the Minnesota Supreme Court*

The decisions in *Boyd* and *Cheek* illustrate the different types of analysis that can develop in different states regarding the proof required for an association in fact. However, analytical conflicts do not always occur in different states; they can occur in the same state as well. Recently, the Minnesota Supreme Court decided two cases in order to establish a standard for determining the existence of an association in fact. One decision, *State v. Huynh*,[191] affirmed a RICO conviction, while the other decision, *State v. Kelly*,[192] reversed a RICO conviction. The Minnesota Supreme Court reviewed these cases on the same day in an attempt to illustrate both sides of the RICO enterprise fence.[193]

In *Huynh*, the defendant and three other men repeatedly demanded money from a local Vietnamese restaurant owner for "protection."[194] The victim received numerous phone calls threatening that if he did not make the payments, the "gang" would kill him and his family. Upon receiving checks and money orders from the victim, the defendant forwarded them to a man named Trong who deposited them in a Texas bank.[195] The defendant was convicted of five counts of coercion and one count of racketeering under Minnesota's RICO statute.

The Minnesota Supreme Court discussed *Turkette* and another federal RICO case that imposed a distinct structure requirement, *United States v. Bledsoe*.[196] Prosecutors argned that such a requirement

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188 *Cheek*, 786 P.2d at 1309 (Graber, P.J., dissenting).

189 *Id.* at 1309, 1311 (Graber, P.J., dissenting).

190 *Id.* at 1311.

191 519 N.W.2d 191 (Minn. 1994) (en banc).

192 519 N.W.2d 202 (Minn. 1994) (en banc).

193 *Id.* at 202.

194 *Huynh*, 519 N.W.2d at 197.

195 *Id.* at 192-93.

196 674 F.2d 647 (8th Cir.), *cert. denied*, 459 U.S. 1040 (1982). The facts in *Bledsoe* are irrelevant to the discussion here. The *Bledsoe* court held, however, that "the enterprise element requires proof of some structure separate from the racketeering activity." *Id.* at 664.

is inappropriate for proof of an association in fact because the facts used to prove the pattern of racketeering element will often be the same facts required to prove the criminal enterprise. The court noted that the commission of criminal acts always involves some organization by the participants, but rejected the state's argument, explaining that "[i]f this minimal cooperative effort is all that is required for the existence of an enterprise, then the RICO offense collapses into nothing more than the enhanced punishment of recidivists."[197] Instead, the *Huynh* court established a three-part test for proving an association in fact:

> (1) a common purpose among the individuals associated with the enterprise; where
> (2) the organization is ongoing and continuing, with its members functioning under some sort of decisionmaking arrangement or structure; and where
> (3) the activities of the organization extend beyond the commission of the underlying criminal acts either to coordinate the underlying criminal acts into a pattern of criminal activity or to engage in other activities.[198]

Applying this test to the facts in *Huynh*, the court determined that the defendant had conceded that he and his associates shared a common purpose. Second, the court reasoned that to be "ongoing and continuing," there had to be "some continuity of structure and personnel."[199] The activities in *Huynh* met this requirement because the scheme lasted for six months, included a regular payment schedule, and was sufficiently organized to impose discipline which was indicated at trial when one of the gang's members exhibited conveniently faulty memory. Finally, although the court considered the third prong as the "closest question," it was satisfied that the evidence met the final requirement for an association in fact.[200] Because the organization did not merely engage in extortion—the alleged pattern of racketeering activity—but also money laundering in another state, the third prong was met.[201] Even though the money laundering was done

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197 *Huynh*, 519 N.W.2d at 195.

198 *Id.* at 196. The court added that these three prongs should henceforth be added to jury instructions in RICO cases, in addition to the statutory language itself. *Id.* at 197. Interestingly enough, the court chose not to use the term "distinct structure," opting instead for a looser requirement akin to the "separability" variation discussed in *Cheek*. *See supra* part III.D.2.

199 *Huynh*, 519 N.W.2d at 197.

200 *Id.*

201 At this point in the analysis, a dissenting justice (joined by one other justice) departed company with the majority. The dissenters would have required the state to prove, as the third prong, the existence of "'an ascertainable *structure* distinct from that *inherent* in the conduct of a pattern of racketeering activity.'" *Id.* at 199 (Gardebring, J., dissenting) (quoting U.S. v. Kragness, 830 F.2d 842, 855 (8th Cir. 1987)) (emphasis added). Instead, the majority merely required the state to prove that "'the *activities* of the organization ex-

in furtherance of the extortion, those acts were "not necessary to the commission of the underlying criminal acts."[202]

In *Kelly*, the other Minnesota case, the defendant was convicted of offenses related to his organization and coordination of a prostitution ring involving as many as five juvenile girls.[203] For nineteen months, the defendant promoted prostitution using the five juveniles who worked for him at different periods of time, ranging in length from three weeks to only a day or so.[204] Applying its newly developed test, the Minnesota Supreme Court concluded that this operation did not constitute an association in fact for RICO purposes.[205] The court found that the defendant and the juveniles had a common purpose: to engage in prostitution activity.[206] However, the court questioned whether this "episodic association" met the second requirement of an "ongoing" organization.[207] Because the juveniles came and went over the nineteen months, the court doubted that there was any "continuity of personnel" sufficient to meet the second prong.[208] Finally, the court held that the third prong was not met because the defendant did not engage in any activity that was not "inherent in the predicate criminal acts of . . . promoting prostitution."[209]

The test the Minnesota Supreme Court developed occupies a middle ground between the heightened structural elements the Florida courts required and the flexible elements the Oregon courts re-

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tend beyond . . . the underlying criminal acts.' " *Huynh*, 519 N.W.2d at 196. The dissent viewed the majority's focus on an analysis of activities to find an association in fact as inherently flawed and certain to lead to confusion in the lower courts. The dissent, following the *Boyd* analysis, focused on the structure of the enterprise itself to determine its existence. Because these cases are recent, their impact has yet to be felt.

202 *Id.* at 197.

203 *Kelly*, 519 N.W.2d at 202-03.

204 *Id.* at 204. The state alleged an association in fact either between the defendant and his fellow pimps (there were two others), or the defendant and the juvenile prostitutes.

205 Note the common features between the *Kelly* facts and the facts of State v. Cheek, 786 P.2d 1305 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990). Both cases involved loose bands of criminals who took orders from a single ringleader. The only significant difference was the varying length of time each member was in the "gang" in *Kelly*. In *Cheek*, the juveniles the defendant "employed" were regularly involved from beginning to end.

206 Two Pennsylvania cases also emphasized the "purpose" element of an association in fact. In Commonwealth v. Dennis, 618 A.2d 972 (Pa. Super. Ct. 1992), the court held that the prosecution had satisfactorily proven that the defendant was engaged with others in transactions leading to the ultimate common goal of distributing methamphetamine. *Id.* at 976.

The case of Commonwealth v. Besch, 614 A.2d 1155 (Pa. Super. Ct. 1992), also dealt with the defendant's involvement in a drug ring. The court held that the "enterprise" definition included the defendant's purposeful participation in the illegitimate business of delivering controlled substances. *Id.* at 1157.

207 *Kelly*, 519 N.W.2d at 205.

208 *Id.*

209 *Id.* The two dissenting judges in *Huynh* concurred in the *Kelly* result, but again disagreed over the third prong of the majority's test.

quired, though the Minnesota analysis is closer in form to the Florida analysis. While the Florida court's analysis, as discussed above, clearly differentiates between organized and unorganized associations, the Minnesota court's analysis merely requires proof of a common purpose and places greater emphasis on the association's *activities* as they relate to the underlying pattern of criminal acts.[210] Although Kelly's prostitution ring was organized in the ordinary sense of the term, it failed Minnesota's third prong because its activities did not extend beyond the promotion of prostitution. This, however, does not mean that Minnesota requires a *higher* standard than Florida. While is possible that *Huynh* would have satisfied Florida's structural requirements, *Kelly* would probably have not, because in *Kelly* there was no direct evidence that planning or collaboration activity occurred within the group.[211] The Minnesota Supreme Court chose to focus the inquiry in cases charging an association in fact on the extent of the activities of the association rather than create a strict structural requirement.[212]

The Minnesota Supreme Court also required a certain "continuity of . . . personnel,"[213] not merely a continuity of structure and

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[210] A New Mexico Court of Appeals appeared to adopt the language of the Florida court's standard, but refused to apply it rigidly, choosing instead to enumerate factors relevant to analysis. In State v. Hughes, 767 P.2d 382 (N.M. Ct. App. 1988), the court required "(1) a common purpose among the participants, (2) organization, and (3) continuity" in order to prove a RICO association in fact. *Id.* at 389. The court explained, though, that these elements could be satisfied through a balanced analysis of relevant factors, including "the identity of the individuals involved, their knowledge of the relevant activities, the amount of planning required to carry out the predicate acts, the frequency of the acts, the time span between each act, and the existence of an identifiable structure within the association or entity." *Id.* Thus, rather than a rigid approach, this method of analysis allows the reviewing court a high degree of flexibility to adjust the analysis in light of the state RICO policies and specific facts in a particular case.

[211] In *Huynh*, the state did not have evidence indicating that the defendant engaged in planning and collaboration activity with the Texas contact. Such evidence might well have existed and such planning activity might well have occurred, but the Minnesota Supreme Court, unlike the Florida court in *Boyd*, did not deem it necessary for a conviction.

[212] It might appear that Minnesota adopts the same test as Florida. However, though the courts use many of the same phrases, the real test of the degree of scrutiny given to associations in fact is how courts *apply* those phrases in particular cases. The dissents in *Huynh* demonstrate that some members of the Minnesota Supreme Court were not satisfied with the structure requirement, arguing that it should be stronger. In voicing their objections to the third prong of the Minnesota test, the dissenters in *Huynh* and *Kelly* advanced an approach that is closer to that adopted by the Florida courts. Minnesota clearly rejected the "distinct structure" requirement that analysis in a Florida court would mandate.

Perhaps the Minnesota Supreme Court felt that the second prong, requiring an "ongoing and continuous" association with "its members functioning under some sort of decisionmaking arrangement or structure," sufficiently addressed the structural requirements for associations in fact. In *Huynh*, the state had evidence that the defendant operated in conjunction with a number of unnamed associates who waited in the car while the defendant collected the payments. This evidence was sufficient to satisfy the second. 519 N.W.2d at 197.

[213] *Huynh*, 519 N.W.2d at 197.

organization. Some states do not require continuity of personnel, allowing individuals to come and go in an association in fact without disqualifying that association as the RICO enterprise.[214] However, Minnesota rejected Florida's strict distinct structure requirement, explaining that if the purpose of the "'distinct structure' requirement is to avoid casting too wide a net and catching the unorganized criminal, then . . . the definition of 'pattern of criminal activity' spelled out in our state's RICO Act . . . accomplishes this purpose."[215] Therefore, although the Minnesota court recognized the importance of preventing RICO's application to unorganized crime, it did not believe that restricting the enterprise definition was necessarily the best way to do it. For associations in fact, state courts have developed various factors required for their proof, but the Minnesota Supreme Court has also wisely looked to the pattern of racketeering element to circumscribe the limits of RICO's applications.[216]

4. *New Jersey's Flexible Approach*

Not every state has chosen to follow the Florida approach to associations in fact. New Jersey courts, among others, following the lead of the Oregon Court of Appeals in *Cheek*, have chosen to interpret enterprise liberally. In a relatively recent landmark case, *State v. Ball*,[217] six defendants were convicted of various crimes relating to an elaborate scheme to locate and lease illegal dumping sites in New Jersey for garbage from New York. Bribes were paid, illegal licenses were issued, and garbage was dumped over a period of approximately one year, despite an ongoing investigation of the entire operation by local authorities.

In reviewing the convictions, the New Jersey Appellate Court developed an approach for determining whether the enterprise element of the New Jersey RICO statute had been met. In this case, the alleged primary purpose of the association in fact was "the unlawful disposal of out-of-state solid waste within New Jersey for the members and associates of the enterprise."[218] The defendants argued that their "short-lived, informal, relationship or incidental association did not constitute a separate ongoing highly structured organization apart from their criminal activity."[219] The New Jersey court, however, rejected such a strict analysis of the enterprise element. After discussing fed-

214 *See, e.g.*, Martin v. State, 376 S.E.2d 888 (Ga. Ct. App. 1989); State v. Cheek, 786 P.2d 1305 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990).

215 *Huynh*, 519 N.W.2d at 196.

216 *See infra* part IV.B.2 for a discussion of how to limit RICO's scope without altering the "enterprise" definition.

217 632 A.2d 1222 (N.J. Super. Ct. App. Div. 1993).

218 *Id.* at 1234.

219 *Id.* at 1235.

eral circuits that had taken the "broadest approach," the court agreed with the New Jersey trial court's analysis, explaining that "[t]he New Jersey Statute is broadly drawn, arguably even more broadly drawn than the Federal Statute."[220] Therefore, the court reasoned, "[t]aking the restrictive interpretations advanced by some Federal Courts would fly in the face of [the] New Jersey legislative intent and would erode the beneficial purposes of the New Jersey Statute."[221]

Following the reasoning of the Oregon courts, the New Jersey court explained:

> Imposing a requirement that there be evidence of a strict and ascertainable underlying structure, and limiting the scope of a RICO enterprise to groups that serve a function beyond that which is necessary for commission of the predicate racketeering offenses, would erode the enlarged, and we believe intended, purposes of New Jersey RICO and frustrate the very purpose for which it was enacted . . . Therefore, . . . all that is required to satisfy the New Jersey RICO enterprise element is *a group of people, however loosely associated,* whose existence provides the *common purpose* of committing two or more predicate acts.[222]

In this case, however, in which the defendants were a "disorganized group" with "no real 'leader,'" a RICO charge was appropriate because the defendants "should not be allowed to escape harsher RICO penalties simply because they lacked the management skills or ambition to raise the group to a higher and more organized realm of criminality."[223] In a clear departure from the Florida and Minnesota analysis, the court concluded:

> We go so far as to hold the "enterprise" element is satisfied if the "enterprise" is no more than the sum of the racketeering acts. Thus, the "enterprise" does not have to be an organization whose purpose is greater than the predicate acts, nor does it have to evidence any definable structure.[224]

The New Jersey court unequivocally indicated its intention to defer to the legislative branch and prosecutorial discretion in determin-

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220 *Id.* at 1239.

221 *Id.*

222 *Id.* at 1240 (emphasis added). Later in the opinion, the majority looked specifically to the Oregon courts for guidance in the interpretation of New Jersey's RICO statute. *Id.* at 1258.

The court explained that the "common purpose" requirement was met in this case because "[i]t is [the defendants'] unlawful participation in the enterprise which provides evidence that defendants' association was more than merely incidental, and which justifies prosecution under RICO." *Id.* at 1244. Therefore, reflecting the court's flexible approach to the enterprise element, the "common purpose" requirement is proven by a minimal evidentiary showing of participation in the association in fact.

223 *Id.* at 1240.

224 *Id.* at 1259.

ing the kinds of criminal associations that could be prosecuted under New Jersey's RICO statute. Like the Oregon Court of Appeals, the New Jersey court recognized that associations in fact can exist in many forms and combinations, and that the judiciary should not restrict the reach of the language of the enterprise definition.

5. *Interpretive Methodologies for Associations in Fact*

Because associations in fact are not easily identifiable legal entities, it is not surprising that state courts determine their existence in different ways. State courts in Florida and, to a less exacting extent, Minnesota, have imposed three-prong tests that must be met in order to establish an association in fact enterprise for RICO purposes. These tests restrict the scope of the application of RICO by limiting the definition of enterprise, but cases like *Huynh* demonstrate that many relatively informal criminal associations can still be prosecuted under RICO in these states. State courts in Oregon and New Jersey reject the three-prong tests and prefer to give the enterprise definition its broadest reading by allowing any association in fact, however loose the organization, to qualify as a RICO enterprise. Sensitive to their limited judicial role, these courts defer to the state legislatures rather than limit RICO's scope about evidence of contrary legislative intent, and look to other elements of the statute to limit its application, namely the pattern of racketeering requirement.

IV
The Future

The previous Parts demonstrated the various constructions that state legislatures have given the enterprise definitions of state RICO statutes and the diverse methodologies that state courts have adopted to interpret them. Though most states originally patterned their RICO enterprise definitions after the federal RICO statute, state RICO prosecutions have increased sufficiently to warrant an independent assessment of their scope and usefulness for state prosecutors. This Part surveys the future of state RICO, responds to its critics, and suggests methods for restricting the scope of state RICO prosecutions without altering the enterprise definition.

A. Looking Ahead: How to Interpret Enterprise

Most states have adopted a broad definition of enterprise for RICO purposes, and some states have added the open-ended word *includes* in order to allow courts flexibility in interpreting the statutes. Courts in states that have not limited their RICO statutes to particular

forms of criminal activity (as Texas and Iowa did)[225] should accept the legislature's invitation for a flexible analysis when interpreting the enterprise definition. When the state legislatures have demonstrated an intent through the language of the statute to allow RICO to reach all types of criminal enterprises, courts should not impose additional requirements of their own on a RICO prosecution.[226] The most effective method of restricting RICO's scope while maintaining fidelity to the goals of the statute[227] is to limit the types of criminal activity that count as predicate acts for the purpose of proving the pattern of racketeering activity requirement. Given the many and various forms in which racketeering criminality can exist, however, it is unwise to limit the enterprise element in any way that might compromise its effectiveness.

Associations in fact, however, present problems of interpretation that other types of RICO enterprise do not. It is difficult for courts and prosecutors to determine what constitutes an association in fact without some legal guidance. Oregon and New Jersey allow many loose associations to constitute RICO enterprises.[228] Florida and Minnesota have more narrowly circumscribed what counts as an association in fact by requiring the prosecution to satisfy certain factors.[229] Factors are appropriate methods by which to guide RICO's scope regarding associations in fact, but they should not become rigid requirements that foreclose a RICO prosecution that might otherwise be appropriate. Courts that develop factors for analyzing associations in fact should approach each case on its own facts in light of the legislative policies that motivated state RICO statutes in the first place. These courts should also grant siguificant deference to local prosecutors as the ultimate enforcers of this powerful tool. The next Part will respond to critics of state RICO laws and suggest how such laws can be effectively applied in appropriate circumstances without tinkering with the broad enterprise definition.

B. Responding to the Critics

In the last five years, criticism of both federal and state RICO statutes by legal commentators has been particularly intense. Much of

225 *See supra* text accompanying notes 44-49.

226 One commentator argued that "[w]henever a court embarks upon its interpretive mission, it should construe statutory language in the light of legislative purpose." Blickensderfer, *supra* note 118, at 879. Besides the obvious problems in determining "legislative purpose" from the often contradictory annals of legislative history, such interpretive methodology can easily be used as a pretext imposing additional requirements that the text of the enterprise definition does not support.

227 *See supra* part I.B.2.

228 *See supra* parts III.D.2, III.D.4.

229 *See supra* parts III.D.1, III.D.3.

the criticism has focused on restricting the broad reach of RICO's definitions, especially the open-ended enterprise definition. All of these critics assume that federal and state RICO statutes should be treated the same. However, as the suggested amendments might apply to the purposes and functions of state RICO statutes, these criticisms miss their mark and should be displaced by more constructive reformation.

1. *Specific Arguments for Restricting RICO*

Russell D. Leblang, a Boston attorney, has leveled heavy criticism against the enterprise definitions of state RICO statutes.[230] Leblang first suggests that legislatures amend the enterprise definitions to require the prosecution to prove that the defendant obtained "substantial income" from the enterprise.[231] He argues that such a requirement would eliminate the application of RICO against "a Martin Luther King type of organization, Operation Rescue, and similar groups whose actions are not motivated by pecuniary gain . . . [and] it will prevent prosecution of small scale criminal activity."[232]

This argument ignores the very purposes of state RICO, which this Note discussed earlier.[233] State RICO should apply to all types of organizations because the criminal activity RICO is intended to reach is not restricted to economic gain alone. For example, an informal, criminal street gang that initiated its members by requiring them to make "hits" (murders) on other street gangs should be reachable by RICO.[234] Many types of criminal activity that state RICO statutes are better suited to target include crimes that might involve no monetary issues at all, including murder, assault, arson, and other crimes of violence. Although RICO can be an extremely effective tool against complex white-collar crime, it should not be judicially restricted to such application.

As discussed above, the United States Supreme Court recently held in *National Organization for Women, Inc. v. Scheidler*[235] that, under the federal RICO statute, an economic purpose need not motivate the RICO enterprise.[236] In the petitioner's *Scheidler* brief, the National Organization for Women argued that the creation of such "non-textual" requirements finds "no support in the text . . . [or] legislative

230 Leblang, *supra* note 6, at 109-11.

231 *Id.* at 109-10.

232 *Id.* at 109.

233 *See supra* part I.B.2.

234 Oregon's RICO statute, OR. REV. STAT. § 166.715-166.735 (1993), is one of several state RICO statutes that does not require a defendant to receive pecuniary gain in order to be guilty of participating in an enterprise through a pattern of racketeering activity. Oregon also includes homicide as a possible offense constituting a predicate act.

235 114 S. Ct. 798 (1994).

236 *Id.* at 801. Though the issue decided in *Scheidler* differs from Leblang's substantial income requirement, it is sufficiently analogous that these criticisms apply to both issues.

history of RICO."[237] The petitioner also argued that an economic motive requirement is "vague, uncertain and problematic" and would "invite the weighing of subjective racial, religious, political, psychological and social motivations that have no place in RICO cases."[238] The term "economic motive" itself is problematic because it remains unclear how much economic motive would be necessary to satisfy the requirement and whether the proof would be the defendant's subjective belief or some codified goal of the RICO enterprise.[239] In reality, groups like Operation Rescue or similar non-profit organizations are just as capable of being infiltrated by criminal elements and of operating as criminal enterprises as any for profit organization. In some cases, these groups can inflict even greater damage by causing physical injury to victims rather than economic injury.

Finally, it is precisely because federal authorities do not have the resources to prosecute small-scale criminal activity that legislatures created state RICO in the first place.[240] It is true that prosecutors should bring RICO charges with sensitivity to the types of cases that are appropriate for a RICO prosecution, but the very fact that certain criminal activity is small-scale should not itself preclude RICO's application. The case examples this Note discussed above[241] demonstrate the threat that pervasive small scale criminal activity can present to local communities. In many cases, particularly in rural communities, small-scale organized criminal activity is much more common and inflicts much greater injury on its victims than large, well-organized criminal syndicates like the Mafia or La Cosa Nostra.

Leblang also suggests that the RICO enterprise should contain a minimum number of individuals because "use of the RICO statute is inappropriate if only one or two people are involved."[242] It is difficult to see how some arbitrary numerical minimum would better serve the purposes of state RICO unless one relies on the erroneous belief that federal *and* state RICO should only be directed toward the nebulous target of organized crime.[243] The *Scheidler* petitioner correctly argued that because Congress defined enterprise without ambiguity, it avoids

237 Brief for Petitioner at 12-13, National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798 (1994) (No. 92-7780) [hereinafter *Scheidler* Petitioner's Brief].

238 *Id.* at 13. For obvious reasons, courts should hesitate to infuse judicially created ambiguity into an otherwise clear and unambiguous statute.

239 *See id.* at 38-39.

240 *See supra* part I.B.2.

241 *See supra* part III.

242 Leblang, *supra* note 6, at 110. For some inexplicable reason, Leblang would except from this restriction "the municipal judge who fixes traffic tickets." This author does not see the logic in this exception. Why exempt the judge from such a restriction, but not, say, the single attorney in a large law firm who commits insurance fraud over a period of 10 years?

243 *See supra* note 19.

"any need to look for hidden meanings . . . or to judicially amend the terms."[244] The state RICO enterprise definitions as they now exist are clear and unambiguous. Leblang offers no logical reason why the enterprise definition should be restricted by an arbitrary number that bears no relation to the criminal activity that RICO is intended to reach.[245] Enterprise criminality exists in many forms and can be just as deserving of enhanced criminal penalties if its participant members are few.[246]

One commentator has argued that the liberal construction clause of the federal RICO statute should be abolished, leading other commentators to suggest the same with regard to state RICOs.[247] It is true that the normal approach to criminal statutes is to require strict construction.[248] However, even if RICO on the whole should be interpreted strictly (an argument that this author neither supports nor rejects), the enterprise definition in particular should not be subject to the rule of strict interpretation because the clear and unambiguous language of the definition in most states exhibits the state legislature's intention to reach every form of criminal enterprise.[249] The term *enterprise* must remain broad and open-ended in order to facilitate the intended targets of the state legislatures: all forms of enterprise crimi-

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244 *Scheidler* Petitioner's Brief, *supra* note 237, at 13.

245 It was discussed above that at least two states, Texas and Kentucky, impose a minimum numerical requirement for proof of an enterprise. *See supra* note 49 and accompanying text. However, it is important to remember that both of those statutes target particular forms of criminal activity and do not represent the vast majority of state RICO statutes that are intended to cover a much broader range of criminal activity. It might well be persuasive that when a state intends to target a particular type of criminal activity like street gang activity, a minimum numerical requirement would be an appropriate method to restrict the scope of the statute to the targeted criminal activity.

246 *See, e.g.*, Thompson v. State, 440 S.E.2d 670 (Ga. Ct. App.) (four defendants), *cert. denied*, (Ga. Mar. 25, 1994); Drewry v. State, 411 S.E.2d 898 (Ga. Ct. App. 1991) (affirming the denial of five defendants' demurrers); State v. Huynh, 519 N.W.2d 191 (Minn. 1994) (one defendant, but at least four other occasional associates); State v. Cheek, 786 P.2d 1305 (Or. Ct. App. 1990) (one defendant with six other occasional associates).

247 *See* Ludwick, *supra* note 9, at 417; *see also* Leblang, *supra* note 6, at 111-12 (arguing that states with liberal construction clauses patterned after the federal statute should abolish them).

248 *See* Leblang, *supra* note 6, at 112.

249 The enterprise definition does not exhibit the vague or ambiguous qualities that normally require a reviewing court to apply the traditional rule of strict construction of criminal statutes. In fact, state courts that have entertained constitutional challenges to the state RICO statute for vagueness have upheld the statute. *See, e.g.*, State v. Tocco, 750 P.2d 874 (Ariz. 1988); Chancey v. State, 349 S.E.2d 717 (Ga. 1986), *cert. denied*, 481 U.S. 1029 (1987); State v. Walker, 506 N.W.2d 430 (Iowa 1993); State v. Passante, 542 A.2d 952 (N.J. Super. Ct. 1987). *But see* Commonwealth v. Bobitski, 632 A.2d 1294 (Pa. 1993) (requiring strict construction).

It is possible that by rejecting the strict construction of the enterprise definition, I implicitly reject that doctrine as applied to the entire RICO statute. That might be so, but a discussion of the implications of such reasoning, as interesting as it might be, is beyond the scope of this Note.

nality. One commentator has also suggested that "liberal construction [of RICO] may bolster public confidence in the legal system by making the law appear more rational."[250] Broad construction should not be seen as judicial license for unfettered interpretation, but should grant broad prosecutorial discretion to which the reviewing courts should defer. There are better methods for restricting the scope of state RICO statutes than by handcuffing the definition that is most fundamental to RICO's purpose.

More persuasive suggestions have focused on associations in fact. One commentator, joining the arguments of others, has argued that prosecutors who allege an association-in-fact enterprise should be required to prove elements of both continuity and structure.[251] Most of these critics rely on the Eight Circuit's opinion in *United States v. Bledsoe*[252] to explain that prosecutors should first be required to prove "a structure capable of acts beyond the alleged pattern."[253] However, any requirement of a formal structure for associations in fact would defy the very definition of associations in fact[254] and undermine the purpose of some state RICOs to reach every possible criminal enterprise. A growing number of state courts allow the enterprise to be inferred from the pattern of racketeering activity.[255] If this structural requirement merely imagines proof of an enterprise *capable* of *committing* acts beyond the alleged pattern, then this requirement does not restrict the enterprise definition much at all. Either way, this requirement does not seem to mandate any amendment to the current enterprise definitions in state RICO statutes.

Leblang argues that prosecutors should be required to prove that the enterprise functioned "as a continuing unit."[256] Because many states intend RICO to reach any and all types of criminal enterprises,

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250 Palm, *supra* note 24, at 181.

251 *See* Daley, *supra* note 6, at 411 (arguing that the Florida definition of enterprise "should be amended to reflect that a showing of continuity is required for this element as well"). Such an approach originated in a federal court case, United States v. Bledsoe, 674 F.2d 647 (8th Cir. 1982), *cert. denied*, 459 U.S. 1040 (1982). For a good discussion of this case, see Ludwick, *supra* note 9, at 392; *see also* Leblang, *supra* note 6, at 111 (arguing for requirements of both continuity and structure); Donald Cosmo Ligorio, *Ohio's Pattern of Corrupt Activities Law: Ohio Revised Code Sections 2923.31-.36*, 17 U. DAYTON L. REV. 279 (1991) (arguing for the adoption of a three-prong test patterned after *Bledsoe*).

252 674 F.2d 647 (8th Cir. 1982).

253 Leblang, *supra* note 6, at 111.

254 As the United States Supreme Court argued in *Scheidler*, "Congress could easily have narrowed the sweep of the term 'enterprise' by inserting a single word." National Org. for Women, Inc. v. Scheidler, 114 S. Ct. 798, 805 (1994) (referring to United States v. Turkette, 452 U.S. 576 (1981), which noted that Congress did not include the word "legitimate").

255 *See* cases cited and discussion *supra* part III.D; *see also* State v. Hill, No. CA-8094, 1990 WL 237485 (Ohio Ct. App. 1990) (allowing inference of RICO enterprise from the pattern of racketeering activity).

256 Leblang, *supra* note 6, at 111.

however, the appropriate rule, which at least two states have adopted,[257] requires prosecutors to introduce "proof of an on-going organization, however loose, that is distinct from the commission of separate criminal acts by an individual."[258] Thus, though there is no formal requirement of structure, there already exists in some states a continuity requirement of an "on-going organization" that recognizes the fact that "associates in that organization might come and go."[259] State courts have adapted this requirement in different forms,[260] and state courts would likely benefit from its use in evaluating whether an association in fact exists. As Part III.D discussed, associations in fact are the most difficult types of enterprise to identify because they are often shadowy and nebulous. It is not unreasonable to expect that state courts would develop their own tests to provide some consistency to their interpretation of the enterprise definition. This does not amount to imposing requirements that are unsupported by the text of the definition, but rather is a method of analysis that courts use to guide the interpretation of a complicated statutory term. This methodology can be developed and used by state courts without altering the textual meaning of the enterprise definition.

2. *Practical Suggestions for Restricting State RICO*

For those legislatures that desire to restrict the scope of state RICO statutes, there are two methods that are preferable to tinkering with the enterprise requirement: (1) adopt rules regarding prosecutorial discretion; and (2) amend the pattern of racketeering activity element to restrict the crimes that can qualify as predicate acts. Leblang offers many ideas for curbing prosecutorial discretion in RICO charges.[261] All of these ideas are based on the prosecutorial philosophy that state RICO should not be overused lest its punitive

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257 *See supra* part III.D.

258 State v. Cheek, 786 P.2d 1305, 1307 (Or. Ct. App.), *review denied*, 794 P.2d 793 (Or. 1990). The "distinctive" requirement was discussed *supra* part III.B. *But see* State v. Russell, 611 So. 2d 1265, 1267 (Fla. Dist. Ct. App. 1992) (requiring the state to prove that "the group has an identifiable decision making structure and a mechanism for controlling and directing the group on an ongoing basis").

259 *Cheek*, 786 P.2d at 1308.

260 *See* discussion *supra* part III.D.

261 One of Leblang's ideas that this author rejects is the creation of a RICO Commission to make every RICO charge and plea bargain subject to its approval. Leblang, *supra* note 6, at 94-96. Such a program would create an unnecessary layer of bureaucracy that would discourage prosecutors from using RICO except in the most extreme circumstances (which the U.S. Attorney would probably handle anyway). This would also hurt states with large rural populations whose prosecutors would have to justify their charging policies to an agency often in a larger city with an urban population.

A milder and more attractive suggestion would be to require RICO charging approval from the district attorneys in the counties affected because they are elected individuals to whom the voters have entrusted the power of discretion. Members of a state commission would be appointed with no analogous internal sense of accountability.

force be diluted.[262] David Frohnmayer, in advocating the Oregon RICO statute, has argued that "[b]ecause of the broad range of offenses potentially indictable under RICO, and the severity of potential RICO remedies, prosecutors should choose with care those cases which they bring under RICO."[263] He explained that prosecutors should "carefully . . . consider the advantages of simply charging violation of one of the underlying predicate offenses rather than bringing a RICO case."[264] States would do well to enact advisory guidelines for prosecutors in an attempt to preserve the sanctity of state RICO's benefit to the criminal justice system.

The U.S. Department of Justice Guidelines also provide some valuable suggestions for guiding prosecutorial discretion. These Guidelines were enacted in January of 1981 in response to an increasingly hostile legal community that was encouraging Congress to amend the broad RICO statute.[265] Even though the Guidelines are not binding, they have provided sufficient guidance to maintain criminal RICO prosecutions at a steady level.[266] One Guideline that states could easily adopt is the submission of a "prosecutive memorandum" and a proposed indictment to the district attorney.[267] After submission, the potential defendant's attorney would have the opportunity to discuss the RICO memorandum and recommendation.[268] Such pre-trial discovery rules are simple methods that would dispel some of the mystery and complexity that currently surround state RICO prosecutions.

Another viable method for restricting RICO's scope is to more narrowly tailor the types of criminal activity that can constitute predicate acts. Many state RICO statutes include a broad range of applicable crimes, including most felonies and an array of misdemeanors.[269] By restricting the types of crimes to which RICO can apply, a state

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262 There is also a concern that local prosecutors overuse state RICO statutes. However, there are often other systemic safeguards to prevent reckless and unfounded prosecutions regardless of the particular crime charged. These safeguards also deter abuse arising from changing every state offense into a state RICO charge. Such heightened punishment is unfair to defendants and avoiding this activity will strengthen state RICO's legitimacy. Chief Justice Rehnquist, discussing federal RICO, explained that "[o]n the criminal side this greater breadth is kept under control by the use of prosecutorial discretion by U.S. attorneys." Rehnquist, *supra* note 36, at A14. Of course, such guidelines are only effective if they are not "routinely violated," as one commentator has charged. *Look Who's Saving RICO*, WALL ST. J., May 24, 1991, at A10.

263 Frohnmayer et al., *supra* note 41, at 20.

264 *Id.* at 21.

265 RAKOFF & GOLDSTEIN, *supra* note 36, § 5.01.

266 *Id.* § 5.02(1). Some federal courts, though, require government compliance with the RICO guidelines. *Id.* § 5.02(3).

267 *See* Coffey, *supra* note 6, at 1043.

268 *See id.* at 1047.

269 *See, e.g.*, GA. CODE ANN. § 16-14-3 (1994) (including crimes "relating to distilling or making liquors"); *see also* Dowd, *supra* note 22, at 163 (explaining that "Florida's RICO statute is far broader than its federal counterpart, incorporating more crimes").

legislature can better target those types of enterprise criminality that present special problems of prosecution in a particular state.[270] This would allow a state to focus on the proliferation of troublesome criminal acts without restricting the types of criminal enterprise that can engage in and be a conduit for those acts.

Conclusion

State RICO constitutes one of the most powerful and effective tools state prosecutors can use to combat the forces of organized criminal activity. Most states have constructed broad enterprise definitions in order to reach all forms of organized criminality, however loose the association might be. In most states, the development of state court case law interpreting the state RICO statutes is in its infancy. However, as state prosecutors bring more charges under the state RICO statutes, it is inevitable that state cases involving interpretation of this broad statute will multiply. In light of the purposes and goals that state legislatures articulated in passing state RICO statutes, courts should refrain from imposing requirements on or restricting the scope of the enterprise definition in state RICO.

Jason D. Reichelt†

[270] The U.S. Department of Justice proposed a model state RICO statute that includes the following "enterprise" definition: "'Enterprise' includes any individual, sole proprietorship, partnership, corporation, trust, or other legal entity, or any union, association, or group of persons, associated in fact although not a legal entity, and includes illicit as well as licit enterprises and governmental entities." PROGRAM BRIEF, *supra* note 8, at 11. This definition is broader than many state "enterprise" definitions and patterns the federal definition. *See supra* part II.

On the other hand, the model RICO statute suggests predicate acts that mostly target white collar crime with little focus on violent criminal activity. *See supra* note 8 for the "nonexhaustive" list. It is surprising that these suggestions do not include rape, child abuse, and other sexual offenses that often outrank assault and theft on a seriousness scale.

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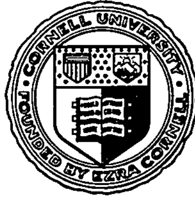

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