

"BIRDS OF A FEATHER" RICO: TRYING PARTNERS IN CRIME TOGETHER

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INTRODUCTION

Throughout most of the 20th Century, the Mafia frustrated federal prosecutors. The law did not aid law enforcement in prosecuting large criminal enterprises. Before the Racketeer Influenced and Corrupt Organizations Act (RICO),¹ prosecuting organized crime was "an awkward affair."² The government's efforts in law enforcement and criminal prosecutions were ineffectual against sophisticated crime circles.³ When organized crime leaders were apprehended, the government often charged them for what seemed to be insignificant offenses. The larger meaning of these offenses was not exposed in court under common law evidentiary standards and procedural rules. As a result, courtroom drama never exposed the overarching picture of organized crime.

Congress enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) as part of a comprehensive effort to change the means by which the government attacked organized crime.⁴ RICO's

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1. Racketeer Influenced and Corrupt Organizations (RICO) Act, 18 U.S.C. § 1961-1968 (2001), amended by U.S.A. Patriot Act, tit. VIII, § 813, 115 Stat. 272 (Oct. 26, 2001).

2. *Effectiveness of the Government's Attack on La Cosa Nostra: Before the Permanent Subcomm. on Investigations Comm. On Governmental Affairs*, 100th Cong. 14 (1988) (statement of David C. Williams, Director, Office of Special Investigations) [hereinafter *Investigations Comm. on Governmental Affairs*]; see e.g., *Accardo v. Comm'r*, 942 F.2d 444 (7th Cir. 1991) (affirming the conviction of Anthony Accardo, a Chicago mob Boss, for tax evasion in the reporting of his criminal defense legal fees). For a complete accounting of Accardo's criminal record, which at his death included 27 arrests, but only the one, seemingly insignificant tax conviction, see Susan B. Bodell, Comment, *Catching "Big Tuna": How the Seventh Circuit Finally Reeled in Anthony Accardo*, 47 U. MIAMI L. REV. 1061 (1993).

3. *Investigations Comm. on Governmental Affairs*, *supra* note 2, at 14; see also *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1445 (E.D.N.Y. 1988) (proposing that the problem was compounded because "conviction and imprisonment of the perpetrators or organized crime were not sufficient to deter or curtail organized criminal activities since the incarcerated individuals were merely replaced with other members of the criminal enterprise while the economic base of the enterprise remained untouched.").

4. See G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 249-80 (1982); see also G. Robert Blakey &

focus on “enterprise” criminality makes a single trial of all “siblings” in a crime “family” possible and appropriate. It forces a judge and jury to understand exactly what the defendants have done, in a way that the common law procedural and evidentiary rules did not.

The success of RICO makes it an appealing model for other nations’ legislation. In 2004, when the U.K. proposed law enforcement reforms with respect to organized crime, it looked to RICO. Its evaluation of the statute is largely innocent of the procedural and evidentiary considerations involved in effective prosecution of organized crime.

This Article examines how RICO’s substantive elements, namely “enterprise,” “pattern,” and “racketeering activity,” shift the balance of power in a criminal prosecution by altering the application of procedural and evidentiary rules. Part I reviews the relevant procedural and evidentiary rules, as they existed before RICO and the advent of the “enterprise trial.” Part II introduces RICO and examines how it changed the application of these rules, with particular focus on the law of joinder of offenses and offenders. Part III examines the law of joinder and severance in the U.K. where the primary paradigm for a trial is a lone defendant answering for a single offence. Part IV uses the recent U.K. ricin trial as a case study, demonstrating the need for a substantive offense to tie together loose-knit conspiracies and more effectively prosecute enterprise criminality like organized crime and terrorism. Finally, this Article concludes that RICO is successful partly because its substantive elements, namely “pattern,” “enterprise,” and “racketeering activity” interact with the procedural law to facilitate joinder of offenses and offenders. This Article suggests that our common law neighbors have missed an opportunity by failing to modify the structure of trials as part of the comprehensive criminal reform program.

I. JOINDER AND SEVERANCE BEFORE RICO

In order to understand the effect of the RICO revolution, it is first necessary to explore the American common law approaches to joinder of offenses and offenders before the advent of the criminal “enterprise trial.”

Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AMERICAN CRIM. L. REV. 1345, 1666-75 (1996) (discussing the legislative history surrounding RICO).

A. *Historical Approaches to Joinder*

Before the Federal Rules of Criminal Procedure, the American common law controlled joinder and severance.⁵ As a general practice, common law viewed a criminal trial as one defendant answering for a single offense. The decision to join offenses and offenders was placed within the discretionary authority of the judge.⁶ In joining offenses, the judge weighed the utility of trying the offenses together "while conceding that regularly or usually an indictment should not include more than one felony."⁷ A judge was not allowed to permit cases where multiple felonies were not of the same class or grade and subject to the same punishment.⁸ In addition to this rather rigid rule of joinder, the prosecutor could only join offenses "when it appear[ed] that they were so closely connected in respect to time, place, and occasion that it [was] difficult, if not impossible, to separate the proof of one from proof of the other."⁹ Joining two or more offenses is efficient because it prevents the needless repetition of evidence and witnesses that would occur if the offenses were tried separately. While efficiency was valued, judges in the 19th and early 20th Century were apprehensive of joinder because they feared that defending two counts at the same time would prejudice a defendant.¹⁰ A jury, even when properly instructed,

5. *United States v. Marchant*, 25 U.S. (12 Wheat) 480 (1827) (holding that defendants do not have a right to be tried severally and separately). Justice Story, in deciding that joinder was proper, stated that "[t]he subject is not provided for by any act of Congress; and, therefore, if the right can be maintained at all, it must be as a right derived from the [English] common law, which the Courts of the United States are bound to recognize and enforce." *Id.*

6. *Pointer v. United States*, 151 U.S. 396, 402 (1894) (quoting ARCHBOLD CRIMINAL PRACTICE AND PLEADING p.95 c.3 (8th ed.), where the Court states that "if different felonies or misdemeanors be stated in several counts of an indictment . . . the judge, in his discretion, may require the counsel for the prosecutor to select one of the felonies, and confine himself to that.")

7. *Pointer*, 151 U.S. at 403. While joinder of the offenses, particularly felonies, was uncommon, U.S. Rev. Stat. § 1024 (1853) empowered the judge to join indictments of the same class of felony. In this case, the judge found that two murder charges arising from murders committed in the same county, with the same instrument (an axe), on the same day, were properly joined. *Id.* at 400. See also *McElroy v. United States*, 164 U.S. 76, 81 (1896) (holding that it was beyond the judge's discretion to join defendants who had not participated in the same act or transaction).

8. *Pointer*, 151 U.S. at 403; *United States v. Nye*, 4 F. 888 (1880) (finding separate and distinct felonies could not be joined but did not destroy the validity of the indictment).

9. *Pointer*, 151 U.S. at 403.

10. *Marchant*, 25 U.S. (12 Wheat) at 480; cf. *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir. 1939) (The joining of three charges of receiving commissions from borrowers from a national bank was within judge's discretion, where evidence as to each was short and simple); *Kidwell v. United States*, 38 App. D.C. 566, 570-71 (D.C. Cir. 1912) (improper joinder is overturned only for abuse of discretion).

may use the evidence "cumulatively" and convict a defendant who, tried on one count, would have been acquitted.¹¹ Thus, there was a strong preference in the American common law for a simple trial unit. One offense and one offender remained the paradigm, and joinder was the exception, not the rule.

A similar rule applied to joining defendants. The American common law rule was that persons charged in the same indictment "have not a right by the laws of the country, to be tried severally, separately, and apart . . . but that such separate trial is a matter to be allowed in the discretion of the Court before whom the indictment is tried."¹² Again, the courts favored the simplicity of a smaller trial. Joinder was restricted to defendants participating in the same offense or transaction.¹³ For example, in *McElroy v. United States*, Chief Justice Fuller ruled that the joinder of five defendants, who appeared to have formed an arson ring, was improper where all five members were charged with one arson and only three were charged with a second arson, which had occurred two weeks later.¹⁴ This joinder was beyond the court's discretion because it "embarrassed" two of the defendants and "distracted" the jury.¹⁵ Accordingly, the court reversed and granted new trials to two of the defendants.¹⁶

11. *Lotsch*, 102 F.2d at 36. Judge Learned Hand, in deciding that joinder was proper in the *Lotsch* case, articulated his concern that "[t]here is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." *Id.* Joint trials are troubling when "the crimes charged are of such a nature that the jury might regard one as corroborative of the other, when, in fact, no corroboration exists." *Kidwell*, 38 App. D.C. at 570. The criticism of joint trials tends not to speak to the defendant's ability to defend two charges. Instead, they reveal a general distrust for the jury's ability to differentiate between defendants and offenses and intelligently apply the law to each. See e.g. *United States v. Dinome*, 954 F.2d 839, 842 (2d Cir. 1992) ("The claim that the jury must have lacked the capacity to understand the instructions given it is thus sheer speculation.").

12. *Marchant*, 25 U.S. (12 Wheat.) 480, 486 (1827).

13. *McElroy*, 164 U.S. at 78 (1896).

14. *Id.*

15. *Id.* at 81. The court also noted that:

[I]n cases of felony, the multiplication of distinct charges has been considered so objectionable as tending to confound the accused in his defence [sic], or to prejudice him as to his challenges, in the matter of being held out to be habitually criminal, in the distraction of the attention of the jury, or otherwise, that it is the settled rule in England and in many of our States, to confine the indictment to one distinct offence or restrict the evidence to one transaction.

Id. at 80.

16. *Id.* at 81. Generally, a joint trial could be unwound upon the showing that the "defendant was embarrassed or confounded in his defense." See also *Pointer*, 151 U.S. at

Typically, the law of joinder was not extended beyond its rationale. Before the Federal Rules, joinder was considered efficient because evidence against each defendant participating in the same offense would have been admissible against each defendant in a separate trial. Thus, joinder prevented the needless and redundant repetition of evidence.¹⁷ If, on the other hand, a trial consisted of diverse defendants and offenses, joinder was not proper because there would be no substantial overlap in the evidence against each.¹⁸ The American common law approach to joinder worked to preserve the traditional paradigm of a simple trial. The rules of joinder of offenses and offenders limited the nature of the crimes joined and applied a "transactional" approach to joining defendants.

B. Joinder and Severance after the Federal Rules of Criminal Procedure, 1946-Present

The Federal Rules of Criminal Procedure took effect March 21, 1946.¹⁹ Rules 8 and 14, the rules that allow joinder²⁰ and severance,²¹

404.

17. *Nestlerode v. United States*, 122 F.2d 56, 58 (D.C. Cir. 1941) (holding that a motion for severance was properly denied where the close relation between the killings here makes much of the evidence pertinent to both). See also *McNeil v. U.S.*, 85 F.2d 698, 703 (D.C. Cir. 1936) (holding that in a trial for embezzlement and grand larceny, the trial court was correct in not putting the prosecutor to his election, because proof of one crime overlapped with proof of the other). See also *Lee v. United States*, 37 App. D.C. 442, 445 (D.C. Cir. 1911) (holding that the proper joinder requires that the evidence of one of the crimes would have been admissible in a separate prosecution of the other).

18. See *McElroy*, 164 U.S. at 78; see also text accompanying notes 13-16.

19. FED. R. CRIM. P. 59. See also Jerold Israel, *Federal Influence in State Cases: Sentencing, Prosecution, and Procedure: Federal Criminal Procedure as a Model for the States*, 543 ANNALS 130, 142 (1996) (The Federal Rules of Criminal Procedure were adopted "at a propitious time." Their predecessor, the Federal Rules of Civil Procedure, was adopted in 1938, proving to be "a major triumph of law reform."). See also Geoffrey C. Hazard, Jr., *Symposium: The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988, V. The Federal Rules Fifty Years Later: Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237 (1989) (When the Federal Rules of Criminal Procedure came into force eight years later, court rules were still a recent innovation. They reflect the "then-prevailing view that the 'lawyer's law' of procedure should be set forth in a systematic fashion—rather than be developed haphazardly through case law—and should be promulgated by a body insulated from politics and advised by experts within the legal profession."). See also Israel, *supra* at 142 (The Federal Rules of Criminal Procedure contain ideas analogous to several Rules of Civil Procedure). Compare FED. R. CRIM. P. 2 ("These rules are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay") with FED. R. CIV. P. 1 (The rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.").

20. FED. R. CRIM. P. 8. Rule 8 provides:

were designed ostensibly as a "substantial restatement of existing law."²² Like the previous American common law approach, the Rules allow joinder of offenses and offenders and grant the trial judge broad discretion to provide remedies.²³

1. Joinder of Offenses Under the Federal Rules

Federal Rule of Criminal Procedure 8(a) allows a joint trial of offenses "of the same or similar character," "based on the same act or transaction," or "constituting parts of a common scheme of plan."²⁴ For

(a) Joinder of Offenses. The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

(b) Joinder of Defendants. The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.

Id.

21. FED. R. CRIM. P. 14. Rule 14 provides for relief from judicial joinder:

(a) Relief. If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

(b) Defendant's Statements. Before ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence.

Id.

22. FED. R. CRIM. P. 8(a) Advisory Committee's notes. The Federal Rules purported to be a restatement of existing law. With respect to the law of joinder, the Federal Rules of Criminal Procedure were innovative in their treatment of multiple defendants charged with multiple counts. The approach the second sentence of rule 8(b) "formulates a practice now approved in some circuits," but not the existing law in most circuits before the Federal Rules. FED. R. CRIM. P. 8(b) Advisory Committee's notes (citing *Caringella v. United States*, 78 F.2d 563, 567 (7th Cir. 1935)). For additional instances where the Federal Rules were not the "substantial restatement of existing law" they purported to be, see *supra* text accompanying notes 30, 36.

23. See, e.g., *Zafiro v. United States*, 506 U.S. 534, 541 (1993) ("Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.").

24. FED. R. CRIM. P. 8. Joinder and severance are not mandatory under the Federal Rules. In some instances, the practical application of the rules may make joinder compulsory. The Fifth Amendment Double Jeopardy Clause may prohibit the prosecutor from bringing charges later that were not joined in the first trial. The relevant portion of the Fifth Amendment provides: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. To be considered the "same offense" for double jeopardy purposes, courts apply the *Blockburger* test that asks: "whether each [criminal] provision requires proof of an additional fact that the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932). If the second offense does not

example, a defendant who recklessly operates a vehicle causing several deaths can be tried in one trial for all of the offenses arising from his conduct. Likewise, actions that are close in time and space, like successive shots from a firearm causing multiple deaths, are properly joined under the rule. Events that are separated by substantial space and time, but that constitute part of a common scheme can also be properly joined. For example, a defendant who commits two bank robberies, one as a "training mission" for the second, can properly be tried under the rule because the robberies were part of the common scheme.²⁵

The modern rationale for joining offenses into a single trial is that joinder furthers judicial efficiency. A single trial eliminates the needless overlap of witnesses and evidence that would occur if the offenses were separately litigated. A joint trial can diminish delays in the criminal justice system, reduce the inconveniences to witnesses and police, and conserve funds. It is for these reasons that the federal court system favors joinder.²⁶ A joint trial is not solely for the benefit of the Government. Defending a single trial is often preferable for the Defendant, who realizes a mentally exhaustive and monetarily draining trial and appeal process. A joint trial can also facilitate concurrent sentencing, which can be to the defendant's advantage.

Nevertheless, joinder of offenses often comes at the cost of real and perceived prejudice. The Federal Rules balance the value of accurate and fair outcomes with the necessity for timely and final decisions by providing for severance. For example, Rule 14 provides that a judge may sever the trial or provide other relief if prejudice occurs.²⁷ Severing the trial is a rare and extreme measure. The more common relief is a limiting instruction in which the judge directs the

require proof of an addition fact, it cannot be brought in a separate trial. Thus, there is an incentive for the prosecutor to join all offenses arising from the same facts or risk losing the convictions. *See also*, *Ashe v. Swenson*, 397 U.S. 436, 447 (1970) (holding that the issue preclusion doctrine prohibits the government from relitigating "an issue of ultimate fact that has been determined by a valid and final judgment"), *but see Dowling v. United States*, 493 U.S. 342, 349 (1990) (limiting *Ashe* to instances where the government had the same burden or proof as to a particular issue in both trials). For a summary of the double jeopardy challenges that RICO has survived, see U.S. Dept. of Justice, Criminal Div., Organized Crime and Racketeering Section, *Racketeer Influenced and Corrupt Organizations: A Manual for Federal Prosecutors* 246 (4th ed. 2000).

25. *See, e.g.*, *United States v. Taylor*, 54 F.3d 967, 973 (1st Cir. 1995) (holding that the "training mission" and the second robbery were part of the same common scheme).

26. *See Zafiro v. United States*, 506 U.S. 534, 541 (1993) ("Joint trials 'play a vital role in the criminal justice system.'" (quoting *Richardson v. Marsh*, 481 U.S. 200 (1987))). Justice O'Connor went on to state that the joint trial system "promoted efficiency and served the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*

27. FED. R. CRIM. P. 14, *supra* note 21 (quoting Rule 14 in full).

jury as to which evidence it should consider as part of each offense.²⁸ A limiting instruction places faith in the jury's ability to distinguish the evidence intelligently and apply the law as to each offense. Depending on the number of offenses joined and the complexity of the evidence, this may be no easy task for the jury.

The jury is asked to consider evidence that might not be admissible if the trials were severed. Take for example, a defendant accused of two robberies. The robberies occurred within two weeks and ten miles of each other and were committed by a man with a dark suntan who was wearing sunglasses.²⁹ The two robberies could properly be joined under the language of Rule 8 because the robberies were "of the same or similar character."³⁰ The prosecutor must introduce evidence as to each offense and prove each offense beyond a reasonable doubt. In a separate trial, evidence of the second robbery could not be admitted unless it tended to show identity, plan, or otherwise fell into the narrow category of exceptions prescribed by the Rules of Evidence.³¹ When the offenses are of a "garden variety," and present no particularity from which the jury could draw the inference of identity, the second robbery

28. See FED. R. CRIM. P. 14 construed in U.S.NITA Commentary, FED. R. CRIM. P. 14.

29. This is slight variation on the facts of *Drew v. United States*, 331 F.2d 85, 94 (D.C. Cir. 1964). There, the defendant was charged with robbery and an attempted robbery. *Id.* After a detailed examination of Federal Rules of Evidence 404(b), the court held that because evidence of one robbery would not have been admissible under the Federal Rules of Evidence if the offenses had been tried separately, and because the prosecution occasionally failed to distinguish between the two robberies, the defendant's motion to sever was improperly denied. *Id.* The *Drew* court endorsed a test that the evidence must be sufficiently "simple and distinct" to mitigate the dangers otherwise created by such a joinder. *Id.* at 93. Further, joining offenses creates a special burden on the counsel. If separate offenses are "to be tried together, both court and counsel must recognize that they are assuming a difficult task the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial." *Id.* at 94.

30. *Id.* at 93. The "of similar character" language of the rule was a controversial issue in the Advisory Committee. It originally read "of similar class" and was designed to restate the federal statute that allowed judges to join felonies. The most vigorous dissenter to this rule was Robert F. Maguire. Robert F. Maguire, *Proposed New Federal Rules of Criminal Procedure*, 23 OR. L. REV. 56, 58 (1943).

31. FED. R. EVID. 404(b) provides that:

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b).

would be inadmissible character evidence.³² The Rules of Evidence presuppose that a jury, when faced with multiple offenses against a single defendant, will infer that the defendant has a propensity for criminal action and convict on bad character alone. Commentators have argued, with varying degrees of success, that Rule 8(a) should be construed in tandem with the Federal Rules of Evidence and that joinder is proper only when the evidence would be admissible if the charges were tried separately.³³

2. *The Joinder of Offenders under the Federal Rules*

Federal Rule of Criminal Procedure 8(b) allows for joinder of defendants "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses."³⁴ For example, a defendant charged with a narcotics violation and a defendant charged with arson and mail fraud could not be joined unless the government could show that acts are connected as part of the "same series of acts."³⁵ In one respect, Rule 8(b) is a narrow rule that, unlike Rule 8(a), does not allow defendants to be joined if their offenses are of the same or similar character or arose out of a common scheme. On the other hand, the last two sentences of 8(b) represent a more expansive role of joinder than was permitted at common law in most jurisdictions.³⁶ Rule 8(b) goes on to state that: "[t]he defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count."³⁷ These

32. *Drew*, 331 F.2d at 90. See, e.g., *United States v. Solomon*, 490 F. Supp. 373, 375 (S.D. Ga. 1980) (evidence of other crimes is admissible to show plan, identity and preparation); *Commonwealth v. Morris*, 425 A.2d 715, 720-21 (Pa. 1981) (deciding under a similar state law that while the evidence could be used to draw the inference of criminal disposition, it was inadmissible to show a modus operandi); *State v. Romero*, 634 P.2d 954, 956-57 (Ariz. 1981) (finding that under a similar state rule, evidence of other crimes is admissible to show identity).

33. See Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005, 1020 (1995) (arguing that the word "plan" in Rule 8, which excludes "unlinked" plans comprised of diverse, unrelated offenses, was used to mean the same thing in rule 404(b)).

34. FED. R. CRIM. P. 8(b). For the full text of the rule, see *supra* note 20.

35. The example in the text is based in part on the indictment in *Turkette*, 452 U.S. 576 (1981). See *infra* notes and text 67-81. If the government could prove a conspiracy to commit narcotics offenses and arson, joinder would be proper. See e.g., *United States v. Castellano*, 610 F.Supp. 1359, 1396 (S.D.N.Y. 1985) ("[C]onspiracy presumptively satisfies Rule 8(a).").

36. FED. R. CRIM. P. 8(b), Advisory Committee's notes.

37. FED. R. CRIM. P. 8(b); see *supra* note 20 (quoting Rule 8 in full).

two sentences effectively overturn the restrictive rule in cases like *McElroy* and recognized a growing judicial trend toward joinder in cases where all defendants were not charged with identical crimes.

The rule of joinder is not of constitutional magnitude.³⁸ It can, however, raise constitutional questions, particularly when a confession is involved. In a joint trial, when one defendant confesses, the confession may contain inculpatory references to other co-defendants. If the confessing defendant chooses not to testify at trial, the co-defendants are left unable to cross-examine the evidence against them. The use of this kind of confession in a joint trial violates the Sixth Amendment Confrontation Clause.³⁹ Even with a limiting instruction (i.e., informing the jury that the confession is only admissible against the confessing defendant), the use of the confession is barred.⁴⁰ This rule, otherwise termed the *Bruton* problem, does not bar joinder of accomplices, but it imposes a significant cost for joinder. The prosecutor could eliminate all references to all other co-defendants,⁴¹ try the defendants separately, or not use the confession at all. In cases where many defendants are properly joined, this can be particularly problematic. In large cases, theoretically, the probability of confessions should increase because of the reduced protection of one's own silence.⁴²

38. *Lane v. United States*, 474 U.S. 438, 445 (1986) (holding that a proper limiting instruction can resolve the prejudice of a misjoined count against a defendant).

39. *Bruton v. United States*, 391 U.S. 123 (1968). The Sixth Amendment reads, in full: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend VI.

40. *Bruton*, 391 U.S. at 136.

41. *Richardson v. Marsh*, 481 U.S. 200, 208 (1983) (limiting the *Bruton* rule to instances where the co-defendant is directly referred to in the confession; confessions which link a co-defendant to the crime if viewed in light of all the other evidence is admissible). *But see Gray v. Maryland*, 523 U.S. 185, 186-87 (1998) (holding that the redacting the co-defendant's name from the confession could not eliminate direct incrimination because the jury will often realize that the redaction refers specifically to the co-defendant).

42. See J.R. LUCAS, RESPONSIBILITY 69-72 (1993). The "Prisoners Dilemma" suggests a scenario where two prisoners are accused of a serious crime. The prosecution does not have enough evidence to convict either on the serious crime; however, they have enough to convict each on a minor crime. The prosecution attempts plea-bargaining with each, offering a pardon for both the major and minor crime in exchange for testimony securing the conviction of the other. Each prisoner has a strong incentive to confess, but in acting selfishly, both defendants will end up worse than if neither confessed. If both confess, they will receive a long sentence for pleading guilty to a major crime. By keeping silent, they

Even when joinder is proper, a judge may order a severance under Federal Rule of Criminal Procedure 14. Rule 14 states that defendants and offenses *may* be severed if a joint trial would prejudice either a defendant or the government.⁴³ As at the American common law, the Federal Rules place the decision to sever a trial squarely within the trial judge's discretion. A defendant seeking severance under Rule 14 bears the heavy burden of establishing that prejudice would result from his joinder with other defendants. As the Supreme Court announced in *Zafiro v. United States*, even if potential prejudice can be shown, "Rule 14 does not require severance . . . ; rather, it leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion."⁴⁴ Often, the given relief comes in the form of a limiting instruction. Severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."⁴⁵

Courts have refused to adopt bright line rules in this area. For example, in trials where defendants are properly joined only because of an overarching conspiracy count and the conspiracy count fails for lack of proof, courts are loath to sever the trials or grant new trials upon review.⁴⁶ This is because courts have opted for the flexible standard of "substantial prejudice" rather than a rigid rule.⁴⁷ After *Zafiro*, judges read Rule 14 to tolerate some prejudice in its application.⁴⁸ Courts have

may only be convicted of the lesser offense. *Id.* The incentive to confess becomes greater as more defendants are joined. Each added defendant increases the other defendants' apprehension that someone will confess and thus implicate all of them. Acting to maximize pay-off, defendants in large trials may confess more readily. The *Bruton* problem does not arise in this scenario unless the confessor refuses to testify at trial. Alternatively, a co-defendant's testimony may exculpate a defendant. Because the co-defendant may not wish to waive his Fifth Amendment right and testify at trial, the exculpatory testimony will not be heard. In this respect joinder acts to silence the witnesses that may be the most helpful to the defendants case. *Id.* For a classical explanation of this problem, see Peter Westen, *The Compulsory Process Clause*, 73 MICH. L.REV. 73, 143 (1974); Russell D. Covey, *Beating the Prisoner at the Prisoner's Dilemma: The Evidentiary Value of a Witness's Refusal to Testify*, 47 AM. U.L. REV. 105 (1997).

43. FED. R. CRIM. P. 14; see *supra* note 21 (quoting Rule 14 in full).

44. *Zafiro v. United States*, 506 U.S. 534, 538-40 (1993).

45. *Id.*

46. See, e.g., *Shaffer v. United States*, 362 U.S. 511, 516 (1960).

47. See, e.g., *United States v. Lane*, 474 U.S. 438, 445 (1986).

48. Whether or not this application is beneficial is subject to some debate. Tolerating some prejudice places considerable faith in the jury's ability to differentiate between defendants and the proof offered of each offense. The ruling in *Shaffer* also seems to allow an unscrupulous prosecutor to allege a conspiracy without any proof and reap all of the benefits of joinder. Justice Douglas argued against this result that "allow[s] conspiracy to

held that a showing that a defendant would have a better chance of acquittal if tried alone is not sufficient to order a severance.⁴⁹ Mutually antagonist defenses alone are not enough to mandate severance.⁵⁰ Additionally, the trial judge's decision to join defendants is subject to review only for abuse of discretion, making joinder a difficult, if not impossible, decision to win on appeal.⁵¹

II. JOINDER AND RICO: THE ENTERPRISE TRIAL

Joinder under the Federal Rules is more liberal than it was under the American common law. Both methods, however, aim for a relatively simple trial of defendants related in the same transaction. RICO functions within the framework of the Federal Rules as a joinder mechanism, allowing joinder of defendants and offenses beyond what would be permitted under the Federal Rules in the context of predicate offenses standing alone. The RICO "enterprise" supplies the connection between superficially unrelated defendants committing diverse crimes and allows the group to be prosecuted in a single trial.

A. The RICO Statute

Congress enacted RICO in 1970 as part of the Organized Crime Control Act.⁵² RICO has proven to be an adaptive statutory scheme. It encompasses both criminal activity that infiltrates legitimate businesses and criminal activity that conducts itself in a business-like manner.

The statute defines a complex crime, in some ways akin to conspiracy in that group crime is targeted and the commission of a "predicate" crime is involved. But RICO accomplishes more than traditional conspiracy law. It strikes at the organization itself, through

be put to new and dangerous uses when we sanction the practice observed here." *Shaffer*, 362 U.S. at 534. Yet a bright line rule that provides mandatory severance when the claims that facilitate joinder fail may have an inapposite effect. Courts balancing efficiency versus the risk of prejudice have firmly put their thumb on efficiency. Thus, such a bright line rule may deter the judge from dismissing a conspiracy charge at the cost of severing the defendants' trials and rehearing the evidence in each case. Thus, perhaps the more sensible determination is the one the court in *Shaffer* made.

49. *Zafiro*, 506 U.S. at 540.

50. *Id.* at 542.

51. UNITA commentary, *supra* note 28; *see id.* at 541-42.

52. As such, RICO was one element of a comprehensive effort to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering-process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988).

the individuals who affect or are affected by it.⁵³ Before RICO's enactment, members of a criminal syndicate could only be prosecuted individually or as part of a conspiracy. Using RICO, the government can prosecute individuals employed by or associated with a criminal enterprise, forming one criminal "enterprise trial" and prosecuting a wide scope of criminality because RICO's predicate offenses are themselves diverse.⁵⁴

In brief, 18 U.S.C. §1962(c), RICO's core prohibition, makes it a crime for a person to conduct the affairs of an enterprise through a pattern of racketeering activity or collection of an unlawful debt.⁵⁵ The

53. Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774, 775 (1988). Goldsmith explains:

Congress recognized that previous efforts against organized crime had failed because the focus had been on individual prosecutions rather than on organizational foundations. Since the structure and strength of organized crime transcend its membership, criminal enterprises could thrive despite successful individual prosecutions. Reform, therefore, was aimed at the enterprise itself—both directly and through the means by which organizational control was often acquired.

Id.

54. G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237, 250 n. 151, 299 n.165 (1982).

55. RICO, § 1962, provides in full:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of § 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

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

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

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962 (2004).

terms "enterprise," "pattern," and "racketeering activity" are not traditional or common law concepts, but they are drafted in terms of common law elements as well as statutory constructs.⁵⁶ An enterprise, as defined by section 1961(4), "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."⁵⁷ Likewise, section 1961(1) defines "racketeering activity" roughly as (1) a crime of violence, (2) provision of illegal goods and services, (3) corruption in government or labor unions, or (4) commercial fraud.⁵⁸ Acts of "racketeering activity" become a "pattern" when they are "continu[ous] and relat[ed]," rather than "isolated" or "sporadic."⁵⁹

RICO, like any offense, can be broken down into person, conduct, surrounding circumstances, result, and corresponding states of mind.⁶⁰ The persons subject to RICO are limited to those "employed by or associated with" the enterprise. In order to violate RICO the person must conduct (or participate) through "racketeering activity" and that conduct must form a "pattern."⁶¹

To violate section 1962(c), the surrounding circumstances must

Read together, each section (a)-(d) builds on the next, establishing multiple ways to violate the RICO statute. Each section provides remedies that are cumulative and not mutually exclusive. Section (c), the "core" provision, is the most sophisticated and complex violation of RICO. Subsections (a) and (b) supplement (but do not supplant) the prohibitions of subsection (c). They provide additional ways of violating RICO's core provision, by "investment and use" or "acquisition and maintenance" of the enterprise. On the other hand, subsection 1962(d) is an "inchoate" version of each of the other prohibitions. Its violation contemplates, but does not require, a substantive violation of the Section. Thus, taken together, as they must be, the subsections of § 1962 — the prohibition provisions of RICO — provide a rich variety of ways to violate RICO, and its subsections fully cover the wide range of roles (e.g., "perpetrator," "victim," "prize," and "instrument") involved in RICO violations — by, through, and against an "enterprise." See generally, Thomas O'Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989) [hereinafter *RICO Enterprise Concept*].

56. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 149-50 (1987) ("RICO is designed to remedy injury caused by a pattern of racketeering, and concepts such as RICO 'enterprise' and 'pattern of racketeering activity' were simply unknown to common law.") (internal citations omitted).

57. 18 U.S.C. § 1961(4).

58. Blakey, *supra* note 54, at 300-06.

59. *United States v. Turkette*, 452 U.S. 576, 583 (1981); see *infra* notes 73-87 and accompanying text.

60. G. Robert Blakey & Kevin P. Roddy, *Reflection on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1666-75 (1996); G. Robert Blakey & Brian Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 1044-50 (2002).

61. The pattern requirement is discussed *infra* Part II(C).

show a connection between RICO's key elements, "enterprise," "pattern," and "racketeering activity." Specifically, the government must prove: 1) the existence of the enterprise, 2) the defendant's employment by or association with the enterprise, 3) the pattern of racketeering activity, 4) the conduct of the enterprise's affairs "through" the pattern, and 5) the enterprise's effect on interstate or foreign commerce.⁶² In addition to these existing circumstances, the substantive offense also incorporates the existing circumstances that are required to commit the predicate racketeering acts. RICO does not require a result beyond that required of the predicate acts. That is to say, the statute does not require that any particular event be caused by the surrounding circumstances. While the substantive offense might require a "result," RICO does not under section 1962(c).⁶³

Nothing on the face of RICO indicates a *mens rea* requirement beyond that of the predicate offense. When a statute does not prescribe a mental element, one may be read into the statute consistent with legislative intent.⁶⁴ Traditionally, if a criminal statute is not merely regulatory, a *mens rea* requirement is required.⁶⁵ Absent a contrary intent, courts read the conduct requirement to require a "knowing" state of mind.⁶⁶ In addition, the defendant must "know" of the surrounding circumstances. This is with the exception of RICO's jurisdictional requirement that the enterprises have an affect on interstate commerce. The government need not prove state of mind as to the effect of the enterprise's activities on commerce.⁶⁷

B. RICO as a Joinder Mechanism

The "heart beat" of the RICO statute is the "enterprise."⁶⁸ The enterprise concept allows joinder of defendants and offenders

62. Nancy L. Ickler, Note, *Conspiracy to Violate RICO: Expanding Traditional Conspiracy Law*, 58 NOTRE DAME L. REV. 587, 607-08 (1983).

63. *But cf.* 18 U.S.C. § 1962 (b) (requiring acquisition or maintenance as an element of the offense).

64. *United States v. Bailey*, 444 U.S. 394, 403-09 (1980). *See also United States v. Gypsum Co.*, 438 U.S. 422, 438 (1978) ("Certainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with the intent requirement.").

65. *Morrisette v. United States*, 342 U.S. 246, 258-59 (1952) (*scienter* required for common law offenses, but not regulatory offenses).

66. *Blakey & Murray*, *supra* note 60.

67. *See, e.g., United States v. Feola*, 420 U.S. 671, 679 (1975) (holding that knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a *mens rea* requirement).

68. *See RICO Enterprise Concept*, *supra* note 55, at 646.

“employed by or associated with” an enterprise or “who conspire to violate section 1962(c).”⁶⁹ The enterprise concept is an overarching element that, like conspiracy, can satisfy the requirements of Federal Rule 8(b). The “enterprise” connects superficially unrelated defendants who may not otherwise have been joined. The scope of the trial is thus highly dependant on how the prosecutor defines the “enterprise.”

A RICO enterprise is defined as “include[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”⁷⁰ Congress chose to define enterprise broadly, using the word “include[ing]” to indicate that individuals, partnerships, and corporations are words of illustration;⁷¹ enterprises existing beyond the foresight of the drafters may be within the scope of the definition.

Courts applying this language have found private businesses, labor organizations, non-profit organizations, marriages, government offices and other “associations in fact” to be an “enterprise” within the statutory definition of the word.⁷² Despite the broad definition of “enterprise” and a congressional direction that RICO “shall be liberally construed to effectuate its remedial purposes,”⁷³ over ten years after the passage of RICO, there remained questions concerning the scope of the term “enterprise.”⁷⁴ In order to see the practical effect of the RICO

69.

70. 18 U.S.C. §1961(4) (2004). For an excellent history of the court’s interpretation of “association in fact,” see Paul Edgar Howard, Note, *Quo Vadis, Association in Fact? The Growing Disparity Between How Federal Courts Interpret RICO’s Enterprise Provision in Criminal and Civil Cases (With Little Statutory Background to Explain Why)*, 80 NOTRE DAME L. REV. 781, 801 (2005).

71. *United States v. Masters*, 924 F.2d 1362, 1366 (7th Cir. 1991).

72. *RICO Enterprise Concept*, *supra* note 55, at 654-56.

73. Pub. Law. No. 91-452, § 9.4(a), 84 Stat. 947 (1970). RICO, like the antitrust statutes on which it was modeled, uses “a generality and adaptability [of language] comparable to that found to be desirable in constitutional provisions.” *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1993). RICO was drafted “broadly enough to encompass a wide range of criminal activity, taking many forms, and likely to attract a broad array of perpetrators operating in many different ways.” *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989). The court in *H.J., Inc.* stated that “[t]he occasion for Congress’ action was the perceived need to combat organized crime. But Congress, for cogent reasons, chose to enact a more general statute.” *Id.* Thus, like the antitrust statutes, “RICO is to be read broadly.” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497-98 (1984).

74. *See United States v. Sutton*, 605 F.2d 260 (6th Cir. 1979) (holding that illegitimate enterprises were beyond the ambit of the RICO statute based on the legislative intent), *rev’d en banc*, 634 F.2d 1001 (6th Cir. 1980). *See also United States v. Cauble*, 706 F.2d 1322, 1330 (5th Cir. 1983), *cert. denied*, 465 U.S. 1005 (1984) (“enterprise criminality” consists of “all types of organized criminal behavior [ranging] from simple political corruption to sophisticated white collar crime schemes to mafia-type endeavors.”) (citations omitted).

enterprise as a joinder mechanism, it is necessary to consider cases where the court held that "enterprises" did not extend to "illegitimate enterprises."

1. *Turkette: The Magna Carta of RICO Prosecutions*

The *Turkette* case involved a nine-count indictment that charged thirteen men with conspiracy to conduct and participate in the affairs of an enterprise engaged in interstate commerce through a pattern of racketeering activity.⁷⁵ The only common thread in the nine-count indictment was defendant Turkette's alleged leadership in the criminal organization.⁷⁶ The Court of Appeals for the First Circuit held that because the alleged enterprise was wholly criminal in nature, it was not an "enterprise" within the meaning of the RICO statute.⁷⁷ When the

Defendants in RICO litigation often question whether RICO applies beyond "organized crime" in the Mafia sense of the word, as if "white-collar crime" were not sometimes "organized." To be sure, "a" "purpose of RICO" was to combat "organized crime," but that specific purpose was not its "only" purpose. "[A]lthough the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO's use to members of organized crime." *Owl Constr. Co., Inc. v. Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984) (quoting *United States v. Uni Oil Inc.*, 646 F.2d 946, 953 (5th Cir. 1981)). "[C]ommentators have persuasively and exhaustively explained why the statute [does] not require [such a showing]." *Id.* (citations omitted). Accordingly, RICO fits well into the typical pattern of Federal legislation aimed at a particular problem, but drafted in all-purpose language.

The Ku Klux Klan Act of 1871 (18 U.S.C. §§ 241-42 (criminal sanctions) and 42 U.S.C. § 1981, *et seq.* (civil sanctions)) is a classic example of this type of legislation. Congress specifically aimed the 1871 Act at the depredations of the Klan in the South after the Civil War, but under the Act, its criminal and civil sanctions apply to "any person" who deprives another of civil rights guaranteed under the Constitution or other Federal law. It equally applies today, for example, to the unlawful conduct of police officers, as in the infamous Rodney King incident in Los Angeles. See *Monroe v. Pape*, 365 U.S. 167, 183 (1961) ("[The KKK Act is] cast in general language and is applicable to Illinois as it is the States whose names were mentioned over and again in the debates."), *overruled on other grounds*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Koon v. United States*, 518 U.S. 81, 85-88 (1996) (reviewing the facts of the prosecution of the Los Angeles police officer under 18 U.S.C. § 242 for the beating of Rodney King). King subsequently obtained a \$3.8 million settlement on his civil rights claim under 42 U.S.C. § 1983. See Charles LeDuff, *12 Years After the Riots, Rodney King Gets Along*, N.Y. TIMES, Sept. 19, 2004, at 18.

75. *United States v. Turkette*, 452 U.S. 576, 578-79 (1981).

76. *Id.* at 579.

77. Compare *United States v. Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1980) (holding that the defendants were all entitled to new trials because joinder was entirely prejudicial when the RICO counts failed) with *United States v. Sutton*, 605 F.2d 260 (holding that, when the RICO count failed because the enterprise was wholly criminal in nature, all defendants were entitled to a new trial because of prejudicial misjoinder).

RICO claim failed, the joinder of each of the defendants became improper, and thus, each defendant was granted a new trial.

The Supreme Court in *Turkette* rejected this interpretation of RICO as inconsistent with the plain language of the statute.⁷⁸ The statute, on its face, contains no limitation on its application to illegitimate enterprises. Had Congress intended to include such a limitation, "it could have easily have narrowed the sweep of the definition by inserting a single word: 'legitimate.'"⁷⁹

The definition of enterprise in section 1961(4) includes two categories: partnerships, corporations and other "legal entities; and "any union or group of individuals associated in fact."⁸⁰ The Court rejected the use of the *ejusdem generis* doctrine to read the statute as if "associations in fact" was merely a more general description of the first category of legitimate enterprises.⁸¹ Instead, "associations in fact" is a "separate type of enterprise to be covered by the statute."⁸²

This reading of RICO does not create the internal inconsistencies of which the Circuit Court opined.⁸³ Including illegitimate associations in the definition of an "enterprise" does not merge the "pattern of racketeering" with the concept of "enterprise." The existence of the "enterprise" is a separate requirement which can be satisfied by "evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit."⁸⁴ The "pattern of racketeering" is a series of offenses prescribed by statute in section 1961(1).⁸⁵ While the proof of the "enterprise" and the

78. *Turkette*, 452 U.S. at 580-81 ("In determining the scope of a statute, we first look to its language.").

79. *Id.*

80. 18 U.S.C. §1961 (4) (2004).

81. *Turkette*, 452 U.S. at 581.

82. *Id.* at 582.

83. *Id.* at 582-583. The *Turkette* went on to state that:

If "a pattern of racketeering" can itself be an "enterprise" for the purposes of section 1962(c), then the two phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs through [a pattern of racketeering activity]" add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.

Id. at 582.

84. *Id.* at 579, 583. The Court found sufficient government allegations that the enterprise consisted of a "group of individuals associated in fact for the purpose of illegally trafficking in narcotics and other dangerous drugs, committing arsons, utilizing the United States mails to defraud insurance companies, bribing and attempting to bribe local police officers, and corruptly influencing and attempting to corruptly influence the outcome of state court proceedings." *Id.* at 579.

85. *Id.* at 583. The "pattern of racketeering activity" is not as easily determined as the

"pattern of racketeering activity" may overlap, that does not mean that the requirements are one in the same.⁸⁶

Lastly, the Court rejected an argument that the interpretation of RICO to include illegitimate enterprises would substantially enlarge the federal jurisdiction into criminal law enforcement, an area of traditional state control.⁸⁷ Even if RICO does change the balance of criminal enforcement, "Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure."⁸⁸ The Court found sufficient evidence in the legislative record to suggest that Congress purposefully moved to change this balance, because existing state and federal laws were inadequate to address the growing problem of organized crime.⁸⁹

a. *Proving the Enterprise*

The Court in *Turkette* set down the rule that the existence of racketeering activity and enterprise are distinct elements of RICO. The "enterprise" can be proved by "evidence of an ongoing organization," and by "evidence that the various associates function as a continuing unit."⁹⁰ In instances where the alleged enterprise is a corporation or a partnership, the enterprise element is satisfied by proof of the organization's legal existence.⁹¹ Where the enterprise is an association in fact, often the proof will be more difficult. A prosecutor may want to introduce expert evidence of the family structure of organized crime, their terminology, and modus operandi to help prove the existence of an enterprise.⁹²

Under the Federal Rules of Evidence, an expert is allowed to offer testimony that will "assist the trier of fact to understand the evidence or to determine a fact in issue."⁹³ For example, a RICO prosecution may

court in *Turkette* lets on. See notes and text *supra* Part II(c).

86. "While proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." *Turkette*, 452 U.S. at 583.

87. *Id.* at 586.

88. *Id.*

89. *Id.*

90. *Id.* at 583.

91. *Turkette*, 452 U.S. at 581-82.

92. Teresa Bryan et al., *Racketeer Influenced and Corrupt Organizations*, 40 AM. CRIM. L. REV. 987, 997 n.73 (2003); U.S. Department of Justice, *supra* note 24, at 277.

93. Federal Rule of Evidence 702 reads in full:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient

want to introduce explanations of organized crime structure and the jargon of the leadership hierarchy (i.e.: "capo," "captain," or "crew"). In *United States v. Daly*, the expert testimony of an FBI agent was admitted, outlining the structure of the Gambino crime family, with whom the defendants were allegedly associated. The agent described the method by which the family had gained control over certain labor unions in the New York City area.⁹⁴ As part of his testimony, the agent identified labor unions, officials, and members of the crime family who appeared on surveillance tapes admitted against all of the defendants. The agent's testimony was "relevant to provide the jury with an understanding of the nature and structure of organized crime families" because "[t]here is no question that there was much that was outside the expectable realm of knowledge of the average juror."⁹⁵ The courts in applying this rule admit the background expert testimony and allow the jury to consider such evidence as "proof of th[e] overall continuing enterprise."⁹⁶

Admission of background testimony relevant to the general nature of mob families has been able to withstand a challenge based on Rule 703, the Bases of Opinion by Experts. This rule provides, in part, that the facts or data relied upon by the expert, "if of a type reasonably relied upon by experts in the particular field . . . , do not need to be admissible into evidence" in order to allow the expert opinion to be admitted.⁹⁷

facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702.

94. *United States v. Daly*, 842 F.2d 1380, 1388 (2d Cir. 1988).

95. *Id.* at 1388. The *Daly* court was not entirely faithful to the text of Rule 702. The rule does not require a showing that the expert testimony consists of information beyond the expertise of the jury; it does, however, require that the information "assist" the jury in understanding the evidence. FED. R. EVID. 702, *supra* note 93.

96. *Daly*, 842 F.2d 1380, 1389.

97. Federal Rule of Evidence 703 reads in full:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

FED. R. EVID. 703.

The Federal Rule altered the common law restrictions on the facts and data an expert may rely on in forming his opinion. The expert's reasonable reliance tended to weigh in favor of

The Advisory Committee notes explain that a physician in his practice forms a diagnosis based on numerous sources: test results, statements by the patient and relatives, and the opinion of other doctors.⁹⁸ Most of these sources would be admissible, but only at the cost of considerable time at trial and cost of production. Yet, the doctor can make a life or death decision in reliance upon these sources. Thus, the doctor's expert opinion "expertly performed and subject to cross examination, ought to suffice for judicial purposes."⁹⁹

In the context of a RICO trial, the "reasonable reliance" requirement of Rule 703 can be an ambiguous term. The government agents testifying to the nature and organization of the mob have relied on countless, nameless informers to form their understanding. In addition, they rely on thousands of hours of wiretaps and prior trial testimony of mob turncoats. These statements are inadmissible hearsay, yet, under the rule, if of the type reasonably relied upon by experts in the field, the expert opinion based upon them is admissible. One wonders if this is the sort of information that the drafters of the Rules of Evidence envisioned being admitted under Rule 703. The FBI agent testifying in these trials can hardly be said to be making "life or death" decisions when formulating a mental glossary of mob vernacular. Furthermore, the "reasonableness" of the agent's reliance could be questioned. Informants are creatures of the underworld themselves and thus of questionable credibility. Allowing informant information into the trial in this way can invite untrustworthy testimony without giving the defendant the opportunity to cross-examine the informant. On the other hand, there may not be a more knowledgeable (or reasonable) source than an informant whose life and livelihood revolve around such customs and vernacular. Accordingly, the courts have been not been receptive to challenges to the expert's opinion based on informant hearsay statements.¹⁰⁰ The "liberal thrust" of the federal rules grants the

the evidence's "particular trustworthiness," which satisfied the Confrontation Clause. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (holding that the Confrontation Clause does not allow admission of hearsay testimony if the declarant is unavailable for cross-examination, unless the statement bears adequate "indicia of reliability," which can be inferred if "the evidence falls within a firmly rooted hearsay exception" or exhibits "particularized guarantees of trustworthiness"). Whether this exception survived *Crawford* is now the subject of some debate. See generally Ross A. Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and the Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539 (2004).

98. FED. R. EVID. 703. Advisory Committee's note.

99. *Id.*

100. *United States v. Brady*, 26 F.3d 282, 287 (2d Cir. 1994); *United States v. Salerno*, 868 F.2d 524, 534-536 (2d Cir. 1987); *United States v. Daly*, 842 F.2d 1380, 1387-88 (2d

judge "authority and discretion to determine whether novel scientific evidence is trustworthy."¹⁰¹ Additionally, the expert evidence is subject to cross-examination and the broad language of Rule 403.

Federal Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence."¹⁰² This limitation works together with the notion of relevance to provide a sliding scale of what evidence will be admitted.¹⁰³ Even information in newspapers relating to mob connections, where it was not used by the prosecutor in the trial, if it comes to the attention of the jury—or might have come to the attention of a jury—it resulted in granting a new trial in litigation prior to RICO.¹⁰⁴ The stereotypes surrounding organized crime are so damaging that judges feared that if the jury read or might have read such an article, they would be inclined to convict on bad character alone, rather than forming an impartial assessment of the defendant's guilt.¹⁰⁵ Thus, mere publicity surrounding the trial can become grounds for a mistrial if the trial court does not take a prompt and effective corrective action to cure the taint of such reports.¹⁰⁶

The substantive element of a RICO charge changes the application of Rule 403 with respect to the admission of evidence concerning a defendant's organized crime connections. Where the alleged enterprise charged is a crime family, evidence that the defendant was "employed by or associated with" the family is an essential element of the charge.¹⁰⁷ If the enterprise is a "crew," a branch of a crime family, the prosecutor can refer to the larger crime family to establish the crew.¹⁰⁸ "In RICO cases, courts have refused to strike allegations of organized

Cir. 1988).

101. *United States v. Losascio*, 6 F.3d 924, 938 (2d Cir. 1993) (citing *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993)).

102. FED. R. EVID. 403.

103. *Id.* at Advisory Committee's note.

104. *United States v. Accardo*, 298 F.2d 133, 133 (7th Cir. 1962) (holding that "separation of jury, exposing it to newspaper publicity prejudicial to defendant, denied him fair trial, despite judge's admonition at voir dire, in absence of frequent, specific admonitions with reference to newspaper accounts"); cf. *United States v. Gigante*, 729 F.2d 78, 84 (2d Cir. 1984) (finding newspaper articles about the mob that would be generally prejudicial were admissible to prove the reasonableness of the fear of a certain loan shark).

105. *Accardo*, 298 F.2d at 139 (Duffy, J., concurring).

106. *Id.* at 136 (majority opinion).

107. 18 U.S.C. § 1962(c) (2004).

108. *United States v. Scarpa*, 913 F.2d 993, 1011-12 (2d Cir. 1990).

crime connections [when they] 'serve to identify the "enterprise" and the means by which its members and associates conduct various criminal activities.'"¹⁰⁹ Evidence that is already probative becomes essential, and should not be excluded under the rule.¹¹⁰ The same is true regarding expert testimony. Evidence tending to show the enterprise's existence and ongoing organization is highly probative and, thus, rarely excluded under Rule 403.¹¹¹

2. *Scope of the Conspiracy*

We have seen how RICO's enterprise concept has played out in prosecuting substantive offenses. RICO also aimed at inchoate group crime through its conspiracy provision.¹¹² The majority of RICO conspiracy cases charge a conspiracy to violate section 1962(c), conducting an enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.¹¹³ In interpreting the conspiracy provision, courts have held that the words "to conspire" in the statute invoke the requirements of common law conspiracy.¹¹⁴ The basic

109. *Id.* at 1013 (citing *United States v. Napolitano*, 552 F.Supp. 465, 480 (S.D.N.Y. 1982)).

110. *Id.* (citing *United States v. DePalma*, 461 F.Supp. 778, 797 (S.D.N.Y. 1978)).

111. *United States v. Badalamenti*, 810 F.2d 17 (2d Cir. 1987); *Salerno*, 868 F.2d 524 (2d Cir. 1989).

112. Ickler, *supra* note 62, at 588. To violate RICO, "(1) a person [must] engage in (2) a pattern of racketeering activity (3) connected to the acquisition, establishment, conduct or control of an enterprise." *St. Paul Mercury Ins. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000) (citing *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988) (emphasis in the original). "Each concept [in this prohibition] is a term of art which carries its own inherent requirements . . ." *Elliot v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989). Restated in plain English, RICO's core provision prohibits a person employed by or associated with an enterprise from conducting the affairs of the enterprise through a pattern or racketeering activity. Section 1962(d) builds on this core section by prohibiting conspiracies to violate the core provision. For the content of subsections (a), (b), and (c), see 18 U.S.C.A. § 1962.

113. Ickler, *supra* note 62, at 588.

114. The relevant statutory phrase in section 1962(d) is "to conspire." *Salinas v. United States*, 522 U.S. 52, 63 (1997) ("We presume Congress intended to use the term in its conventional sense, and certain well-established principles follow."). See generally *Aetna Casualty & Security Co. v. P. & B. Autobody*, 43 F.3d 1546, 1561-63 (1st Cir. 1994) (defendants need not know details or roles of others if they know of a larger scheme to be guilty of a conspiracy, they need only have "knowingly joined" a conspiracy); *United States v. Gonzales*, 921 F.2d 1530, 1539-40 (11th Cir. 1991) ("That the many defendants and predicate crimes were different, or even unrelated, . . . [is] irrelevant, so long as it . . . [can] be reasonably inferred that each crime was intended to further the enterprise."); *United States v. Rastelli*, 870 F.2d 822, 828 (2d Cir. 1989) (requiring that a defendant "know the general nature of the enterprise and know that the enterprise extends beyond his individual role"). *United States v. Friedman*, 854 F.2d 535, 562 (2d Cir. 1988) ("A RICO conspiracy is . . . by definition broader than an ordinary conspiracy to commit a discrete crime . . .");

conduct required is agreement. At the English common law, a conspiracy was punishable even though no overt act, that is, no act beyond the mere making of the agreement, was completed.¹¹⁵ A mere tacit understanding is sufficient to find an agreement was formed.¹¹⁶ Thus, it is possible for two or more parties to form a conspiracy even though they do not know the others' identity, are not all aware of the details of the objective, or are not all original members of the scheme.¹¹⁷ The clandestine nature of conspiratorial agreements often makes it difficult to present direct evidence that an agreement transpired. Thus, juries may properly "rely on inferences drawn from the course of conduct of the alleged conspirators" to establish an agreement.¹¹⁸

The person's privity to the agreement and the objective of the agreement control the scope of the conspiracy. In this regard, RICO represents an expansion of traditional conspiracy law. At American common law, defendants engaged in diverse criminal activity that was superficially unrelated could not be joined in one conspiracy. This was because a single agreement or common objective could not be inferred from such assorted activity. RICO helps eliminate this problem. "[T]he object of a RICO conspiracy is to violate a substantive RICO provision . . . and not merely to commit each of the predicate crimes

United States v. Valera, 845 F.2d 923, 930 (11th Cir. 1988) ("Under the RICO Act . . . a series of agreement, which, pre-RICO, would constitute multiple conspiracies, can form, under RICO, a single 'enterprise' conspiracy"); United States v. Rosenthal, 793 F.2d 1214, 1233-34 (11th Cir. 1986) ("Congress intended to authorize the single prosecution of a multifaceted, diversified conspiracy The RICO statutes permit the joinder into a single RICO count or counts several diverse predicate acts . . .").

115. See, e.g., King v. Gill, 106 Eng. Rep. 341 (1818), Poulterers' Case, 77 Eng. Rep. 813 (1611). Despite that at common law, no overt act was required, the law of conspiracy does not violate the oft quoted precept that "the law does not punish criminal thoughts." This is because "the criminal agreement itself is the *actus reus*." United States v. Shabani, 513 U.S. 10, 16 (1994).

116. See e.g., Iannelli v. United States, 420 U.S. 770, 778 (1975) ("The agreement need not be shown to have been explicit. It can instead be inferred from the facts and circumstances of the case"); United States v. Hartley, 678 F.2d 961, 969 (11th Cir. 1982).

117. United States v. Burchinal, 657 F.2d 985, 990-93 (8th Cir. 1981).

118. Interstate Circuit v. United States, 306 U.S. 208, 221(1939); accord WAYNE R. LAFAVE, CRIMINAL LAW 623 (4th ed. 2003). Allowing the prosecution to rely on inference of the agreement via the conduct of the alleged conspirators is by no means a new idea. This idea has been traced back to 1837 in an oft quoted jury instruction that read:

If you find that these persons pursued by their acts the same object, often by the same means, one performing one part of an act and the other performing another part of same act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object.

WAYNE R. LAFAVE, CRIMINAL LAW 623 (4th ed. 2003) (quoting Regina v. Murphy, 172 Eng. Rep. 502 (1837)).

necessary to demonstrate a pattern of racketeering activity."¹¹⁹ Thus, defendants are properly charged with a conspiracy to violate RICO even if they "did not commit or even agree to commit the predicate acts that are elements of a substantive count to be found guilty of the racketeering conspiracy, for 'it suffices that he adopted the goal of furthering or facilitating the criminal endeavor.'"¹²⁰

This broad definition of conspiracy, which requires neither overt acts¹²¹ nor an agreement to commit two predicate crimes,¹²² allows the statute to reach the higher level participants of organized crime. To appreciate this difference consider the scope of conspiracy under *Salinas v. United States*.¹²³ In that case, a sheriff and his deputy were charged with taking bribes in violation of section 666(a)(1)(B),¹²⁴ one substantive RICO count, and conspiracy to violate the RICO statute. The deputy, Mario Salinas, was convicted of all but the substantive RICO count.¹²⁵ In appealing his conviction, Salinas challenged that he was entitled the jury instruction that, in order to be convicted for a RICO conspiracy, he must have committed or agreed to commit two predicate offenses.¹²⁶ A unanimous Court opined that Salinas was not entitled to such an instruction, as it was sufficient that Salinas "accepted numerous bribes and . . . knew about and agreed to facilitate the scheme."¹²⁷ The paradigm of an organized crime family is an insulated hierarchical system, wherein those in the bottom rungs of the ladder often are the ones committing the substantive offences under the knowledge and facilitation of the enterprise's leaders. The Court in setting aside the two-act rule in *Salinas* acknowledged that RICO enlarged the traditional scope of conspiracy and permits joinder of those who facilitate violations, but might otherwise be considered unrelated.

3. *The Scope of the Pattern*

RICO's enterprise concept plays a critical role in joinder of offenses and offenders. The concept unites what might otherwise be

119. *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978).

120. *United States v. Ciccone*, 312 F.3d 535, 542 (2d Cir. 2002) (RICO conspiracy required no overt act).

121. *Id.*

122. *United States v. Zichettello*, 208 F.2d 78, 99 (two act rule set aside).

123. *Salinas v. United States*, 522 U.S. 52, 63-4 (1997)

124. Theft or bribery concerning programs receiving Federal funds, 18 U.S.C. § 666 (2006); *Salinas*, 522 U.S. 52 (1997).

125. *Salinas*, 522 U.S. 52 (1997).

126. *Id.* at 61.

127. *Id.* at 66.

diverse offenses committed by the same defendant or defendants and makes joinder possible. Similarly, RICO's requirement of a "pattern of racketeering activity" unites what would otherwise be an assorted set of predicate offenses. The concept of a "pattern of racketeering activity" thus facilitates joinder beyond the common law conspiracy or the "common scheme" joinder of what the Federal Rules would allow in the context of individual offenses standing alone.

A pattern "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering . . ." ¹²⁸ The two violations may be violations of state or federal law, they need not be violations of the same statute, and the acts need not be previously charged. ¹²⁹ Simply proving two acts may not, however, be enough to establish a violation. The Supreme Court in *H.J., Inc. v. Northwestern Bell Telephone Co.*, ¹³⁰ held that the prosecution must prove a relationship between the predicate acts (or an external organizing principle) and continuity (or its threat) of those acts in order to prove a "pattern of racketeering activity." This test, commonly referred to as the "continuity plus relationship requirement," has read this provision to mean that "there is something to a RICO pattern *beyond* simply the number of predicate acts involved." ¹³¹

In order to establish continuity, the acts must either consist of "a series of related predicates extending over a substantial period of time" ¹³² or present "the threat of continuing activity" ¹³³ The Court suggested that continuity should be examined on a case by case basis, ¹³⁴ but that ultimately "development of these concepts must await future cases." ¹³⁵

The relationship requirement is met when a pattern of predicate

128. 18 U.S.C. § 1961(5) (2005). *See generally*, G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 TEMPLE L. Q. 1009, 1029-30 (1980) (describing the element of "pattern" in the RICO statute).

129. *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 482, 488-92 (1985) (holding that there was no requirement of a prior conviction of a racketeering offense in order to succeed on a civil RICO charge).

130. *H.J., Inc.*, 492 U.S. 229 (1989).

131. *Id.* at 238-39.

132. *Id.* at 242.

133. *Id.* at 239 (citing 116 CONG. REC. 18940 (1970) (Sen. McClellan (quoting S. REP. NO. 91-617))).

134. *Id.* at 243.

135. *H.J. Inc.*, 492 U.S. at 243.

acts "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."¹³⁶ This interpretation of "pattern" extends the scope beyond traditional conspiracy law¹³⁷ or "multiple scheme" joinder under the federal rules.¹³⁸ In organized crime prosecutions, the "pattern of racketeering activity" brings together an enterprise's illegal activities and allows for one trial.¹³⁹ The relationship between the "pattern" and the "enterprise" is key. Two racketeering acts "that are not directly related to each other may nevertheless be related indirectly because each is related to the RICO enterprise."¹⁴⁰ For example, evidence of a murder and an illegal sportbooking operation, are properly joined, provided that these "predicate act[s] [are] sufficiently related to the enterprise's activities."¹⁴¹ Further, the predicate acts need only be related to the affairs of the enterprise, they need not *further* the enterprise's business.¹⁴² Thus, the relationship between "pattern" and

136. *Id.* at 240 (quoting Dangerous Special Offender Sentencing Act, Title X, 18 U.S.C. § 3575 (repealed 1984)).

137. In traditional conspiracy law, charging one conspiracy and proving several conspiracies may justify a reversal, even if no evidence was improperly admitted against a defendant. *See, e.g.,* *Kotteakos v. United States*, 328 U.S. 750 (1946). That indictment charged one large conspiracy, and the prosecution proved eight smaller conspiracies. The Court found, "The dangers of transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place." *Id.* at 774. Further, to be guilty of a conspiracy charge, a defendant need not have been personally engaged in a prohibited activity. *Salinas v. United States*, 522 U.S. 52, 63-4 (1997). Aiders and abettors and co-conspirators are equally liable for predicate acts committed by co-defendants. *Salinas*, 522 U.S. at 63.

138. *See supra* notes 24-25 and accompanying text.

139. *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978) ("RICO helps to eliminate . . . [problems common to joint trials] by creating a substantive offense which ties together these diverse parties and crimes."); *United States v. Turkette*, 632 F.2d 896, 909-10 (1st Cir. 1980), *rev'd*, 452 U.S. 576 (1981) ("This case points up another infirmity in the government's interpretation of RICO: it avoids the strictures of Rule 8(b). By inserting the RICO conspiracy charge, the government consolidated in one indictment acts and transactions which otherwise could not have been joined.").

140. *United States v. Indelicato*, 865 F.2d 1370, 1383 (2d Cir. 1989) (*en banc*) (finding that three murders committed at the behest of the Bonanno crime family forms a pattern).

141. *United States v. Minicone*, 960 F.2d 1099, 1108 (2d Cir. 1992) ("[I]nformal organization associated for the common purpose of engaging in an ongoing course of criminal conduct, including extortion, loansharking, illegal gambling, and trafficking in stolen property" can demonstrate a pattern of racketeering activity).

142. *United States v. Losascio*, 6 F.3d 924, 943 (2d Cir. 1993) (deciding that, in the trial of John Gotti, the jury was properly instructed that it could find the defendants guilty even if it found that the racketeering acts charged in the indictment were committed exclusively for the individual's own purpose, not to further the goals of the Gambino

“enterprise” encompasses more than the acts might otherwise be joined absent a RICO charge.¹⁴³

4. Proving the Conspiracy

The co-conspirator exemption to the hearsay rule helps obviate the difficulties in proving large-scale conspiracies and conspiratorial agreements. At American common law and under the Federal Rules of Evidence, the statements of a party's co-conspirators can be used against a party as a party admission.¹⁴⁴ This hearsay exception is an important weapon in combating RICO offenses. The co-conspirator exemption to the hearsay rule (defined in the Federal Rules of Evidence as an admission by a party-opponent) states that “a statement is not hearsay” and is therefore admissible if made “by a coconspirator of a party during the course, and in furtherance of, the conspiracy.”¹⁴⁵ The rationale for this rule is based on a theory of agency. The “unity of interests” of the conspirators generally makes it reasonable to treat any statement against interest made by a co-conspirator as an adopted statement of the defendant.¹⁴⁶ A conspiracy need not be charged for the statement to be admissible, but the trial judge must find by a preponderance of the evidence that the statement was made by a co-conspirator of the defendant in furtherance of the conspiracy.¹⁴⁷ A statement consisting of merely “idle chatter” is thus excluded by the rule.¹⁴⁸

In a RICO trial, the statements of co-conspirators become vitally important in proving the scope of the enterprise and each defendant's

family).

143. *United States v. Sutton*, 605 F.2d 260, 274 (6th Cir. 1979) *rev'd*, 642 F.2d 1001 (6th Cir. 1980) (en banc). In *Sutton*, the defendants “were running a virtual department store of crime.” *Id.* at 274 (dissent). When the RICO charge failed in *Sutton*, “joinder of the remaining counts could not have been sustained under Rule 8.” *Id.* at 272; *see also Turquette*, 632 F.2d at 909-10.

144. Federal Rule 801(d)(2)(E) reads that a statement is not hearsay if it is:

[A] statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

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

145. *Id.*

146. *United State v. Gigante*, 166 F.3d 75, 83 (2d Cir. 1999).

147. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *accord United States v. Maldonado-Rivera*, 922 F.2d 934, 958 (2d Cir. 1990).

148. *Salerno*, 868 F.2d at 536.

role in the organization.¹⁴⁹ Furthermore, much more co-conspirator hearsay is available.¹⁵⁰ This is because "the conspiratorial ingenuity of La Cosa Nostra expands the normal boundaries of a criminal enterprise, and Rule 801(d)(2)(E) must expand accordingly to encompass the full extent of the conspiracy."¹⁵¹ There are more conspirators and thus more available statements in furtherance of the conspiracy, but also much more for a prosecutor to prove. The co-conspirator exception to the hearsay rule is useful in prosecuting organized crime because the hierarchical structure involved. This structure, with its various levels of participation, often includes oath of silence and threats discouraging members from testifying against each other. In the event that the government is able to "turn" one of the members, the testimony of the member about other conspirators' statement is admissible under the co-conspirator exception; it is often the most probative and important evidence in securing the conviction.¹⁵²

When Congress enacted RICO, it did so as part of a comprehensive effort to change the means by which the government attacked organized crime.¹⁵³ When Congress changed the substantive law, it necessarily changed the application of procedural and evidentiary rules. Thus, RICO's focus on "enterprise" criminality makes a single trial of all offenders in a crime family possible and appropriate. The statute's success has been in part because it permits a judge and jury to

149. See, e.g., *United States v. Amato*, 15 F.3d 230, 234 (2d Cir. 1994) (holding that statements informing other members "as to the progress or status of the conspiracy" are admissible under the exception); *United States v. Rastelli*, 870 F.2d 822, 837 (2d Cir. 1989) (finding that statements "which provide[s] reassurance, serve[s] to maintain trust and cohesiveness among them, or inform[s] [them] of the current status of the conspiracy further[s] the ends of the conspiracy") (internal citations omitted); *United States v. Paone*, 782 F.2d 386, 391 (2d Cir. 1986) (admitting a narrative of several murders by apprising a coconspirator of the progress of the conspiracy); *United States v. Persico*, 832 F.2d 705, 716 (2d Cir. 1987) (trial court's ruling on whether a statement was "in furtherance" of the conspiracy only overturned if clearly erroneous); U.S. Department of Justice, *supra* note 24, at 139-41.

150. *Gigante*, 166 F.3d at 82.

151. *Id.*

152. See e.g., *Paone*, 782 F.2d at 390. In *Paone*, one witness testified about a conversation regarding a murder in which the defendants participated. One defendant was "reported as commenting on the manner in which [the victim] was killed, stating that it took only one bullet." *Id.* Another defendant "was reported as saying he wished that he had been present to watch [him] bleed." *Id.* The court held that while this testimony was graphic and devastating to the defendant's case, it was nevertheless admissible under the exception. *Id.*

153. For a discussion of the legislative history surrounding RICO, see G. Robert Blakey, *The RICO Civil Fraud Action in Context*, 58 NOTRE DAME L. REV. 237, 249-80 (1982); see also, G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young*, 33 AM. CRIM. L. REV. 1345, 1666-75 (1995).

understand exactly what the defendants did in a way that the American common law procedural and evidentiary rules did not.

III. ENGLISH EXPERIENCE: JOINDER AND SEVERANCE

The success of RICO makes the statute an appealing model for other nation's legislation. In late 2004, when the U.K. considered modernizing its organized crime legislation, the Home Office looked to RICO.¹⁵⁴ After a cursory review of the statute, the Home Office in its White Paper, "One Step Ahead: A 21st Century Strategy to Defeat Organized Crime," dismissed RICO as "not need[ed] at this stage."¹⁵⁵ Its evaluation of the statute did not, however, consider the procedural and evidentiary impact of the statute. This section discusses the current landscape of the U.K. legal system with respect to its application of procedural and evidentiary rules. Part A briefly discusses organized crime in the U.K., as the nation's perception of the problem will inevitably effect the legislative relief fashioned. Part B explains the existing procedural rules and how they militate against prosecuting group crime in the U.K. Part C examines the evidentiary rules and corresponding rights of defendants.

A. Perception of the problem

In 2004, the Home Office issued a White Paper titled "One Step Ahead: A 21st Century Strategy to Defeat Organised Crime." The White Paper was not to first and, arguably, will not be the last, attempt to understand organized crime in the U.K. Previous inquiries occurred in 1989 when the Home Affairs Committee considered the impact of organized crime in connection with drug trafficking.¹⁵⁶ The issue was revisited again in 1995 by the Home Affairs Committee¹⁵⁷ and again

154. See HOME OFFICE, ONE STEP AHEAD: A 21ST CENTURY STRATEGY TO DEFEAT ORGANISED CRIME, 2004, Cm. 6167, at 40, available at http://www.homeoffice.gov.uk/docs3/wp_organised_crime.pdf [hereinafter White Paper].

155. *Id.*

156. This committee produced both the report DRUG TRAFFICKING AND RELATED SERIOUS CRIME, 1988-89, H.C. 370, and PRACTICAL POLICE CO-OPERATION IN THE EUROPEAN COMMUNITY, 1989-90, H.C. 363-I. Neither takes on trial procedure as a means of effectively enforcing existing states. Both these committees [sic] were representative of a growing European awareness of organized crime, particularly the transboundary issues of crime. See, e.g., HOME AFFAIRS COMMITTEE, ORGANISED CRIME: REPORT, TOGETHER WITH THE PROCEEDINGS OF THE COMMITTEE, 1994-95, H.C. 18-I, at ix n.1 [hereinafter 1995 REPORT] (citing Dutch Parliament, Italian Parliament, and EU Parliament reports on organized crime).

157. 1995 REPORT, *supra* note 156; HOME AFFAIRS COMMITTEE, ORGANIZED CRIME: MINUTES OF EVIDENCE, 1994-95, H.C. 18-II [hereinafter 1995 EVIDENCE]; HOME AFFAIRS

most recently in the White Paper. Nevertheless, these attempts were largely innocent of the procedural and evidentiary issues that surface in an organized crime trial. While most of these attempts considered and dismissed the implementation of a RICO-type statute, the analyses did not consider the advantages of modernizing the trial process. Specifically, the reports did not consider the benefits of a RICO-type trial in which the judge and jury can see exactly what the defendants have done, in way that was not exposed in the context of English common law offenses and their concomitant procedural and evidentiary rules.

B. *Organized Crime in the U.K.?*

The nation's perception of organized crime will inevitably shape the form of relief chosen. The clandestine nature of organized crime adds complexity to any assessment of the scope of the problem and the U.K. is no different.¹⁵⁸ The Committee Reports and White Paper see organized crime as primarily an issue of enforcement¹⁵⁹ and frontier control.¹⁶⁰ This summer, the White Paper proposed the creation of a new enforcement branch: The Serious Organized Crime Agency.¹⁶¹ The agency brings together the National Checking Service (NCS), the National Criminal Intelligence Service (NCIS), Her Majesty's Customs & Excise (HMCE), and the Immigration Service's intelligence efforts and eliminates problems of "duplication" and "bureaucracy."¹⁶²

The White Paper recognized, more so than any other attempt, that

COMMITTEE, ORGANIZED CRIME: MEMORANDA, 1994-95, H.C.18-II [hereinafter 1995 MEMORANDA].

158. Much of the U.S. information on the activities of organized criminals has been supplied via wiretaps obtained pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 212-225 (1968) (codified as amended at 18 U.S.C. §§ 2510-2521) (1988)); S. REP. NO. 90-1097, at 66 (1968). The U.K., in the wake of the July 2005 terrorist attacks, proposed changes to its domestic wiretapping law. See, e.g., Sarah Lyall, *3 Main British Parties to Back Tougher Antiterrorism Laws*, N.Y. TIMES, July 27, 2005, at A6 (indicating all three parties willingness to admit wiretap evidence in terrorism trials); Noel McAdam, *Phone-tap Plea in Terror Battle: Blair to Consider Move on Evidence*, BELFAST TELEGRAPH, July 22, 2005.

159. 1995 REPORT, *supra* note 156 (concluding that "there is a considerable need for coordination in intelligence sharing and operational action between agencies" but that better enforcement could be obtained through the "development of existing structures rather than the creation of a new one.").

160. *Id.* at xxxiv ("We conclude that it remains vital for the government to ensure that (a) that there is no erosion in the effectiveness of the United Kingdom's frontier controls, and (b) that the External Frontiers Convention, when it is eventually concluded, will be effective in protecting both Europe's external frontiers and the U.K.'s national borders.").

161. See White Paper, *supra* note 154, at 21.

162. *Id.* at 22.

"most organized criminals in the U.K. are U.K. nationals."¹⁶³ Until the late 1980s, the term "organized crime" was used "almost exclusively to describe Sicilian-American crime groups in North America."¹⁶⁴ Indeed, the 1995 reports on organized crime show almost no awareness of homegrown organized crime. The Home Office Report to the Committee suggested that "there do not appear to be any domestic groups in this country of the level of organization or sophistication that would meet the NCIS definition [of organized crime]."¹⁶⁵ Furthermore, the Committee found no evidence that organized crime was operating within the higher echelons of government or unions in the U.K.¹⁶⁶ Accordingly, since the U.K. found no evidence in 1995 of any problem starting at home, the response was largely an appeal for multilateral policing so as to prevent the spread of crime from nations in South America or Eastern Europe.¹⁶⁷

1. *The White Paper's Response*

The 2004 White Paper takes a different approach. The links between the U.K. and other nations are still emphasized, but the need for better legislation was acknowledged. The Home Office "found a number of areas where the current legal framework appears not to be fit for purpose in combating organized crime and has developed a series of proposals for enhanced powers to be targeted on those who cause most

163. *Id.* at 11.

164. 1995 MEMORANDA, *supra* note 157, Memo 15, at 193 (Dr. Barry A. K. Rider, *Organized Crime in the United Kingdom: A Personal Perspective*).

165. 1995 REPORT, *supra* note 156, at xv (citing 1995 EVIDENCE, *supra* note 157, at 147, Q6). The report goes on to state the opinion of one expert that "there is little evidence that in the United Kingdom, there are indigenous groups which have these characteristics [i.e. of organized crime groups]." Further, the CPS reported that the "gang-land crime in East London, such as that encountered in the 1960s . . . has not generally been encountered in the last few years." *Id.* at xv.

166. See 1995 EVIDENCE, *supra* note 157, at 147, Q361. The U.K. was found to be less likely than other countries to be vulnerable to corruption. The Home Office memo stated in part this is because the U.K. does not have "a history of corruption which can help organized groups get a strong foothold. We benefit from having a well established public sector with safe guards . . . against partiality and corruption." *Id.*

167. See 1995 REPORT, *supra* note 156, at xv-xviii. The 1995 report evinces a very "its an island, so if you didn't bring it, it's not here approach" type approach. As stated above, the recommendations are aimed at prevention and policing rather than legislative enactments and trial procedures. This is not to say that this approach is right or wrong, only that the U.K. perception of organized crime has shaped the Committee's response. To the extent the 1995 report addressed the criminal procedure, and it did in paragraphs 148-157, the Committee did not address issues of joinder and evidence. The only procedural reform raised (and it was rejected) was a proposal to limit disclosure. *Id.* at liii.

harm."¹⁶⁸ Thus, the White Paper begins with RICO, the mother of all organized crime statutes.¹⁶⁹

The White Paper begins its analysis by, quite correctly, pointing out the advantages of the statute. RICO enables trials to be removed to federal courts,¹⁷⁰ and allows for longer sentences for offenders.¹⁷¹ RICO also allows the prosecutors to link together otherwise diverse crimes committed in the context of racketeering. The White Paper points out, as most important among the statute's salient features, the use of civil RICO as an enforcement measure.¹⁷² The Paper concludes that:

Against this background, the Government has carefully considered the case for RICO style legislation to be introduced here. We are not convinced of the need at this stage. To work, RICO still needs sufficient evidence to convict on the underlying "predicate" offence before these can be set in the wider racketeering context. It does not, therefore, help against those targets who have evaded detection altogether. RICO appears to be more useful against traditional "racketeering" organisations than the sort of large scale trafficking groups which are the main threat in the U.K.¹⁷³

Instead of suggesting a RICO-type statute, the Commission opts for future legislative enactments that enhance current legislation. Specifically, organized criminals are most likely to be charged with a specific act to supply commodity, which as the White Paper suggests, only counters low-level organizers and couriers.¹⁷⁴ Additionally, the paper suggests other legislative solutions like revamping conspiracy provisions or creating a membership crime.¹⁷⁵ To the degree that these

168. White Paper, *supra* note 154, at 39.

169. *Id.* at 40. This is not the first time that the RICO has been suggested by U.K. crime reform efforts. Dr. Barry Rider of Jesus College in Cambridge submitted a memorandum to the Home Affairs Committee in 1995 arguing for the adoption of a RICO-type statute. The statute was only mentioned once in the Committee's final report, but apparently no further consideration was taken at that time.

170. Because RICO is a federal criminal statute it incorporates a jurisdictional element of the offence, namely that the enterprise effect interstate commerce. 18 U.S.C. § 1962(a)-(c) (2004); *RICO Enterprise Concept*, *supra* note 55, at 678. This clearly, is not a selling point in the U.K. legal system, which has neither a state nor federal government; they have only "government."

171. Under criminal RICO, the person guilty of acquiring, maintaining, or conducting an enterprise through a pattern of racketeering activity may be heavily fined and imprisoned for up to 20 years, or for life, if the maximum penalty for a predicate offense includes life. 18 U.S.C. §1963 (2004).

172. White Paper, *supra* note 154, at 40.

173. *Id.*

174. *Id.* at 41.

175. *Id.*

hypothetical statutes would be effective, they still do not address one of the primary problems in that U.K. criminal procedure strongly prefers small trials, which almost inevitably fails to join together the offender and offense and allow crucial evidence of the involvement of organized crime leaders. The White Paper failed to address one important aspect of RICO's success: the joinder of offenses and offenders into one trial that allows the judge and jury to see exactly what the offenders have done.

2. *The Consultation Papers Guidance*

The White Paper's response was informed by the work of Michael Levi, a professor of criminology and consultant to the Home Office. Professor Levi, in his consultation paper to the British government, summarizes some of RICO's procedural advantages illustrated in this Article.¹⁷⁶ Levi states that the statute both "enables prosecutors to show the nature of an enterprise, putting forward a context within which the offences occurred" and eases "issues of joinder and severance . . . permitting a trial of more co-defendants."¹⁷⁷ Nevertheless, Levi discourages enacting a RICO-type statute in the U.K. because the statute lengthens trials, confuses the jury, and requires more proof than traditional conspiracy crimes.¹⁷⁸ Levi concludes that RICO, while

176. MICHAEL LEVI & ALASTER SMITH, A COMPARATIVE ANALYSIS OF ORGANIZED CRIME CONSPIRACY LEGISLATION AND PRACTICE AND THEIR RELEVANCE TO ENGLAND AND WALES (Home Office Online Report 2002), www.homeoffice.gov.uk/rds/pdfs2/rdsolr1702.pdf.

177. *Id.* at 4.

178. *Id.* at 4-5. Levi enumerates seven specific objections to the statute:

1. It takes a lot of work to build up a case. Investigators need accurate intelligence about an organisation before they can start. They need databases and intelligence analysts and good computer systems that are capable of dealing with 10 years of data including assets, upfront businesses and covert businesses.
2. There are Performance Indicator implications, as there will be smaller numbers of cases (though the number of individual defendants could be used as an alternative).
3. It lengthens trials and the jury sometimes loses track of particular defendants and their roles, this in turn sometimes leads to severances of cases.
4. It may also be hard for jurors to appreciate what constitutes an 'enterprise' under the legislation. It is somewhat labyrinthine to show a pattern of crimes and the existence of an organisation to carry them out, and then that the organisation is operating through a pattern of criminal activity.
5. There are regional variations. Judges in Manhattan get many cases, whereas regional ones are rarer. The level of judicial experience, as well as regional court cultures, sometimes produces what is regarded as "bad law."
6. There is a risk of abuse which, both as an issue of principle and to preserve existing powers from judicial and political attack, has to be monitored.
7. There are human rights concerns over the potential for the legislation to be used

successful against organized crime on the U.S. Continent, could not be successfully transplanted because the cultural difference between the U.S. and U.K. He states:

One can think of no 20th century U.K. parallels to the levels of corrupt control over city life and aspects of commercial services that have been witnessed in the U.S. Although there have been instances of entrenched local cultures of corruption in England and Wales, there have been none yet revealed that include large trenches of police as well as elected officials, and no systematically corrupt union domination or pension fund abuses or toxic waste dumping has surfaced in England or Wales.¹⁷⁹

For all of these reasons, he concludes, the cost of implementing a RICO type statute outweighs the "numerically small but perhaps

over-zealously.

Id.

Levi's first point is fair enough. In a RICO case, the prosecutor must prove additional elements not present in traditional common law offenses, namely the "enterprise" and "pattern" of predicate activity. As illustrated in Part 1 of this Article, more evidence is available to the prosecutor by the operation of the "enterprise" and "pattern" concepts. So while an element may require proof, much more is admissible to prove that element. In the U.S., wiretapping is instrumental in proving the "enterprise" and "pattern" elements. In the U.K., wiretap evidence is inadmissible. To the extent Professor Levi's concern is that RICO would be useless without wiretap evidence, an amendment to the U.K.'s law of evidence is in order. *Id.* at 17. This Article argues for such a change. If, instead, this point is arguing that a RICO statute would require expenditures for wiretapping evidence, such equipment is already in use. According to the Home Office's own website, wiretapping is successfully used by the Home Office. In 2003 alone, wiretapping lead to over 1,680 arrests. Frequently Asked Questions, http://www.homeoffice.gov.uk/terrorism/faq/atcsa_faq.html#1 (last visited July 17, 2005) [hereinafter Frequently Asked Questions]. Yet, in each of these cases the wiretap evidence was inadmissible in at trial.

Levi's second point, that implementing a RICO statute would require a change in internal procedures for counting cases, seems to have answered itself. Joint trials would presumptively yield fewer cases, but the total number of defendants could increase. Indeed, the joint trial seems to be at the core of Levi's objections. This Article specifically addresses point 3 and 4. *See infra* Part IV(B)(2).

Levi's last two objections are not unique to RICO. Like most federal statutes, RICO has developed regional nuances that vary within the circuits. Nevertheless, when considering whether to adopt a RICO-type statute, the U.K. is not married to any particular interpretation. The drafters of such a hypothetical RICO statute could easily insert language favoring one interpretation over another. Similarly, the overzealous use of a criminal statute is not unique to RICO. Any criminal statute can be misused or overused, that choice is left to the prosecutor. If the concern is that a RICO-type statute would be too powerful, the drafters could require prior authorization to use the statute. Such is the case in the U.S.. *See* Department of Justice, *supra* note 24.

179. LEVI & SMITH, *supra* note 176, at 16.

strategically important cases in which RICO legislation might lead to convictions.”¹⁸⁰

The Consultation Paper misunderstands two important features of RICO. First, RICO has proven to be a powerful tool against legitimate business and government offices infiltrated by organized crime, yet its scope is not limited to such instances. As the Supreme Court held in *Turkette*, “neither the language nor structure of RICO limits its application to legitimate ‘enterprises.’”¹⁸¹

Second, the White Paper and the Consultation paper informing its decision are premised on the notion that the U.K. does not experience true “organized crime” crime in the same way the US does or did prior to the passage of RICO. They state that “RICO appears to be more useful against traditional ‘racketeering’ organizations than the sort of large-scale trafficking groups which are the main threat to the U.K.”¹⁸² The visible manifestations of organized crime in the U.K. are manifold. The U.K. experiences drug crimes,¹⁸³ human trafficking,¹⁸⁴ international car theft rings, and counterfeit goods smuggling.¹⁸⁵ While a full-scale investigation of organized crime is far beyond the scope of this Article, a preliminary look at the crimes reported in London’s newspapers reveal the presence of precisely the kind of groups RICO’s enterprise concept has been so effective against. For example, large groups of Eastern European women are routinely trafficked, against their will, into Britain for prostitution. These kinds of operations require a host of “suppliers” in Eastern Europe, “importers” to physically move these

180. *Id.* at 17.

181. *United States v. Turkette*, 452 U.S. 576, 587 (1981).

182. White Paper, *supra* note 154, at 40.

183. Stewart Tendler, *Suspected Drugs Baron Arrested*, *TIMES* (London), Mar. 18, 2005, at 35 (leader of a 15 member gang arrested for smuggling three tons of cocaine into Britain from 1996 to 1998); Daniel McGrory, “*Drugs Boss*” *Is Silent As Investigators Seize £ 5m*, *TIMES* (London), Mar. 25, 2005, at 16; Stewart Tendler, *Family of Drug Barons Kept Their Stash in Crooked Bank*, *TIMES* (London), May 11, 2005, at 9.

184. Rosemary Bennet, *Men Who Pay for Sex with Trafficked Girls to Face Rape Charge*, *TIMES* (London), Mar. 2, 2005, at 24 (“[I]n 2002, 1,400 women are trafficked into Britain for sex and [there is reason to believe] that figure has doubled”); Andrew Norfolk, *Millionaire Gangmaster Faces Jail Over His Scots Factory Slave Army*, *TIMES* (London), Feb. 4, 2005, at 11 (man arrested for transporting Eastern Europeans to U.K. to work for “slave wages”).

185. Illegal importation of other illegal products is also sophisticated in the U.K.. See e.g., Jon Ungoed-Thomas, *Designer Fakes “Are Funding Al-Qaeda”*, *TIMES* (London), Mar. 20, 2005, at 14 (cheap counterfeits of designer goods funding terrorist organizations); Anthony Browne, *Customs Not Able to Keep Up With Rise of Fake Goods*, *TIMES* (London), Feb. 9, 2005, at 29 (“Britain is losing the battle with organized criminals smuggling counterfeit goods in the country.”).

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women, and coordination of over 730 flats in London to house and control women upon their arrival, not to mention associates to launder the profits.¹⁸⁶ These groups have the coordination to engage in large-scale international criminal enterprises, yet they are not considered "organized crime" in the U.K. These few examples, pulled from the front pages, indicate the tip of the iceberg of U.K. crime. The possibilities of criminal enterprises operating just under the surface of detection are endless. Still, neither the 1995 reports nor the White Paper recognizes this phenomena.

3. *U.K. Criminal Procedure*

Before examining the law relating to group trials in the U.K., a brief introduction to the nation's criminal procedure and defendants' rights are in order. The U.K. is one of very few traditional common law countries without a written constitution.¹⁸⁷ As a result, there was a limited public understanding of the form and substance of a U.K. citizen's rights.¹⁸⁸ Until the European Convention on Human Rights of 1998 came into force in October 2, 2000, few rights were codified.¹⁸⁹ Indeed, even after the adoption of the Convention, some rights that British citizens enjoy, like the law of double jeopardy, cannot be found in statute form.¹⁹⁰ Whenever convention rights are at issue, the courts are not bound by pre-convention precedent¹⁹¹ and they "must take into account" judgments, decisions, or declarations of the European Court of Human Rights (ECHR).¹⁹² Most of the ECHR interactions with the criminal law involve the concept of a fair trial¹⁹³ (Art. 6) and the

186. Bennett, *supra* note 184.

187. See generally Penny Darbyshire, EDDEY & DARBYSHIRE ON THE ENGLISH LEGAL SYSTEM §1-021.

188. *Id.* ("There is no talk of fundamental constitutional rights, as is common in Germany or France and is drummed into each child's memory in the United States, because we don't think we have any.")

189. *Id.*

190. J.R. Spencer, *The Case for a Code of Criminal Procedure*, 2000 CRIM. L. REV. 519, 522.

191. Darbyshire, *supra* note 187, § 4-006 (citing 1997 White Paper, *Rights Brought Home*).

192. Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter ECHR], available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (last visited Oct. 4, 2006). Taking these decisions "into account" is not necessarily the same as a binding precedent. Darbyshire, *supra* note 187, § 1-022.

193. ECHR Article 6 provides in full that:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable

procedures surrounding unlawful deprivation of liberty¹⁹⁴ (Art. 5). The

time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ECHR, *supra* note 192, art. 6.

194. ECHR Article 5 provides in full that:

1. Everyone has the right to liberty and security of person.

2. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

3. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

4. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

5. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily

technical due process embodied in Article 6 is by far the most common application of these rights.¹⁹⁵

While a U.K. citizen's rights seem straightforward under the Convention, the actual procedure afforded is not always as clear. U.K. criminal procedure is dispersed throughout 150 different statutes spanning the better portion of two centuries.¹⁹⁶ Additionally, a large portion of the law of evidence has no statutory basis at all.¹⁹⁷ This has made the law of criminal procedure in the U.K. largely inaccessible to the public¹⁹⁸ and a "nightmare to apply for judges, magistrates' clerks and practicing lawyers."¹⁹⁹ Multiple campaigns for reform have been brought about and there exists a push for the drafting of a comprehensive code of criminal procedure.²⁰⁰ These changes did not

by a court and his release ordered if the detention is not lawful.

6. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

ECHR, *supra* note 192, art. 5.

195. ROBIN C.A. WHITE, *THE ENGLISH LEGAL SYSTEM IN ACTION: ADMINISTRATION OF JUSTICE* § 4-005 (2000) (citing G. Chambers, *Practicing Human Rights: U.K. lawyers and the European Convention on Human Rights*, the Law Society Research and Policy Planning Unit Research Study No. 28 (London: the Law Society) (explaining that over half the applications against the U.K. were made under this article)).

196. J.R. Spencer, *The Case for a Code of Criminal Procedure*, 2000 CRIM. L. REV. 519, 520. This is, of course, with the notable exception of the Justices of the Peace Act of 1361, which is still in force. *Id.*; WHITE, *supra* note 195, § 4-002. The Law Commission, in its 2000 survey, found: "207 Acts of Parliament devoted to criminal procedure and/or evidence, the earliest enacted in 1795; 64 pieces of secondary legislation containing rules that differed according to whether they governed summary proceedings or those on indictment – 271 different sources of law, procedure and evidence, not including case law or guidance from the Lord Chief Justice or the Attorney General." LORD JUSTICE AULD, *A REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES* § 272 (2001) [hereinafter AULD REPORT], available at <http://www.criminal-courts-review.org.uk/ccr-10.htm>.

197. Spencer, *supra* note 196, at 520.

198. See AULD REPORT, *supra* note 196.

199. Darbyshire, *supra* note 187, § 10-001.

200. AULD REPORT, *supra* note 196. Several commissions have evaluated the need for a criminal procedure code. *Id.* For example, the Royal Commission on Criminal Procedure of 1981 took note of the problem and produced the Police and Criminal Evidence Act. *Id.* Again, the Royal Commission on Criminal Justice of 1993, produced the Criminal Justice and Public Order Act 1994, the Criminal Appeal Act of 1995, and the Criminal Procedure and Investigations Act of 1996. *Id.* In 1997 the Narey Report reviewed the system and came up with the Crime and Disorder Act of 1998. *Id.*

Finally, after the success of the Woolf reforms on the civil justice system, Justice Auld conducted a similar comprehensive review of the criminal system and concluded that a single, comprehensive code of Criminal Procedure was sorely needed. AULD REPORT, *supra* note 196. In his report the Lord Justice characterizes the current law as problematic because "[f]inding the right source or sources can be a time-taking and confusing task for judges and experienced criminal law practitioners. And, having found them, the content is often

occur as part of the government's organized crime agenda. Yet, in order to truly have a "21st Century Strategy to Defeat Organized Crime," perhaps the first step to reform is procedure and evidence.

The current U.K. laws recognize limited instances where offenses and defendants can be joined into a single trial. In general, current U.K. procedure follows the restrictive English common law view that a trial should consist of one defendant answering for a single offense.

4. Joinder of Offenses Under Current U.K. Law

The joinder and severance of offenses is controlled by Rule 9 of the Indictment Rules of 1971, which provides that joinder is proper if the counts are "founded on the same facts, or form or are part of a series of offenses that are of the same or similar character."²⁰¹ The formulation of the rule is similar to the Federal Rules formulation, with the notable exception that Federal Rule 8(a) allows joinder of offenses that are part of a "common scheme or plan."²⁰² Thus, the joinder of offenses in the U.K. should represent a more restrictive system than under the Federal Rules. Yet, courts have stretched the language of the rule, particularly the "same or similar character" requirement, to effectuate joinder akin to what one would expect under the Federal Rules. For example, in *Ludlow v. Metropolitan Police Commissioner*, a defendant was charged with one count of attempted theft and one count of robbery that allegedly took place sixteen days later.²⁰³ While the crimes charged were similar in law, the only factual similarity was that both offenses were committed in public houses (read: pubs). One offense was an attempt to rob a public house, and another was seemingly a dispute over a bar tab. The court held that in order to be properly joined under the rule, there must be a nexus between the offenses. The offenses must be similar in fact *and* law. Surprisingly, the court went on to hold that joinder was proper in *Ludlow* and that the similar location would suffice as a nexus, however slight, between the

impenetrable and sometimes leads to conflicting decisions." *Id.* ¶ 273. Furthermore, "[f]ew of these sources, standing on their own, represent the whole law or the current law on any particular aspect, many of them being subject to piecemeal amendment, often by several more recent instruments." *Id.* ¶ 272. The ultimate cost of this disorder is borne by the tax payers who pay for the cost of the additional research, injustice, and loss of public confidence. *Id.* ¶ 273.

201. Rule 9 reads in full: "Charges for any offenses may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offenses of the same or a similar character." Indictment Rules, 1971, r. 9 (U.K.).

202. FED. R. CRIM. P. 8(a); *see supra* note 20 (quoting the rule in full).

203. *Ludlow v. Metro. Police Comm'r*, [1971] A.C. 29 (H.L.) (U.K.).

facts.²⁰⁴

Even when the offenses have been properly joined under this rule, the judge has discretion to order a separate trial where he is "of the opinion that a person accused may be prejudiced or embarrassed in his defense by reason of being charged with more than one offence in the same indictment."²⁰⁵ The courts have added to this requirement, tacking on the additional requisites that the severance must be in the "interests of justice" and premised upon some "special feature" that makes the joinder of the offenses prejudicial.²⁰⁶

The rules of joinder and severance are often read in tandem with the rules of evidence in order to determine whether a joint trial is proper.²⁰⁷ In particular, the English common law upholds a general prohibition of "similar fact" evidence, that is, the prosecution may not

204. *Id.*

205. Indictments Act, 1915, § 5(3) (U.K.). The section reads in full:

(4) Where, before trial, or at any stage of a trial, the court is of the opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any powers of the court under this Act to amend an indictment or to order a separate trial as appears necessary.

(5) Where an order of the court is made under this section for the postponement of a trial-

(a) if such order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and

(b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and

(c) the court may make such order as to granting the accused person bail and as to the enlargement of recognisances and otherwise as the court thinks fit.

Indictments Act § 5(3).

206. *Ludlow v. Metro. Police Comm'r*, [1971] A.C. 29, 41 (H.L.) (U.K.). *Ludlow* represents the leading case regarding joinder of offenses. There the House of Lords held that one count of attempted larceny and one count of robbery were properly joined, despite that the only factual similarity was that both offenses were committed in public houses in west London. *Id.* at 30, 41.

207. *Dir. of Pub. Prosecutions v. Boardman*, [1975] A.C. 421, 449 (H.L.) (U.K.). There, Lord Cross stated that:

If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused being charged not with a single offence against one person but with three separate offences against three persons. It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is reason for doubting the wisdom of the general rules excluding similar fact evidence. But so long as there is that general rule the court ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all of the charges together.

Id. at 459.

adduce evidence of previous or subsequent bad conduct of the accused other than those relating to the offence charged.²⁰⁸ The rationale for this rule is that "similar fact" evidence is both irrelevant for showing guilt and, insofar as the evidence is relevant, its highly inflammatory nature outweighs its relevancy.²⁰⁹ Joinder of offenses has the effect of allowing evidence to be put to the jury that would not have been admissible if the offenses had been tried alone. In certain circumstances, this consideration alone is enough to prove that severance should be granted.²¹⁰

Still, severance is a sparingly granted relief.²¹¹ Because the Indictment Rules grant broad discretion to the trial judge, a ruling on severance is difficult, if not impossible to overturn.²¹² The more common relief granted is a jury instruction directing the jurors that they may not use the evidence on one count to support that on another.²¹³

208. See, e.g., *R v. Brown*, (1963) 47 Crim. App. 204 (holding that evidence of one participant pleading guilty to one count of ship-breaking was not admissible in a trial for a break-in that occurred five days later since there was no idiosyncratic features to link the two offenses); *R v. Taylor*, (1923) 17 Crim. App. 109 (holding that the accused possession of a burglary device found several days after the charged offense was committed was inadmissible because it tended to prove disposition and not culpability).

209. The prohibition of "similar fact" evidence is the British analogue to Rule 404(b) which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

FED. R. EVID. 404(b). Compare with *Boardman*, [1975] A.C. at 462 (stating what has become the classical common law test that "if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty").

210. See, e.g., *R v. Brooks*, (1991) 92 Crim. App. 36 (ruling that after the trial courts decision that evidence on three counts of incest was not admissible, the trial court should have granted a severance); *R v. Sims*, [1946] K.B. 531. Normally these certain circumstances include counts of sexual offences, which are often considered to be so scandalous and prejudicial that they cannot be tried with other charges. *Brooks*, 92 Crim. App. at 42.

211. LAW COMM'N, LAW COM NO. 273, EVIDENCE OF BAD CHARACTER AT CRIMINAL PROCEEDINGS 2.91 (2001), available at http://www.lawcom.gov.uk/lc_reports.htm.

212. *Ludlow v. Metro. Police Comm'r*, [1971] 1 A.C. 29, 41 (H.L.) (U.K.).

213. Auld Report, *supra* note 196, ¶ 2.95.

5. Joinder of Offenders Under Current U.K. Law

The indictment may include separate counts and name different defendants in each count.²¹⁴ The joint trial of these counts and defendants is not subject to any specific statutory rule: joinder of offenders is defined solely by practice. The seminal case controlling joint trials is *R v. Assim*.²¹⁵ There two defendants, both employees of the same night club, were involved in an altercation when a customer attempted to leave the club without paying.²¹⁶ One defendant was charged with unlawfully wounding one customer, and his co-defendant was charged with assault occasioning actual bodily harm.²¹⁷ Since the charges were committed against two separate defendants, they were, necessarily, charged in two separate counts.²¹⁸ The court in *Assim* assumed without deciding that the Indictment Rules of 1915, by its plain language, only applied to joinder of offenses.²¹⁹ In the absence of a statute, the court can use its "inherent power both to formulate its own rules and to vary them in the light of current experience and the needs of justice." According to the court, the history of the joint trials did not provide guidance, as the prominent publicists of the time and previous decisions did not provide a clear benchmark by which to measure the appropriateness of a joint trial.²²⁰ Thus, the court enunciated that

214. See, e.g., *R v. Assim*, (1966) 50 Crim. App. 224.

215. Practice Direction [1971].

216. *Assim*, 50 Crim. App. at 225-26.

217. *Id.* at 225.

218. *Id.* at 233.

219. *Id.*

220. *Id.* at 234. The court went on to say that:

[O]n an examination of the authorities, this court considers that there never has been a clear, settled and general practice based on principle as to the occasions when joinder of offenders is in the practice correct: moreover, there may well have been wide fluctuations as to what might be called the terminal limits at any one time of the application of the practice then in force. Indeed, as regards past centuries this absence of settled practice is reflected in the variations of views between eminent writers, as for instance those expressed in the 1778 and 1800 editions of Hale's *Pleas of the Crown*, pp. 174 and 175 and the 1824 edition of Hawkins' *Pleas of the Crown*, pp. 331 and 332.

Id. In light of the finding that no rule of joinder existed, the court, quite generously, took upon themselves the burden of making one up. The courts reference to Hale and Hawkins here is perhaps disingenuous. Hale's pleas of the crown does not represent an aberration from the ordinary rule of joinder of principals and accessories in the same indictment, for the same crime. His seminal treatise says:

But yet the principle and accessory being indicted by one or several indictments, and both appearing they may be arraigned at the same time and both pleading not guilty, the same jury shall charged with both and directed to inquire of both, viz. first of the principle.

whether “the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together,” then the defendants can be properly tried together, subject always to the ever-present discretion of the court.²²¹ The *Assim* court thus opted for an extremely flexible standard (“interests of justice”) rather than a rigid rule.

The problems with an “interests of justice” test are patent. First, it provides little guidance on what “justice” entails and whose “justice” should be served. In determining “justice,” courts seem to look to a myriad of factors: whether separate trials could lead to inconsistent verdicts,²²² whether a separate trial would prejudice either the prosecution or the defense, convenience to the witnesses,²²³ potential for prejudice in a joint trial, overlapping evidence, and the wishes of the defendants. Secondly, the “interests of justice” test, while paying lip service to the value of consistency of verdicts, does not itself produce consistent results.²²⁴ The rule in *Assim* is read to tolerate some prejudice in application, allowing evidence into a joint trial that would not have been admissible against one or more defendants tried alone. The quantum of prejudice required to overturn a denial of severance is variable. Thirdly, inconsistent results are rarely overturned. The Court of Appeals interferes only if it can be shown that the trial judge ignored relevant decisions, took account of irrelevant decisions, or arrived at a

MATHEW HALE, 2 HISTORIA PIACITORUM CORONAE, THE HISTORY OF THE PLEAS OF THE CROWN 222 (1847).

The later references to Hawkin’s dissenting view of joinder is also flawed, primarily in that later editions do not include this quote. Thus, sometime between 1824 and May 8, 1966, when *Assim* was decided, Hawkin’s (or his editor) changed his mind. Further, a reading of Archibald indicates that a rule of joinder existed as far back as 1867. The rule is that individuals who jointly commit a criminal act whether “robbery, burglary, or murder, they may be indicted for is jointly.” Participation in the act is what is essential under this reading, and joinder is not exclusively to acts of robbery, burglary and murder. JON JERVIS, ET AL., ARCHBOLD’S PLEADING AND EVIDENCE IN CRIMINAL CASES 62-64 (16th ed. 1867). Again, “[w]here several persons join in the commission of an offence they may be jointly or separately indicted for it.” HENRY W. DISNEY & HAROLD GUNDRY, THE CRIMINAL LAW: A SKETCH OF ITS PRINCIPLES AND PRACTICE 51 (1895). Thus a rule did exist, however rigid it may appear to be, and the rule clearly said what we would think of in modern terms as an “act or transaction” test.

221. *Id.*

222. ARCHBOLD’S PLEADING AND EVIDENCE 155-157 (22nd Ed. 2004).

223. R v. Crawford, [1997] 1 W.L.R. 1329; R v. Edwards, [1998] Crim. L.R. 756; R v. Grundkowsky, [1946] K.B. 369; R. v. Moghal, (1977) 65 Cr.App. 56.

224. R v. O’Boyle, (1990) 92 Cr.App. 202; R v. Randle [1995] Crim. L.R. 331.

manifestly unreasonable decision.²²⁵

6. *Overloading the Indictment*

A fair reading of *Assim* could imply that perhaps joinder is more liberally applied in the U.K. than the U.S. In fact, the *Assim* opinion (and corresponding practice direction) are subject to an additional caveat. A trial judge must also consider whether trying a single indictment would result in an unduly complicated trial and would place undue burden on the jury. The generally followed rule is derived from dicta in the case of *R v. Novac* and its resulting practice direction.²²⁶ In *Novac*, four defendants were tried on nineteen counts, each pleading not guilty.²²⁷ Three of the defendants were linked via an overarching conspiracy count, specifically the conspiracy to procure males under 21 to commit acts of indecency, and various substantive offences relating to the conspiracy.²²⁸ A fourth defendant was tried on roughly similar charges related to the conspiracy, but not membership in the conspiracy.²²⁹ The trial lasted forty-seven working days and required a four to five day summing up.²³⁰ Ultimately, many of the convictions were quashed because of errors in similar-fact evidence and corroboration.²³¹ Lord Justice Bridge concluded that "the indictment of 19 counts against four defendants resulting in unnecessary length and complexity."²³² He went on to find that:

Quite apart from the question whether the prosecution could find legal justification for joining all these counts in one indictment and resisting severance, the wider and more important question is whether in such a case the interests of justice were likely to be better served by one very long trial, or by one moderately long and four very short separate trials. . .

Some criminal prosecutions involve consideration of matters so plainly inextricable and indivisible that a long and complex trial is an ineluctable necessity. But we are convinced that nothing short of the criterion of absolute necessity can justify the imposition of the

225. *R v. Grondkowski*, [1946] K.B. 369 (affirming joinder even though all members of the court strongly indicated that they would not have joined the defendants).

226. Practice Direction (Crime: Conspiracy) [1977] 1 W.L.R. 537.

227. *R v. Novac*, (1977) 65 Cr.App. 107.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. ARCHIBOLD'S PLEADING AND EVIDENCE 167 (22nd ed. 2000).

burdens of a very long trial on the court.²³³

As a result of the court's clear statement of preference for shorter, more straightforward trials, a practice direction was issued.

The practice direction provides that in an indictment containing both substantive and conspiracy counts, "the judge should require the prosecution to justify joinder, or, failing justification, to elect whether to proceed on the substantive or on conspiracy counts."²³⁴ The practice direction has worked to create simple trials, where one offender answering for a single offense is the rule, and joinder is the exception.²³⁵

That this rule is alive and well in English law is evidenced by the courts tersely worded opinion in *Kellard*, the case that has the "ignoble distinction" of being England's longest jury trial.²³⁶ The trial lasted 252 working days and involved four defendants charged with twenty-nine counts relating to fraudulent trading and conspiracy to defraud. While the length and complexity of trial alone was not dispositive of a miscarriage of justice, the court went on to rebuke the prosecutor because it was his "duty . . . to review the evidence in a long case and

233. *Id.*

234. Practice direction (Crime: Conspiracy) [1971] 64 Cr. App. R. 258. In any case where an indictment contains substantive counts and a relating conspiracy count, the judge should require the prosecution to justify joinder, or, failing justification, to elect whether to proceed on the substantive or on the conspiracy counts. "A joinder is justified for this purpose if the judge considers that the interests of justice demand it." [1997] 1 W.L.R. at 537.

The need for simplicity in the presentation of the case was echoed by Lawton L.J. in the context of the length of the indictment in *Thorne* when he said:

This Court has noticed a tendency recently for prosecuting counsel to overload indictments. There must be an end to this. Indictments must be kept short. No more accused should be indicted together than is necessary for the proper presentation of the . . . case Necessity, not convenience, should be the guiding factor.

R v. Thorne, (1978) 66 Cr.App. 6, 12. Later, "[a]ll that can be said with confidence is that the indictment was overloaded, far too many lengthy submissions were made and too much time was spent by counsel in addressing the jury. Counsel must curb their verbosity." *Id.* at 14. Similar observations by the same learned judge were made in the case of *Landy, White and Kay* (1981) 72 Cr.App.R. 237. The most recent authority, and in some respects the most relevant to the present appeal, is the case of *Cohen*. This decision is not fully reported and we proceed by reference to the transcript. The length of the trial was described as "awesome" as it covered 184 days, a shorter period than that taken by the trial in the present case. *Peter Hutchesson, R v. Cohen and Others*, 142 N.L.J. 1267 (1992).

235. For example, consider the thirty longest cases heard between 2003 and 2004. The average length of these "very long" trials was 67 days (still relatively short by U.S. comparison). An average of six defendants was tried in these cases. The jury heard testimony from an average of 114 witnesses. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, A FAIRER DEAL FOR LEGAL AID, 2005, 5.5, available at <http://www.dca.gov.uk/laid/laidfullpaper.pdf> [hereinafter A FAIRER DEAL FOR LEGAL AID].

236. *R v. Kellard*, (1995) 2 Crim.App. 134, 140.

decide how much of it, even though relevant, [could] be withheld in the interests of time and clarity."²³⁷ The preference of the common law of joinder, even today, is to preserve the trial unit as one defendant answering for a single offence. The practice direction, which requires severance of conspiracy and substantive counts, actively works against one trial of all of the participants of large scale criminal venture, in short, organized crime, or for that matter, terrorism.

C. Evidence and Human Rights Implications of Joinder

As stated in Part I, there are special evidence issues that arise in joint trials than would otherwise arise in the context of separate defendants tried for a single offense. In the United States, admission of evidence in a joint trial can have constitutional implications. Admission of one defendant's confession in a joint trial against the defendant and his co-conspirators can give rise to Confrontation Clause issues, more specifically termed a *Bruton* problem.²³⁸ Additionally, when counts and

237. *Id.* at 146.

238. *Bruton v. United States*, 391 U.S. 123 (1968). Nevertheless, confessions are typically not an issue in sophisticated enterprise trials. The more common result is that a potential co-defendant will "turn" and testify against his former compatriots at trial, eliminating the *Bruton* problem. Even in the event that a defendant confesses and then decided not to testify at trial, neither the English common law nor the European Court of Human Rights would cry foul on behalf of the potentially prejudiced co-defendant. The common law rule is that admissions and confessions are evidence only against their maker, and not against co-defendants whom they might implicate. PETER MURPHY, *MURPHY ON EVIDENCE* 298 (8th ed. 2003). On the other hand, this does not mean that confessions implicating a co-defendants are excluded. Instead, the co-accused is entitled *only* to a limiting instruction that the confession can only be used as evidence against the confessor. Simply put: there is no *Bruton* rule in the U.K.. Even the editing of confessions, which is key in the United States when the prosecution adduces a confession, is often not permitted. The court does not have the power the edit out otherwise admissible evidence in the accused's statement unless the prosecution and the accused consent, which is rare. *Lobban v. R.*, [1995] 1 W.L.R. 877, 879 (P.C. 1995) (holding that the co-accused was not entitled to edit himself out of a co-defendants confession where the material in the confession would have been admissible against the confessor); *R v. Jefferson*, (1994) 99 Crim. App. 13, 24 (holding the a co-accused could not edit incriminating statements against him, made by his co-defendant, out of his co-defendant's information).

Furthermore, a co-defendant who might be implicated in a confession probably will not find relief in the European Convention on Human Rights. *Kostovski v. Netherlands*, App. No. 11454/85, 12 Eur. H.R. Rep. 434, ¶39 (1989) (holding, in part, that is the job of national law, not the convention, to regulate domestic evidences laws).

Unlike the United States Supreme Court, the European Court of Human Rights does not have the power "to regulate the operation of criminal procedure, including the rules of evidence, in a State which is bound by [the Convention]." *Kostovski*, 12 Eur. H.R. Rep. 434, ¶39. Thus, unlike the U.S. Constitution that transcends all laws (including those of

offenders are joined, it may have the effect of silencing otherwise exculpatory witnesses/co-defendants by virtue of the Fifth Amendment.²³⁹ Finally, counts that should have been joined, but were not, can be barred from being brought again under *Blockburger* and the Double Jeopardy Clause.²⁴⁰

The law of joinder itself militates against prosecuting group crime in the U.K. In the rare case that counts are joined, however, it remains to be seen to what extent the law of evidence, England's unwritten constitution, and the newly applicable European Convention on Human Rights protect defendants' rights at trial, while still providing efficient and accurate judgments.

I. *Co-conspirator Exception to the Hearsay Rule*

A joint trial, however rare, does confer some advantages on the prosecution in U.K. trials. However objectionable a U.S. audience may find the treatment of confessions, it is only part of the advantages allowed to the prosecutor. Like the U.S., the U.K. also recognizes a co-conspirator exception to the hearsay rule, albeit the rule is less

procedure and evidence), these rights do not directly effect domestic law, and U.K. law has changed little since their adoption. The Convention does provide, however, that persons have a right to a fair trial, including the "right to examine or have examined witnesses against him." ECHR, *supra* note 192, art. 6.3(d).

When a defendant confesses, implicating other properly joined parties, and then declines to take the stand, a co-defendant is left without recourse. Since the evidence is not "admissible" against him, he cannot make a confrontation clause challenge. Yet, since relatively little is known about the workings of the jury, he cannot be sure that the evidence, which is also hearsay, is not being used against him in deliberations. While the Court has not had the occasion to consider whether a confession adduced in a joint trial violates this right, the Court has considered the admission of hearsay testimony. In *Blastland v. United Kingdom*, the Court of Human Rights considered the correctness of the hearsay rule *on its face*, and concluded that rule served a relatively benign purpose and was acceptable under the Convention. (1987) 10 EHRR 528, 531. Similarly, the U.K. Court of Appeal has addressed this issue, holding that the accused rights to a fair trial were not violated when hearsay statements of a person who was not called as a witness were admitted against him. *R v. Gokal*, (1997) 2 Crim. App. 266. While the defendant did not have the opportunity to confront the witnesses against him, the grant of judicial discretion and the provisions of the hearsay rule properly protect the rights of the accused. Thus, a defendant in a joint trial will probably face the same fate of having no recourse in a Human Rights appeal.

239. Alternatively, a co-defendant's testimony may exculpate a defendant. Because the co-defendant may not wish to waive his 5th Amendment right and testify at trial, the exculpatory testimony will not be heard. In this respect joinder acts to silence the witnesses that may be the most helpful to the defendants case. For a classical explanation of this problem, see Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 73, 143 (1974); Russell D. Covey, *Beating the Prisoner at the Prisoner's Dilemma: The Evidentiary Value of a Witness's Refusal to Testify*, 47 AM. U.L. REV. 105 (1997).

240. *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

circumscribed than its US counterpart. The rule generally proscribes that where "the prosecution allege[s] a common design, the acts and declarations of [conspirators] in furtherance of the common design, even though in absence of the other, are admissible evidence against both to prove the existence and carrying out of the common design."²⁴¹ The exception applies whether or not a crime was committed to further the conspiracy, and whether or not the maker of the statement was jointly tried and indicted.²⁴² Nevertheless, because the U.K. strongly favors small trials with minimal joinder of defendants, these advantages are rarely used.

2. *The Police and Criminal Evidence Act*

On December 15, 2004, a new law came into effect in the U.K. that dramatically changed the admissibility of "bad character" evidence.²⁴³ Under the new statutory scheme, evidence of previous convictions and other reprehensible conduct can be adduced as evidence of the defendant's propensity to commit crimes of the kind charged.²⁴⁴ This change will likely aid the prosecutors to obtain convictions of repeat offenders. Further, the Criminal Justice Act 2003 contains provisions unique to multi-defendant trials. Under section 101(e) a co-defendant can introduce evidence of another defendant's bad character when such evidence has "substantial probative value in relation to an important

241. MURPHY, *supra* note 237, at 8.2.2.1; ARCHBOLD, *supra* note 221, § 34-60.

242. MURPHY, *supra* note 237, at 8.2.2.2; ARCHBOLD, *supra* note 221, § 34-60.

243. Criminal Justice Act, 2003, c. 44, §§ 98-110, 112; R v. Bradley (2005), 1 Crim. App. 24 (Eng.) (holding that the provisions of the act applied to all trials and Newton hearings begun on or after the 15 December 2004).

244. Criminal Justice Act 2003 § 98. That section defines bad character as evidence of, or of a disposition towards, misconduct on his part, other than evidence which (a) has to do with the alleged facts of the offence with which the defendant is charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence. *Id.*

Under the new scheme "bad character evidence" is admissible in seven circumstances:

- (1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if-
 - a. all parties to the proceedings agree to the evidence being admissible,
 - b. the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
 - c. it is important explanatory evidence,
 - d. it is relevant to an important matter in issue between the defendant and the prosecution,
 - e. it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
 - f. it is evidence to correct a false impression given by the defendant, or
 - g. the defendant has made an attack on another person's character.

Id. § 101.

matter in issue between the defendant and a co-defendant.”²⁴⁵ This provision aims to codify and liberalize the often murky law in cases where co-defendants are running “cutthroat” defenses.²⁴⁶ The provision provides that if the nature of one defendant’s defense is to undermine the other, than evidence of the other defendants’ “bad character” as to truthfulness is admissible.²⁴⁷ While courts have not had the occasion to interpret the provision, commentators and drafters generally agree that the test for admissibility (probative value in relation to an important matter in issue), which is a new concept in U.K. evidence law, will “likely to be interpreted [to mean] only as more than merely trivial.”²⁴⁸ Thus, defendants are able, and even encouraged, to act as a second prosecutor and adduce evidence against a co-defendant at trial. This section represents a substantial departure from the previous law regarding co-defendants and character evidence. While its effect remains to be seen, the Criminal Justice Act 2003 has the potential to change the landscape of group trials in the U.K.

3. *Inadmissibility of Wiretap Evidence*

Up to this point, this Article has discussed nuances of U.K. evidence law that aid in the prosecution of criminal enterprises. Our common law neighbors have more liberal evidence rules regarding confessions, hearsay, and character evidence than the US. For that reason, the U.K. law with respect to wiretap evidence seems particularly draconian. In the U.K., evidence obtained from domestic wiretaps is inadmissible.²⁴⁹ The Regulation of Investigatory Powers Act 2000

245. Criminal Justice Act 2003 § 101(e).

246. Crown Prosecution Service, *Bad Character Evidence* (2004), available at http://www.cps.gov.uk/legal/section13/chapter_uhtml#content (last visited July 17, 2005); ANDREW KEOGH, *EVIDENCE OF BAD CHARACTER UNDER THE CRIMINAL JUSTICE ACT 19 (2003)*, available at <http://www.crimeline.info/badcharacter.pdf> (last visited July 17, 2005).

247. “A matter in issue between the defendant and a co-defendant” is defined as:

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.

(2) Only evidence-

a. which is to be (or has been) adduced by the co-defendant, or which a witness is to be invited to give (or has given) in cross-examination by the co-defendant,

b. is admissible under section 101(1)(e).

Criminal Justice Act 2003 § 104.

248. Crown Prosecution Service, *supra* note 246; *see also* KEOGH, *supra* note 245, at 19.

249. I.H. DENNIS, *THE LAW OF EVIDENCE* 269-272 (2d ed. 2002); RICHARD MAY,

(RIPA) criminalizes the intentional interception of a communication without lawful authority in the course of transmission by means of a public telephone system.²⁵⁰ The statute confers power to the Secretary of State to issue a warrant authorizing wiretapping when it is deemed necessary for the purposes of protecting the U.K.'s national security or economic well-being, or for the purposes of detecting serious crime.²⁵¹ The Home Office claims that their use of wiretapping has prevented and disrupted terrorists and is widely used against drug rings.²⁵² In 2003, the interceptions led to:

- seizure of 26 tons of illicit drugs;
- seizure of 10 tons of tobacco;
- detection of £390m of financial crime; and
- 1,680 arrests.²⁵³

Thus, wiretapping is widely used in the U.K. pursuant to the RIPA warrant process, but its use is restricted to intelligence and not admissible in a court of law.²⁵⁴

Paradoxically, evidence obtained from domestic microphone surveillance ("bugging") is admissible.²⁵⁵ Evidence obtained via

CRIMINAL EVIDENCE § 2-21 (4th ed. 2005).

250. Regulation of Investigatory Powers Act, 2000, c. 23, § 1(1) (Eng.) [hereinafter RIPA].

251. RIPA § 5(2)-(3). Those sections provide in full:

(2) The Secretary of State shall not issue an interception warrant unless he believes—

- a. that the warrant is necessary on the ground falling within subsection (3); and
- b. that the conduct authorized by the warrant is proportionate to what is sought to be achieved by that conduct.

(3) Subject to the following provisions of this section, a warrant is necessary on grounds falling within this subsection if it is necessary—

- a. in the interests of national security;
- b. for the purpose of preventing or detecting serious crime;
- c. for the purpose of safeguarding the economic well-being of the United Kingdom; or
- d. for the purpose, in circumstances appearing to the Secretary of State to be equivalent to those in which he would issue a warrant by virtue of paragraph (b), by giving effect to the provisions of any international mutual assistance agreement.

Id. § 5(2)-(3).

252. Home Office, Frequently Asked Questions, <http://www.homeoffice.gov.uk/terrorism/faq/atcsa?faq.html#1> (last visited July 17, 2005) [hereinafter Frequently Asked Questions].

253. *Id.*

254. *Morgans v. Dir. Of Pub. Prosecution*, [2001] 1 A.C. 315 (U.K.).

255. *R v. Khan (Sultan)*, [1997] A.C. 558, 582 (U.K.) (admitting evidence obtained by bugging despite that the bugging operation constituted a civil trespass); I.H. DENNIS, *THE LAW OF EVIDENCE* 269-272 (2d ed. 2002).

wiretapping in another country is also admissible.²⁵⁶ Yet, the wealth of wiretap information obtained under the RIPA procedures cannot be used as evidence. The rationale proffered for this curious rule is that, by bringing covertly obtained evidence into the judicial process, intelligence agencies would have to reveal sensitive sources and methods of surveillance.²⁵⁷ Some argue that the court use of intercepted information would discourage serious criminals and terrorists from using the phone, thereby drying up a crucial source of information.²⁵⁸

256. R v. Aujla, [1998] 2 Crim. App. 16 (U.K.) (holding that evidence obtained from a Dutch wiretap place on telephone in the Netherlands and authorized by the Dutch authorities was admissible to prove a violation of British law in a U.K. court).

257. Regina v. P, [2002] 1 A.C. 146 (U.K.); Frequently Asked Questions, *supra* note 238. The Home Office, on their public website, explains this incongruent rule. The site states that:

Our intelligence only approach, based on decades of dealing with terrorism, brings with it uniquely close co-operation between law enforcement and intelligence agencies. No other country in the world even gets close to this level of co-operation. None of those involved in this work here would be willing simply to swap our approach for any of the evidential schemes operating elsewhere.

Id. Moves have been made to change this rule and adopt legislation that would allow wiretap evidence to be used in court. Specifically, a report last summer advocated for a three-tier warrant system issuing intelligence only, non-evidential, and evidential warrant, the latter requiring judicial authorization. The report concluded that such a law would result in a modest increase in convictions for some serious criminals, but not terrorists. Press Release, Charles Clarke, Sec'y of State for the Home Dep't, U.K.: Statement by the Home Secretary on the "interception of communications" (Jan. 26, 2005), available at <http://www.statewatch.org/news/2005/jan/11uk-intercepts-evidence.htm>; see also 430 PARL. DEB., H.C. (6th ser.) (2005) 1238 (statement of Mr. Mitchell). There, Mr. Mitchell remarked that right balance had not been struck with respect to effectiveness of intelligence services and the public interest in prosecuting certain cases. He said that:

[U]nder the [proposed] clause, relaxing the ban [on wiretap evidence] would not place an obligation on the prosecution to use intercept evidence. It would simply allow the submission of intercept evidence in court and stand on a par with what is available to other agencies dealing with serious crime and terrorism. What is more, there are already eclectic and disparate cases in which intercept evidence is used in criminal courts, albeit as an exception to the general rule, and there has not been any damage to police or intelligence service operational capabilities and methodology. I submit that these experiences puncture the Government's objections to the use of intercept evidence and render the present state of the law in this area quite ludicrous.

Id. To date, none of these reform efforts have been successful in altering this "ludicrous" and "disparate" rule.

258. In debates before the House of Commons the Rt. Hon. Tom Harris justified the rule based on the experience in America with wiretaps. There he said:

I want to address the issue of wire tap or intercept evidence The security services were extremely concerned that a crucial source of counter-terrorist information would *dry up* if wiretap evidence were permissible in court.

. . . .

Let us look at the American example. In many states in America where wire tap is allowed, that source of information has *all but dried up* because criminals—members of the mafia and terrorists—understand that this that they say on the

Neither of these rationales can fully account for the U.K.'s "ludicrous" and "disparate" use of wiretap information. First, those who engage in organized crime or terrorism use circumspection when using the telephone, or for that matter, any form of communication. They are cautious because they might be under government surveillance, not because those statements might later be used in court. For this reason, wiretap evidence in the U.S. has not "dried up." Secondly, as the American experience with wiretapping has demonstrated, sensitive sources and methods can be protected without sacrificing this important source of evidence. The Classified Information Procedures Act (CIPA)²⁵⁹ is one possible model that provides for in camera, ex parte review of sensitive sources and methods.

As the Home Office freely admits, wiretapping is used and is a fruitful source of information. That important source of information is not used in court proceedings and is a waste of valuable resources that could be used to bring criminals to justice.

IV. THE "RICIN PLOT:" A CASE STUDY OF BRITISH JUSTICE

Lord Woolf, in an article for the Times, recently quipped that "the standards of justice that the system is delivering are no better than that which were provided . . . 50 years ago."²⁶⁰ The Lord Chief Justice is correct, but for altogether different reasons than he supposed. The practice direction,²⁶¹ the proposed criminal justice reforms,²⁶² and judge's preferences²⁶³ for trials of limited scope and length frustrate the

telephone will inevitably be used against them in court, and are extremely careful not to say anything on the telephone. This is exactly why, I am glad, the Government have been very reluctant to conclude that the law should change.

430 PARL. DEB., H.C. 1441 (2005) (statement of Rt. Hon. Tom Harris) (emphasis added).

259. 18 U.S.C. App. §1-16 (2004).

260. Lord Woolf, *The Standards of Justice We Deliver Are No Better than 50 Years Ago. Why?*, TIMES (London), April 5, 2005, at 4. The Lord Chief Justice goes on to state that the problem with the system is an influx of long and complex criminal fraud cases. These cases, he argues, should be "strictly confined" to a given time frame. He states that "there is a consensus that, save exceptional circumstances, no trial should be permitted to exceed a give period – some favour three months, others an outer limit of six months." *Id.*

261. The conspiracy practice direction reads: "The judge should require the prosecution to justify the joinder, or, failing justification, to elect whether to proceed on the substantive or conspiracy counts. Practice Direction (Crime: Conspiracy), (1977) } W.L.R. 537 (Eng.). See *supra* text accompanying notes 210-216.

262. See, e.g. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, A FAIRER DEAL FOR LEGAL AID, 2005, Cm. 6591 (U.K.), available at <http://www.dca.gov.uk/laid/laidfullpaper.pdf> (proposing to cap the length of longer trials and encourage case management).

263. See *supra* text accompanying notes 234-237.

prosecution of criminal enterprises. The paradigm of a British trial is simple: one defendant, one offense. It is a trial system that may or may not have been adequate for prosecuting "street crime," but it is wholly ineffectual when prosecuting organized crime, white-collar crime, or for that matter, the terrorist issues that the U.K. faces today. In short, one reason why the "standards of justice" have not improved in Britain over the last fifty years is that the trial system has not been modernized. The recent "ricin plot" illustrates the failure of these antiquated rules of joinder and severance to bring modern day criminals to justice.

A. *The Plot to Poison Britain*

In early January 2003, a raid on a flat in North London exposed all the makings for a chemical attack in Britain.²⁶⁴ While there is yet to be any official report of the case, the news reports revealed a plot involving thirteen al-Qaeda operatives linked to the Abu Doha network and the Salafist Group for Preaching and Combat in the U.K.²⁶⁵ The group was allegedly planning to make ricin and nicotine poisons to plant on car door handles in the city. Additionally, the group had planned to taint toiletries, like Nivea face cream and toothbrushes in local shops.²⁶⁶

The plot was uncovered after one critical member was apprehended and interrogated in Algeria.²⁶⁷ With this information, the

264. Sean O'Neill, *How High Street Poison Plot Ended in a Bedsit Bloodbath*, TIMES (London), April 14, 2005, at 6 [hereinafter *High Street Poison Plot*].

265. See David Leppard & Nick Fielding, *Ricin Defendants to Claim Asylum*, SUNDAY TIMES (London), April 17, 2005, at 4. See also Sean O'Neil, *Was Ricin the Last Act of Terror Cell?*, TIMES (London), April 15, 2005 at 7 [hereinafter *Last Act of Terror Cell*]. While not charged with crimes in the ricin case, Abu Doha is widely regarded as a "senior terrorist," the leader of an Algerian extremist group in London, and former terrorist trainer in Afghanistan. *Id.* He allegedly recruited and "mentored" Ahmed Resam, who is in U.S. custody over the plotted millennium bomb attack on LAX, and Nizar Trabelsi, who is currently in prison in Belgium for plotting to bomb a NATO airbase. *Id.* Abu Doha is being held in Belmarsh, fighting possible extradition to the U.S. *Id.*

266. Stewart Tendler & Sean O'Neill, *The al-Qaeda Plot to Poison Britain*, TIMES (London), April 14, 2005, at 1 [hereinafter *Al-Qaeda Plot*].

267. Sean O'Neill, *Informers' Arrest Brought Down Plan*, TIMES (London), April 14, 2005, at 7 [hereinafter *Informers' Arrest*]. In December 2002, the Algerian government detained Mohammed Meguerba, a terrorist suspect with al-Qaeda connections. *Id.* Under interrogation, Meguerba revealed his plot with a man named "Nadir," with whom he claimed to have concocted ricin. *High Street Poison Plot*, *supra* note 263. He confessed to the Algerian authorities that the attack planned "would not be a mass attack, but on chosen individual citizens" and that Jewish people were among the targets being considered. *Id.* While Meguerba claimed not to know the address where he and "Nadir" had worked, the information from this interrogation was enough to lead police to a North London flat. *Id.*

It was later revealed that this information, along with a twenty-seven page confession, was

London police were led to a two-bedroom flat in Wood Green containing recipes and the ingredients to manufacture ricin. The flat contained several sets of recipes for making cyanide, ricin and other toxins, in addition to instructions to make explosives and detonators.²⁶⁸ The police also confiscated "apple pips . . . cherry stones . . . castor beans and bottles of acetone, packets of plastic gloves, thermometers, digital scales and funnels," in short, the ingredients for ricin and a make-shift laboratory.²⁶⁹ While ricin was not found in the flat, investigators did uncover one pot of Nivea face cream containing a nicotine poison.²⁷⁰

Passport photos from the flat led the police to Kamel Bourgass, identified in the interrogation in Algeria.²⁷¹ In the hours after the flat raided, Bourgass, or "Nadir," fled to London for Bournemouth. He allegedly spent several days with an unidentified man who authorities believe was arranging Bourgass's escape.²⁷² On January 14, nine days

obtained under torture by the Algerian intelligence services (DRS). Reda Hassaine & Sean O'Neill, *I Was Tortured, Says Ricin Plotter*, THE TIMES (London), May 9, 2005 at 13 [hereinafter *Ricin Plotter*]. Under U.K. law and multitude of international accords, a person who commits torture is subject to criminal liability and confessions obtained under torture are inadmissible in U.K. courts. See, e.g. *R. v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte*, (2000) 1 A.C. 147 (H.L.) (U.K.); Police and Criminal Evidence Act, 1984, c. 60, § 76 (U.K.) [hereinafter PACE]. U.K. statutes, particularly PACE, contemplate the "fruit of the poisonous tree" problem and provides that even if a confession is obtained by oppression, the admissibility of "any facts discovered as a result of the confession" remains unaffected. PACE § 76(4). Thus, in the criminal trial of the ricin defendants, the evidence obtained as a result of Meguerba's tortured confession would not be inadmissible for that reason alone. Conversely, the Special Immigration Appeals Commission (SIAC), the only body wherein detained terrorist suspects can appeal their detention, can accept evidence given under torture, provided that the U.K. has not "procured or connived at" the torture. *A and Others v. Secretary of State for the Home Department* [2004] EWCA (Civ) 1123, [252] (U.K.).

As the ricin case illustrates, the U.K. uses information obtained through torture for intelligence purposes. A recent government memo has permitted MI6 to use this information, provided that no U.K. personnel took part in the torture. Robert Winnett, *Torture Ruling*, SUNDAY TIMES (London), March 27, 2005, at 10.

268. *High Street Poison Plot*, *supra* note 263.

269. *Id.*

270. Leppard & Fielding, *supra* note 264. The original police report claimed to have found ricin in the apartment. After DNA testing on the substance, police retracted the statement as a false positive. *Id.*

271. *High Street Poison Plot*, *supra* note 263.

272. *Id.* The 100 arrests were primarily members of the Salafist Group for Preaching and Combat (GSPC), which has sent thousands of its members to training camps in Pakistan and Afghanistan. Kim Sengupta & Jason Bennetto, *Ricin Plot: Police Made 100 Arrests to Smash al-Qa'ida Network; Most Active Group had Sent Thousands of Members to Train*, THE INDEPENDENT (London), Apr. 14, 2005, at 5. The group is allegedly affiliated with Abu

after the raid on the North London flat, Anti-Terrorist Branch officers discovered and arrested both men.²⁷³ Tragically, a botched arrest allowed Bourgass to break free. He stabbed Detective Constable Stephen Oake eight times before he was subdued. DC Stephen Oake died on the scene.²⁷⁴

Over 100 people were arrested in connection to the ricin plot.²⁷⁵ The police action in the case cost upwards of £20 million.²⁷⁶ Later, thirteen men were charged, including Bourgass, for their involvement in the plot.²⁷⁷ The other twelve men charged were allegedly connected to Bourgass and the al-Qaeda sponsored Salafist Group for Preaching and Combat (GSPC), an Algerian based terrorist cell.²⁷⁸

1. Evidence of a Conspiracy

Among those arrested and tried with Bourgass was Mouloud Sihali, a "wheelerdealer," who arranged flats and false papers for asylum seekers in London. Upon searching his flat, the police found five false passports, one with the picture of a key terrorist suspect.²⁷⁹ This search also led to the arrest of David Khalef, a terrorist suspect who was in possession of a false passport and recipes to make ricin, cyanide, and botulinum.²⁸⁰

Additionally, Mustapha Taleb, an Algerian extremist, was charged after his fingerprints were found on two sets of recipes for ricin in Bourgass' London apartment. He admitted to handling and photocopying the recipes, but denied any knowledge of their contents. Taleb was convicted and charged in his absence of terrorism crimes in the Algeria unrelated to the ricin charge.²⁸¹ The fingerprints of Kamel

Doha who, according to a U.S. indictment, had personal permission from Osama bin Laden to construct the Khalden training camp in Afghanistan. *RICO Enterprise Concept*, *supra* note 51.

273. *Last Act of Terror Cell*, *supra* note 264.

274. *High Street Poison Plot*, *supra* note 263. It is unclear from the articles the extent of the other officer's injuries. The news reports do point out that Bourgass was not handcuffed when he was apprehended. The officers feared that handcuffing the man would result in the destruction or contamination of possible evidence on his hands. Instead, the officers chose to guard him on both sides; a move that proved fatal for one officer.

275. *Id.*

276. Leppard & Fielding, *supra* note 264.

277. *Id.*

278. *High Street Poison Plot*, *supra* note 263; *Last Act of Terror Cell*, *supra* note 264.

279. *High Street Poison Plot*, *supra* note 263.

280. *Id.*

281. Richard Ford, Series of Blunders Let a Terrorist Walk Free, *TIMES* (London), Apr. 14, 2005, at 6.

Merzoug also were found in twenty-three places on the poison recipes. Merzoug, a resident alien, is known for using at least two false identities within Britain.²⁸²

2. *The Trial(s)*

Originally, thirteen men including Bourgass were indicted for "conspiracy to make chemical or biological weapons."²⁸³ When secondary testing revealed that the only poison in the flat was a nicotine poison, the charges were replaced with charges of "conspiring to cause a public nuisance."²⁸⁴ The Crown Prosecution Service elected to try the men in three groups: Bourgass for the murder of DC Stephen Oake, one trial on conspiracy charges against Bourgass and eight others, and one trial for the remaining four alleged conspirators.

Bourgass was convicted and received a life sentence for the murder and further jail time for attempted murder and wounding.²⁸⁵ In a second trial, Bourgass and eight other men were tried on charges of "conspiracy to cause a public nuisance by the 'use of poison or explosives to cause disruption, fear, or in-jury [sic]'" and conspiracy to murder.²⁸⁶ The eight other men included Mustapha Taleb and Kamel Merzoug, whose fingerprints were found extensively over the flat and ricin recipes, David Khalef, a man found in possession of ricin recipes, and Mouloud Sihali, the man responsible for supplying the group with false passports.²⁸⁷ Additionally, Sidali Feddag, Samir Asli, Mouloud Bouhrama, and Khalid Alwerfeli were joined, although little is known from the available sources of their participation in the plot.²⁸⁸ Four other men were charged in the conspiracy and awaited a second, separate trial for their participation.

3. *Outcome of the Ricin Trial*

After deliberating for more than seventy-four hours, the jury cleared four of Bourgass' co-defendants and convicted four of

282. *Id.*

283. Leppard & Fielding, *supra* note 264.

284. *See id.*

285. Russell Jenkins & Stewart Tendler, *Bungled Special Branch Raid Left Policeman Dead; Ricin Plot*, THE TIMES (London), Apr. 14, 2005, at 8.

286. *Al-Qaeda Plot*, *supra* note 265.

287. Leppard & Fielding, *supra* note 264; Ford, *supra* note 280; Rosie Cowan & Duncan Campbell, *Ricin Plot: Detective Murdered by Obsessive Loner: Illegal Immigrant had Trained with al-Qaida*, THE GUARDIAN, Apr. 14, 2005, at 9.

288. *Al-Qaeda Plot*, *supra* note 265.

immigration crimes.²⁸⁹ Only Bourgass was convicted in the conspiracy charge. He was sentenced to seventeen years for his involvement.²⁹⁰ The second trial of the remaining four alleged conspirators was abandoned, and the men were officially cleared.²⁹¹

Thus, the multi-million pound investigation and trial of the "most wanted terrorist suspect in Britain" was a bust.²⁹² The prosecution had already obtained more than a life sentence for Mohammed Bourgass. The four men convicted of passport offenses will be released soon, as their sentences are only slightly longer than the time already served.²⁹³ The remaining eight men cleared are in the process of seeking asylum in the U.K. on the grounds that the ricin trial prevents them from returning home because of probable torture.²⁹⁴ A senior Scotland Yard official said that the outcome of the trial was "disappointing," to put it mildly.²⁹⁵

While the outcome of the ricin case certainly is "disappointing," it is not entirely improbable. Since September 11, 2001, the British police have made 702 arrests under the powers granted to them by the Terrorism Act of 2000.²⁹⁶ These arrests have produced a meager seventeen convictions for terrorist offences.²⁹⁷ The ricin case is an illustration of need for a change in the U.K. criminal justice system. Sir Ian Blair, the Commissioner of the Metropolitan Police, blamed the acquittals on the lack of a substantive law to tie together "very loose-knit conspiracies" and deal specifically with "acts preparatory to terrorism."²⁹⁸

289. *Id.* Mustapha Taleb and Kamel Merzoug, whose fingerprints were found extensively over the flat and ricin recipes were completely exonerated at trial. David Khalef, the man found in possession of ricin recipes, and Mouloud Sihali, the man responsible for supplying the group with false passports were sentenced to 3 years and 15 months respectively for possessing false passports. Ford, *supra* note 280.

290. *Id.*

291. *Id.*

292. Jenkins & Tendler, *supra* note 284. See also Leppard & Fielding, *supra* note 264.

293. *Al-Qaeda Plot*, *supra* note 265.

294. Leppard & Fielding, *supra* note 264.

295. *Id.*

296. Robert Verkaik, *Ricin Plot: What Now for the Terror Laws?*, THE INDEPENDENT (London), Apr. 14, 2005, at 4.

297. *Id.*

298. Stephen Pollard, *Oh, Do Shut Up, Sir Ian*, TIMES (London), Apr. 18, 2005, at 20. The Terrorism Act of 2000 provides such an offence criminalizing acts preparatory to terrorism. Section 57(1) states that: "A person commits an offense if he possesses an article in circumstances which give rise to a reasonable suspicion that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism. *Id.*; Terrorism Act of 2000, c. 11, § 57(1) (2000) (U.K.). Nevertheless, the offence does not tie together offences and offenders, nor does it abrogate the practice direction severing the conspiracy and substantive counts.

The U.K. trial system, which prefers simple trials of one defendant charged with a single crime, militates strongly against prosecuting "loose-knit conspiracies." This approach, while serviceable when prosecuting street crime, is utterly unworkable when faced with terrorism crimes. The ricin case illustrates the need for a RICO-type statute with predicate offenses tailored to the needs of a terrorism prosecution. Such a law would modernize U.K. trial procedures and make a single trial of an entire terrorist cell possible and appropriate.

B. *The Anatomy of a Hypothetical Ricin RICO*

RICO has been a successful tool for American prosecutors faced with the "very loose knit" conspiracies Sir Ian Blair mentions. While, as the White Paper states, making a RICO case involves exponentially more proof,²⁹⁹ the benefits of a RICO trial are manifold. A RICO trial would join the thirteen defendants and their diverse offenses in one trial. A RICO trial would allow for the more liberal admission of evidence of the Salafist Group for Preaching and Combat (GSPC) or al-Qaeda, groups that all thirteen conspirators were allegedly members.³⁰⁰ Because such a trial places terrorism activity in context and allows the jury to see exactly what the defendants did, trying the ricin case as a RICO case would have been more likely to secure convictions against the ricin thirteen.

1. *Joinder of Offenses and Offenders*

The ricin thirteen were not tried in one trial for their involvement, most probably because they could not be. In the ricin case, the U.K. practice direction and strong judicial preference for a short, simple trial forced the thirteen men to be tried in three "shorter" trials. Bourgass' trial for murder and assault were severed from the conspiracy and passport offenses. As a result, in the second trial for conspiracy to create a public nuisance and conspiracy, the defense portrayed the plot as an ultimately abortive plan, carried out by men without the faculties, intelligence, or will to kill.³⁰¹ Newspaper reports of the Bourgass' first

299. White Paper, *supra* note 4, at 6.01.

300. *High Street Poison Plot*, *supra* note 263; *Last Act of Terror Cell*, *supra* note 264; Verkaik, *supra* note 295.

301. One commentator at the trial quipped that Bourgass "presumably intended to try to make the stuff [ricin], but was clearly a hare-brained nut" and that his conspirators were "no more than a bunch of illegal immigrants and passport forgers, of whom thousands must be loose in Britain." Simon Jenkins, *A Sledgehammer for a Nut*, *TIMES* (London), Apr. 15, 2005, at 20. At trial, Bourgass was asked about a bag discovered in the flat in which the recipes were hidden. He claimed he had found it in the street in Brixton. When asked why

trial and conviction for murder and four counts of attempted murder were shielded from the jury.³⁰² The second trial of Bourgass and eight other men, alluded to ties with terrorist groups, suggesting that the conspiracy was “in furtherance of [an] extremist Islamic cause” but the ricin plotters’ membership in terrorist organizations were spoken of in veiled terms.³⁰³ Bourgass’s training at an al-Qaeda camp and the other defendants’ membership in the Salafist Group for Preaching and Combat (GSPC) were not revealed at the trial.³⁰⁴ Further, because the conspiracy trial was severed in two, a jury never saw the full membership of the group.³⁰⁵ At trial, the group looked like a “ramshackle operation” without the organization to do any real harm.³⁰⁶ In short, the trial failed to secure conviction of the terrorist cell because a terrorist cell was never on trial. The individuals and offenses were severed from each other, making it impossible for the judge and jury to see exactly what the offenders had done.

A RICO case would join the defendants and offenses and make a single trial possible. In prosecuting the ricin case as a hypothetical RICO conspiracy, a prosecutor could name the Salafist Group for Preaching and Combat (GSPC) or al-Qaeda as a RICO enterprise and all thirteen conspirators as members.³⁰⁷ In the ricin case, RICO’s

he had kept it, he replied “because I’m stupid.” Cowan & Duncan, *supra* note 286. Thus, jurors were left with the notion that the defendants were essentially harmless when, as the murder of DC Stephen Oake proved, this was anything but the truth.

302. Pollard, *supra* note 297. Conversely, the evidence of the ricin plot was put before the jury in the murder case. Steven Morris, *New appeals put anti-terrorism measures to test*, THE GUARDIAN (London), May 19, 2005, at 6.

303. Duncan Campbell & Rosie Cowan, *Ricin Plot: Terror Trail that led from Algeria to London: One Jailed, Four Freed after Jury Deadlocked at end of Eight Month, £20m. Trial*, THE GUARDIAN (London), Apr. 14, 2005, at 8.

304. See Dodd, *supra* note 302; *Last Act of Terror Cell*, *supra* note 264.

305. As a result, the reports of the trial seem to reach the consensus that Bourgass was “a murderous and inept loner” who acted alone. As one reporter objects:

Who then . . . supplied him with multiple ID papers, activated him, provided safe houses and taught him to use a knife to kill one and gravely injure three other police officers? And if Bourgass was acting alone, how come there were four sets of his poison recipes and fingerprints of several people all over them?

Sean O’Neill, *Be Afraid in Your Armchair*, TIMES, Apr. 20, 2005, at 18 [hereinafter *Armchair*].

306. Campbell & Cowan, *supra* note 302.

307. A RICO enterprise “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 U.S.C. § 1961 (4) (2006). Naming the Salafist Group for Preaching and Combat (GSPC) or al-Qaeda as a RICO enterprise, would cast the “enterprise” in the “perpetrator” role. *RICO Enterprise Concept*, *supra* 55, at 656.

Courts have held that this definition includes “wholly illegitimate” organizations. *United States v. Turkette*, 452 U.S. 576, 584-585 (1981). Furthermore, the Supreme Court in

enterprise concept would function as a joinder mechanism, allowing joinder of defendants "employed by or associated with" an enterprise, or who "conspire[] to violate section 1962(c)."³⁰⁸ A RICO statute tailored to the needs of a terrorist prosecution could include crimes of violence, possession or manufacture of poisons, and immigration offenses as "predicate activity."³⁰⁹ Under the language of section 1962(c), if these offenses are committed by a defendant or another similarly joined to the enterprise and is committed in the "affairs" of the enterprise, then they can all be properly joined in a single trial.³¹⁰

2. Overcoming U.K. Objections to Joinder

The suggestion that the liberal joinder of offenses and offenders is advantageous and even necessary to promote justice faces vehement opposition in the U.K., where long trials are the problem, not the solution.³¹¹ The U.K.'s most recent criminal reform project, *A Fairer Deal for Legal Aid*, goes so far as proposing a cap on the length of longer trials and removing the jury from complicated cases.³¹² This

National Organization of Women, Inc. v. Scheidler, held that no economic motive was required to violate RICO. 510 U.S. 249 (1994).

308. 18 U.S.C. § 1962(c) (2006). See also FED. R. CRIM. P. 8.

309. See 18 U.S.C. § 1961 (1) (2006).

310. 18 U.S.C. § 1962 (c); *RICO Enterprise Concept*, *supra* note 55, at 654-55. As shown in Section II above, RICO would allow for the more liberal admission of evidence. For example, because the "enterprise" is an essential part of making a RICO case, the prosecution could adduce evidence of the internal structure al-Qaeda or the Salafist Group for Preaching and Combat (GSPC). See *RICO Enterprise Concept*, *supra* note 55. See also *United States v. Salerno*, 686 F.2d 534, 536 (2d. Cir. 1987).

In addition to the evidentiary advantages that RICO presents, prosecutors in the U.K. have an added advantage. The Criminal Justice Act (2003) changed the law with respect to character evidence, allowing the free admission of previous convictions when those previous convictions tend to prove a "matter in issue between the defendant and the prosecution." Criminal Justice Act of 2003, c. 44, § 101(1)(d) (2003) (U.K.), available at, <http://www.opsi.gov.uk/acts/acts2003/20030044.htm>. The act goes on to define a "matter in issue between the defendant and the prosecution" as the "question whether the defendant has a propensity to commit offenses of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence." *Id.* § 103 (1)(a). Thus, under the new act, one defendant's past conviction for terrorist offense, would be admissible.

311. The discussion assumes that, when Lord Woolf wrote, *The Standards of Justice we deliver are no better than 50 years ago, Why?*, he was speaking of justice not only as the speedy resolution of claims but also as the accuracy of those resolutions. See Woolf, *supra* note 246. While there is no official report of the ricin case a reading of the news and other media reveal overwhelming evidence of the defendants' guilt. That much of this evidence was not put before the jury, or at least not put before the same jury and in a single case, shows the U.K. trial procedure as actively working against accurate results and justice.

312. DEPARTMENT OF CONSTITUTIONAL AFFAIRS, *A FAIRER DEAL FOR LEGAL AID* 5.40 (2005), available at <http://www.dca.gov.uk/laid/laidfullpaper.pdf> (last visited Sept. 27,

reform was instigated by the burgeoning £2.1 billion legal aid budget that the Department of Constitutional Affairs proposes to reduce by limiting complex cases.

A survey of the *longest* thirty cases heard between 2003-2004 showed that:

- The average length of these trials was 67 days.³¹³
- On average, six defendants were tried in these cases.³¹⁴
- The average number of prosecution witnesses was 114.³¹⁵

The objection to joint trials is not just their length, it also is a general distrust of a juror's ability to remember the evidence presented over a longer trial and differentiate between defendants.³¹⁶ In the speech announcing these proposals, Lord Falconer of Thornton QC, the leader of the reform project, stated "[t]he days of the 18-month trial are over Any jury in the world would find it almost impossible to remember properly what was said 18 months ago. Most cases should not last longer than a few months."³¹⁷

Since the passage of RICO and the advent of the "enterprise trial," U.S. courts have had several occasions to examine the policies behind joinder and larger trials.³¹⁸ For the most part, the fears expressed by Lord Falconer, Lord Woolf, and others are unfounded.

First, joint trials do not necessarily increase the cost of adjudication. Instead, joinder prevents the unnecessary repetition of evidence.³¹⁹ Not only does this save a prosecutor the time of presenting evidence twice (at twice the cost), but it also saves the sometimes recalcitrant witness the hassle of reappearing. This becomes particularly important in terrorism cases, where witnesses require special arrangements to attend trial because they present a security

2006) [hereinafter A FAIRER DEAL FOR LEGAL AID]; Lord Woolf, *supra* note 259.

313. A FAIRER DEAL FOR LEGAL AID, *supra* note 311, at 5.5.

314. *Id.*

315. *Id.*

316. See Frances Gibb, *Length and Cost of Trials to be Cut*, TIMES (London), May 11, 2005, at 22.

317. *Id.*

318. See Brendan Judge, Note, *No Easy Solutions in the Problem of Criminal Mega-trials*, 66 NOTRE DAME L. REV. 211 (1990); FEDERAL BAR COUNCIL COMMITTEE ON SECOND CIRCUIT COURTS, A PROPOSAL CREATED BY EXTREMELY LONG CRIMINAL TRIALS, 128 F.R.D. 137 (1989) [hereinafter FEDERAL BAR COMMITTEE]; Paul Marcus, *Prosecuting White-Collar Crime: Re-Evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL OF RTS. J. 67 (2002).

319. See *Zafiro v. United States*, 506 U.S. 534, 537 (1993). Additionally, they "promote efficiency and serve the interest of justice by avoiding scandal and inequity of inconsistent verdicts." *Id.* (internal quotation marks omitted).

risk.³²⁰ Thus, while the U.K. is seeking to save money from the legal aid defense budget, any savings it realizes will probably be offset by an increase in the Crown Prosecution Office's spending and Prison Services.³²¹

Second, to say that the jury is unable to perform its function and differentiate between defendants is both speculative and untrue.³²² Even in the largest cases, jurors have been able to differentiate between defendants. For example, in one of the largest cases ever, *United States v. Casamento*, the jury heard testimony from more than 275 witnesses over a seventeen month trial of 31 defendants.³²³ Despite the duration and complexity of the trial, the jury was able to differentiate the defendants; several were acquitted on the continuing criminal enterprise charge and one defendant was acquitted on a narcotics charge.³²⁴ This is not to say that every trial should become a seventeen month affair but it does illustrate that U.S. juries are able to differentiate between defendants and recall the content of evidence delivered over a seventeen

320. FEDERAL BAR COMMITTEE, *supra* note 318, at 138. The report states that:

The government's apparent preference for lengthier joint trials rather than shorter separate trials is often based on defensible policies, such as the efficiency of one long trial, a desire to present a full picture of a complex multi-defendant criminal scheme, an interest in limiting the number of appearances by government witnesses who may be reluctant to testify at all or whose appearances may present security problems, or a reluctance to allow the discovery that might be the side effect of multiple trials.

Id.

321. See e.g., Lord Woolf, *supra* note 259. He states that "there is no satisfactory liaison between the courts and the Prison Service or between the police and the Crown Prosecution Service. Among the consequences were that trials were often interrupted because of the late arrival of defendants from prison . . . and witnesses did not attend court when required." *Id.*

322. See G. Robert Blakely, *RICO: Federal Experience (Criminal and Civil) and an Analysis of Attacks Against the Statute*, in THE HANDBOOK OF ORGANIZED CRIME IN THE UNITED STATES 451, 460-67. That RICO makes for long, burdensome trials is a myth. For example, "an analysis of reported RICO opinions shows that of over 400 opinions that provided information regarding trial length, only six trials were found to last over six months. The vast majority (76.4 percent) were shorter than three months." *Id.* at 460. While not all RICO charges are quickly resolved, these figures indicate that a RICO trial is typically *not* the monstrously long trial the British fear.

A second concern, that juries in complex enterprise trials are confused and use evidence admitted against one defendant against all defendants. The evidence will have a prejudicial spill-over effect, and jurors will convict defendants who, in an individual trial, would not have been convicted. It is not obvious from this claim that the reverse might also be true. Jurors may acquit a defendant because he appeared comparatively less guilty than a co-defendant. In short, "where multiple defendants are on trial, it is . . . at least as likely that 'innocence by comparison' rather than 'guilt by association' will obtain." *Id.* at 463.

323. *United States v. Casamento*, 887 F.2d 1141, 1149 (2d Cir. 1989).

324. *Id.* at 1151.

month span.³²⁵

Last, the argument that the U.K. needs a RICO-type statute to modernize both their substantive and procedural law should not be dismissed if only for one important reason: RICO is effective.³²⁶ In 1969, the Committee on the Judiciary in the United States Senate issued a report listing 288 "made members" of the mob, that is, those members in the highest levels of leadership.³²⁷ In 1988, eighteen years after RICO's adoption, the Permanent Subcommittee on Investigations held a second set of hearings, this time naming over a thousand known *la Cosa Nostra* (LCN) members in all levels of leadership.³²⁸ When comparing the two lists of members and their resulting convictions and jail time served, after RICO, more high ranking LCN members were convicted.³²⁹ Of the LCN members identified in 1969, members served an average of 46 months in prison over their lifetime, or just under four years.³³⁰ By contrast, the LCN member identified in the 1988 hearings

325. Indeed the *Casamento* court itself took issue with the length and complexity of the trial. On appeal, the Second Circuit affirmed the defendants' convictions but stated that it had "misgivings about trials of this magnitude." *Id.* The court went on to issue benchmarks to district courts facing such large trials. In those cases when a trial is expected to exceed four months, the prosecutor has the burden of an "especially compelling justification" for joinder. *Id.* at 1152. The Judge should "explore" severance with the prosecutor, and determine if smaller trials of easily proven defenses that "carry exposure to adequate maximum penalties" is more appropriate. *Id.* See also *United States v. Gambino*, 729 F.Supp. 954, 970 (S.D.N.Y. 1990) (following the *Casamento* benchmarks and severing a twelve defendant trial into two groups). *But see* *United States v. Tocco*, 200 F.3d 401, 414 (6th Cir. 2000) (declining to follow *Casamento* benchmarks).

326. See James B. Jacobs & Lauryn P. Gouldin, *Costa Nostra: The Final Chapter?*, 25 CRIME & JUSTICE 129 (1999).

327. *Measure Relating to Organized Crime: Hearing Before the Subcomm. on Criminal Laws and Proc. of the S. Comm. on the Judiciary*, 91st Cong. 125 (1969).

328. *Organized Crime: 25 Years after Valachi: Hearing before the Permanent Subcomm. on Investigation of the S. Comm. on Governmental Affairs*, 100th Cong. (1988).

329. To ensure the reliability of data, the only sources in this study were the Committee Hearings, Lexis Law, and the Historical New York Times. A keyword search was conducted for each named member in the Federal and State Cases database, All News, and the New York Times Data Base. Indictments resulting in a trial were noted; indictments not resulting in a trial were not. The date of sentencing is recorded, if available. In the event it was not, the date of the first post-trial opinion is recorded. Other data recorded includes name, date of birth, date of death, cause of death, position in the crime family, and any known aliases. Through this method the researcher recorded data on the Bonanno family, one of the 5 major crime families operating in New York City. This study is not exhaustive, but it does represent a large sample population for comparing convictions and sentences.

330. This is preliminary data obtained for a small size of 140 LCN members of the Bonanno crime family. Of the 25 Bonanno family members identified in 1969, all but 5 members were charged with a crime in their lifetime. That the high ranking members served less than four years in prison *over their lifetime* demonstrates a failure of the law to secure meaningful convictions that incapacitate criminals. Often these members were

served an average of 68 months (almost 7 years) for each conviction, with many members convicted two or three times.³³¹ Of the members identified in the 1988 hearings, thirty percent went on to be convicted in for RICO or a RICO conspiracy. By far, LCN members charged with RICO violations served the most prison time. Those charged with RICO, including those charged with a RICO violation who later plea bargained, served an average of twelve years.³³² Ten percent of those charged with a RICO violation received a life sentence.

A "well-designed and tried RICO prosecution is a thing of beauty." It places the racketeering or terrorism activity in context and allows the jury to see exactly what the defendants have done. For these reasons, trying the ricin case as a RICO case would be more likely to secure convictions against the ricin thirteen, that is, to do justice. Passing a RICO-type statute would serve to update the antiquated U.K. trial system to more effectively deal with phenomena like terrorism in modern society. Further, the success of the RICO statute in the U.S. would not have been as dramatic if not for the wealth of evidence provided under the requirements of Title III, the wiretap statute.³³³ The U.K.'s inconsistent position on wiretap evidence is justified on the basis that "a crucial source of counter-terrorist information would dry up if wire tap evidence were permissible in court."³³⁴ Put differently, the objection is not that wire tapping is not or should not be used in the U.K.; it is that its use in court would reveal sensitive sources and methods or, alternatively, provide a powerful deterrent to terrorist from using the phone. This Article argues that a statute like the Classified Information Procedures Act, combined with the U.K.'s existing procedures, would protect sensitive sources and methods, so as not to reveal how domestic surveillance is done.³³⁵ If used in court, wiretap

charged with crimes like criminal contempt or obstruction of justice that carried minimal sentences.

331. This data omits numerous life sentences that are still being served and thus cannot be quantified. Again, this preliminary data was obtained from a 140 person sample of the Bonanno crime family. Of the 115 members identified in 1988, researchers were able to find convictions of 71 members. Of these 71 members convicted, 29 were prosecuted several times, indicating a high (40%) chance of recidivism. Of the 71 convicted, 36 were convicted for RICO or RICO conspiracy.

332. This data omits RICO trials that are still pending or where the sentence remained unpublished. The average is far less than RICO's twenty year penalty because a majority (60%) reportedly plea bargained. The data also omits the three life sentences obtained; because the sentences are still being served, they cannot be quantified.

333. Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, 82 Stat. 212 (1968) (codified as amended at 18 U.S.C. §§ 2510-2520 (2006)).

334. 430 PARL. DEB., H.C. (6th ser.) (2005) 1441 (U.K.).

335. Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980)

evidence would not “dry up,” as for several reasons, that has not been the case in the U.S. experience.

Moreover, wiretap should not be ignored for an additional reason: it is effective. During 2002, electronic surveillance led to 1,617 arrests and 2,066 convictions.³³⁶ Wiretap evidence is a particularly important source of evidence when prosecuting a RICO case. Of the RICO cases surveyed, 95% of the RICO convictions used electronic surveillance.³³⁷ For all of these reasons, the U.K. should consider amending their otherwise liberal rules of evidence.

CONCLUSION

Congress enacted the RICO as part of a comprehensive effort to change the means by which the government attacked enterprise criminality. The statute makes a single trial of all “siblings” in a crime “family” possible and appropriate. It permits a judge and jury to understand exactly what the defendants have done, in a way that the American and English common law procedural and evidentiary rules did not.

The success of RICO makes it an appealing model for other nations’ legislation. In late 2004, when the U.K. proposed law enforcement reforms with respect to organized crime, it looked to RICO. Nevertheless, its evaluation of the statute is largely innocent of the procedural and evidentiary considerations involved in effective prosecution of enterprise criminality. For all of these reasons, the U.K. should consider updating its trial procedure in order to take advantages of the procedural advantages a joint trial affords against all forms of enterprise criminality, including terrorism.

(codified at 18 U.S.C. App. 3, §§ 1-16 (2006)).

336. Director of the Administrative Office of the United States Courts, Report on Application for Orders Authorizing or Approving the Interception of Wire, Oral, or Electronic Communications 5 (2003), available at <http://www.uscourts.gov/wiretap03/contents.html> (last visited Sept. 26, 2006).

337. Again, this information is preliminary data, found by using the Bonanno crime family data as the sole source of information. This percentage may even be higher, but due to limitations in the information available, this is the only percentage that can be stated with any degree of certainty.