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## RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?

Susan W. Brenner

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# RICO, CCE, AND OTHER COMPLEX CRIMES: THE TRANSFORMATION OF AMERICAN CRIMINAL LAW?

Susan W. Brenner\*

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\* Susan W. Brenner is an Associate Professor of Law at the University of Dayton.

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## I. INTRODUCTION

*Why is the prosecution arm doing this . . . ?*<sup>1</sup>

This Article examines a generally unremarked process that is transforming American criminal law—the move from a “simple” to a “compound” model of liability. The essential difference between the two models is that simple liability makes each act one—and only one—crime, whereas compound liability lets an act sustain liability for multiple offenses.<sup>2</sup>

Compound liability began appearing in federal law more than a century ago, but rapidly accelerated the pace of its infiltration after Congress adopted the “Racketeer Influenced and Corrupt Organizations” and the “Continuing Criminal Enterprise” statutes in 1970.<sup>3</sup> Until then, compound liability was a matter of common law; RICO and CCE were the first statutes explicitly incorporating it.<sup>4</sup> For almost a decade, prosecutors avoided RICO and CCE because of their peculiar liability structures; but they eventually learned to use them, and by the last decade of the twentieth century, compound liability has become a routine feature of federal law and has made serious inroads at the state level as well.<sup>5</sup>

As many have noted, often critically, federal law’s embrace of compound liability increased the number of federal prosecutions and the

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<sup>1</sup> Letter from Sam Adam, Chicago defense attorney, CHICAGO LAWYER, July 1991, at 13.

<sup>2</sup> See Susan W. Brenner, *S.C.A.R.F.A.C.E.: A Speculation on Compound Criminal Liability and Double Jeopardy*, 27 NEW ENG. L. REV. 916, 929-37 (1993). See also *infra* part II.A.

<sup>3</sup> The former is commonly known as “RICO,” the latter as “CCE”. The origins and provisions of both statutes are discussed *infra* part II.B.

<sup>4</sup> See *infra* part II.A-B.

<sup>5</sup> See, e.g., Edward S.G. Dennis, Jr., *Current RICO Policies of the Department of Justice*, 43 VAND. L. REV. 651, 652-53 (1990). See *infra* part II.D. for the present status of compound liability in state and federal law.

complexity of criminal charges.<sup>6</sup> Prosecutors may have reason to regard this phenomenon with satisfaction,<sup>7</sup> but others share the frustration expressed by a noted Chicago defense attorney:

Thirty years ago I began my practice trying prostitution cases at 1121 S. State Street. Presently, I am engaged in a multi-defendant, multi-count RICO conspiracy trial . . . in which the bulk of the indictment consists of 30-some prostitution counts, all under the umbrella of a RICO conspiracy. What would have been an hour or two trial in the state court is now a month or more federal prosecution . . . All to what end?<sup>8</sup>

While the empirical effects of this shift receive a great deal of attention, its conceptual implications have almost escaped notice.<sup>9</sup> This Article explores that neglected issue, examining American law's attachment to compound liability and the effect this has on traditional precepts of criminal law. Section II explains the nature of compound liability and traces its rise in American law. Section III attempts to account for its success to date and speculates about the future of compound liability. Section IV serves as a brief conclusion.

## II. COMPOUND LIABILITY: AN OVERVIEW

*The configuration of the charges—including the use together of RICO and CCE and drug conspiracy and numerous substantive counts . . . gave the prosecution a hard-ball edge.*<sup>10</sup>

This section compares simple and compound liability and traces the latter's recent success in American law at both the federal and state levels. It also analyzes the distinguishing characteristics of compound liability.

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<sup>6</sup> See, e.g., Paul Marcus, *Criminal Conspiracy Law: Time to Turn Back from An Ever Expanding, Ever More Troubling Area*, 1 WM. & MARY BILL OF RTS. J. 1 (1992); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661 (1987); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920 (1987); Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213 (1984).

<sup>7</sup> See *infra* part III.

<sup>8</sup> Adam, *supra* note 1, at 13.

<sup>9</sup> But see Lynch, *RICO: The Crime of Being Criminal, Parts III & IV*, *supra* note 6, at 84.

<sup>10</sup> *United States v. Williams-Davis*, 821 F. Supp. 727, 755 (D.D.C. 1993).

### A. *Two Models of Criminal Liability*

Historically, Anglo-American criminal law implicitly assumed that an act constituted the commission of one and only one crime.<sup>11</sup> For centuries, this seldom articulated assumption structured the conceptualization of “crime,” as in Blackstone’s statement that a crime is “an act committed . . . in violation of a public law.”<sup>12</sup> It produced the notion that the goals of the criminal law could be achieved by enunciating a single prohibition—or “crime”—for each undesirable act.<sup>13</sup>

Unchallenged, this ancient assumption remained anonymous;<sup>14</sup> but the recent success of a rival assumption which rejects its correlation of exclusion between act and crime requires a nomenclature to distinguish the two approaches. This Article will, therefore, use “simple liability” to denote the traditional one act-one crime model and “compound liability” to designate the model that lets one act serve as the predicate for multiple offenses.<sup>15</sup>

The taxonomy comes from grammar, which classifies sentences according to their structure.<sup>16</sup> A simple sentence contains one independent

<sup>11</sup> See Brenner, *supra* note 2, at 917-19. See generally Frank E. Horack, Jr., *The Multiple Consequences of a Single Criminal Act*, 21 MINN. L. REV. 805, 814-18 (1937). References to an “act” denote that all the elements traditionally needed for liability—act, mens rea, causation, and resulting harm, if required—are present. See, e.g., WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §§ 3.1-3.12 (2d ed. 1986).

<sup>12</sup> 4. WILLIAM BLACKSTONE, COMMENTARIES \*5. See also WILLIAM L. CLARK, HANDBOOK OF CRIMINAL LAW § 1 (2d ed. 1902) (stating that a crime is an “act which the law forbids”); 1 FRANCIS WHARTON, TREATISE ON CRIMINAL LAW § 14 (8th ed., Philadelphia, Kay & Brother 1880) (stating that a crime is an act “in violation of public law”).

<sup>13</sup> See Brenner, *supra* note 2, at 919:

Since the goal was to discourage certain conduct by defining it as unacceptable, the architects of the law of crimes supposed that it was sufficient to articulate one such definition for each undesirable behavior. The operative premise was that a definition sufficed because it provided a means for sanctioning those who engaged in that conduct. In a correlative undertaking, the criminal law sought to establish appropriate punishments for each offense; the theory was that identifying behavior as a crime would accomplish the goals of the criminal law as long as an adequate punishment was prescribed and administered for engaging in that behavior.

<sup>14</sup> *Id.* at 917-23.

<sup>15</sup> See generally *id.* at 916.

<sup>16</sup> See, e.g., DIANA HACKER, THE BEDFORD HANDBOOK FOR WRITERS 463-64 (3d ed. 1991). Four sentence structures exist—simple, compound, complex, and compound-complex. *Id.* at 463. The text following this note defines the first two structures. A “complex” sentence is a simple sentence that includes a subordinate clause—a word pattern that “cannot stand alone as a complete sentence.” *Id.* at 464. A “compound-complex” sentence is a compound sentence that includes one or more subordinate clauses. *Id.* at 465.

clause—a subject, verb, and perhaps, an object. It can include multiple subjects and/or verbs, but cannot incorporate more than one independent clause.<sup>17</sup> A compound sentence, on the other hand, contains at least two independent clauses. The compound sentence is, in other words, an aggregate composed of simple sentences.<sup>18</sup>

This useful dichotomy captures each model's distinctive approach to criminal liability: the simple model regards it as a categorical phenomenon, and therefore assumes an exclusive correlative relationship between act and offense.<sup>19</sup> Postulating that any act warrants the imposition of but one quantum of liability, this model encompasses a single determination—"liability" or "no liability." The simple model's limited analysis reflects its origins in archaic justice systems which employed literal, often draconian, penalties that made iterative liability irrelevant.<sup>20</sup>

The simple model has existed since criminal law began as the rough justice of the *lex talionis*, which demanded "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."<sup>21</sup> In such a system, a "liability/no liability" repertoire suffices because a finding of "no liability" requires no action, while a finding of "liability" triggers the imposition of punishment which is considered to be commensurate with the harm resulting from the crime

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<sup>17</sup> *Id.* at 464 (stating that a simple sentence is composed of "one independent clause with no subordinate clauses"). An "independent clause" can stand alone as a full sentence, i.e., "contains a subject and verb plus any objects, complements, and modifiers of that verb." *Id.*

<sup>18</sup> *Id.* ("A compound sentence is composed of two or more independent clauses with no subordinate clauses."). This terminology has not been used to designate models of criminal liability, but grammatical terms have been used to describe the structure of offenses such as RICO and CCE. *See, e.g.,* *United States v. Pungitore*, 910 F.2d 1084, 1109 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991) (referring to "compound-complex felonies such as RICO"). *See generally* *Whalen v. United States*, 445 U.S. 684, 709 (1980) (Rehnquist, J., dissenting) (referring to compound and predicate offenses).

<sup>19</sup> That is, it assumes that an act constitutes *only* one offense. *See supra* note 13 and accompanying text.

<sup>20</sup> At one point in English history, for example, felonies were capital crimes, so a determination of liability effectively eliminated the system's need to devote further consideration to that offender. *See* Horack, *supra* note 11, at 819; 3 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 75-76 (London, MacMillan 1883). For other English punishments, see BLACKSTONE, *supra* note 12, at \*377. For the sometimes literal, generally harsh punishments imposed in medieval Europe, see ANDREW MCCALL, *THE MEDIEVAL UNDERWORLD* 54-81 (1979).

<sup>21</sup> *Exodus* 21:25. *See also* Brenner, *supra* note 2, at 968-69. Anglo-Saxon law, precursor to the common law that shaped American criminal law, included this principle. *See, e.g.,* THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 425-26 (5th ed. 1956); 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 57-59 (London, MacMillan 1883).

at issue.<sup>22</sup> Since each offense is viewed as adequately addressing the evil inherent in the conduct it prohibits, imposing liability is a matter of matching conduct and crime and proving the former.<sup>23</sup>

Like a simple sentence, this version of criminal liability is a categorical, not a permutable, phenomenon; liability either exists or it does not, depending on the status of several basic elements. The simple model suffices as long as criminal conduct is perceived as falling into a series of discrete categories, each of which inflicts readily identifiable injury to persons, to property, or to the state.<sup>24</sup> In America, it persisted until the end of the last century, when federal law began experimenting with a new model.<sup>25</sup> Like a compound sentence, this version of criminal liability is an aggregate resulting from the combination of discrete elements.<sup>26</sup> Unlike simple liability, it lets an act or course of conduct serve as the factual predicate for multiple offense liability.<sup>27</sup>

<sup>22</sup> See *supra* note 13.

<sup>23</sup> Because it equated "act" and "crime," the common law used two principles—"merger" and "double jeopardy"—to preclude additive liability for one act. See, e.g., 1 JOEL P. BISHOP, *NEW COMMENTARIES ON THE CRIMINAL LAW UPON A LEGAL SYSTEM OF EXPOSITION* § 1060 (Chicago, T.H. Flood & Co. 1892) ("[O]ut of the same facts a series of charges shall not be preferred." (quoting *Regina v. Elrington*, 9 Cox C.C. 86, 90, 1 B. & S. 688)).

Merger barred cumulative liability for greater and lesser offenses, i.e., for a misdemeanor and a felony. See JUSTIN MILLER, *HANDBOOK OF CRIMINAL LAW* 50 (1934) ("[I]f by the same act the defendant committed both a misdemeanor and a felony, the misdemeanor was merged in the felony and the defendant was liable for the latter alone."). It did not apply if the crimes were both misdemeanors or felonies. *Id.* See also *Berkowitz v. United States*, 93 F. 452, 455 (3d Cir. 1899). The constitutional ban on double jeopardy was, until recently, interpreted to fill this gap. See *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (finding that double jeopardy bars re-prosecution and "multiple punishments for the same offense"); *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 173 (1873) (finding that double jeopardy "prevent[s] the criminal from being twice punished for the same offence"); See also Brenner, *supra* note 2, at 920-23.

Merger and double jeopardy have been attributed to the strictures of common law criminal procedure. See Comment, *Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribund Constitutional Guarantee*, 65 YALE L.J. 339, 342-43 (1956); MILLER, *supra*, at 51; see also *Iannelli v. United States*, 420 U.S. 770, 777 n.11 (1975) ("As the procedural distinctions diminished, the merger concept lost its force and eventually disappeared.").

<sup>24</sup> See generally Note, *Twice in Jeopardy*, 75 YALE L.J. 262, 279 (1965) (stating that the common law "distinguished among rape, arson, and murder, but not between 'intimidating any person from voting' and 'interfering with his right to vote'"). See also *id.* at 279 n.75 ("At the time of Henry III there were only eleven felonies. In Coke's time the number had risen to thirty.").

<sup>25</sup> See *infra* part II.B. (describing experimentation).

<sup>26</sup> See *infra* part II.B-C.

<sup>27</sup> *Id.*

## *B. The Emergence of Compound Liability in American Law*

Compound liability became a major influence on federal law in 1970, with the adoption of RICO and CCE.<sup>28</sup> The Supreme Court had, however, confronted common law compound liability issues on several occasions in the nineteenth century.<sup>29</sup> Though RICO and CCE were shaped by forces independent of this jurisprudence, it paved the way for their success.<sup>30</sup>

### *1. Before 1970*

Despite simple liability's general dominance in the nineteenth century,<sup>31</sup> compound liability issues arose in three areas of federal law: prosecution by different sovereigns, liability for continuing offenses, and merging of greater and lesser offenses.

It became apparent early in the century that federal and state authorities would, on occasion, seek to impose liability for the same conduct.<sup>32</sup> Defendants confronted with this endeavor argued that it produced a cumulative liability which violated the Fifth Amendment's prohibition of double jeopardy.<sup>33</sup> The Supreme Court upheld the practice, thereby creating a noticeable anomaly in the prevailing "one act-one crime" model of criminal liability.<sup>34</sup> This anomaly facilitated the rise of compound liability by acclimating judges and lawyers to the notion of iterative liability for a single course of conduct.<sup>35</sup>

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<sup>28</sup> See *supra* note 3 and accompanying text. See also *infra* part II.B.2.a.-b.

<sup>29</sup> See *infra* part II.B.1.

<sup>30</sup> See *infra* part II.B.2.

<sup>31</sup> See Brenner, *supra* note 2, at 916-23.

<sup>32</sup> See, e.g., *Fox v. State of Ohio*, 46 U.S. (5 How.) 410, 432 (1847); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 32-33 (1820). It was not until late in the next century that the Court upheld prosecutions by different states. See *Heath v. Alabama*, 474 U.S. 82 (1985).

<sup>33</sup> The amendment provides that no one shall "be subject for the same offence to be twice put in jeopardy of life and limb." U.S. CONST. amend. V. The rise of compound liability has required the reevaluation of aspects of this provision. See Brenner, *supra* note 2, at 951-68.

<sup>34</sup> See, e.g., *Moore v. State of Illinois*, 55 U.S. (14 How.) 13, 16-17 (1852) (stating that harboring fugitive slave violated both state and federal law—"[o]ne act constitutes two distinct offences . . . [which] may be separately tried, and . . . punished"); accord *United States v. Lanza*, 260 U.S. 377, 382 (1922). *Contra* *Fox v. State of Ohio*, 46 U.S. (5 How.) 410, 439-40 (1847) (McLean, J., dissenting); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 72-74 (1820) (Story, J., dissenting).

<sup>35</sup> See, e.g., *United States v. Lanza*, 260 U.S. 377, 382 (1922) ("[A]ct was an offense against the state of . . . Washington and also an offense against the United States.").



The Court undercut compound liability by applying a common law rule barring multiple liability for a "continuous offence."<sup>36</sup> In *In re Snow*, it held that Snow could not be convicted of three "crimes of unlawful cohabitation" for living with several women between 1883 and 1885 because "there was but one entire offense."<sup>37</sup> Ironically, though, this tenet of simple liability survives in some jurisdictions;<sup>38</sup> its concept of a "continuing offense" became an integral component of RICO and CCE.<sup>39</sup>

The nineteenth century Supreme Court's most important compound liability decision involved the common law rule of merger, under which a lesser crime—such as a misdemeanor—merged into a greater felony, blocking convictions for both.<sup>40</sup> The question arose as to whether conspiracy was encompassed by this rule, disappearing into a completed substantive offense.<sup>41</sup> At common law, conspiracy was a misdemeanor and so merged into a completed felony.<sup>42</sup> In *Clune v. United States*,<sup>43</sup> the Court held that conspiracy was "a separate offence" and could be punished as

<sup>36</sup> See, e.g., *Ex parte Nielsen*, 131 U.S. 176, 186-90 (1889); *In re Snow*, 120 U.S. 274, 281 (1887). For the common law rule, see BISHOP, *supra* note 23, at § 793; WILLIAM L. CLARK, HANDBOOK OF CRIMINAL PROCEDURE 324 (2d ed. 1918); WHARTON, *supra* note 12, at § 27.

<sup>37</sup> *In re Snow*, 120 U.S. at 285. Later, the Court retreated from this position. See, e.g., *Blockburger v. United States*, 284 U.S. 299, 302-03 (1932); *Albrecht v. United States*, 273 U.S. 1, 11 (1927); *Morgan v. Devine*, 237 U.S. 632, 639-41 (1915); *Gavieres v. United States*, 220 U.S. 338, 342-43 (1911); *Burton v. United States*, 202 U.S. 344, 377 (1906); *Carter v. McClaughry*, 183 U.S. 365, 394-95 (1902).

<sup>38</sup> See, e.g., MODEL PENAL CODE § 1.07(1)(e) (1985).

<sup>39</sup> See *infra* part II.B.2.

<sup>40</sup> See *supra* note 23.

<sup>41</sup> *Clune v. United States*, 159 U.S. 590, 595 (1895). For an application of the rule, see *Hoyt v. People*, 30 N.E. 315, 315 (1892) ("The conspiracy to burn is merged in the consummated act of burning, [so liability exists for] arson only, and not conspiracy to commit arson and arson.").

The traditional distinction between conspiracy and substantive crimes was based on the proposition that the former required collective action while the latter did not. See *United States v. Cadwallader*, 59 F. 677, 681-82 (W.D. Wis. 1893); BLACK'S LAW DICTIONARY 1597 (4th ed. 1968). But as modern law allows one to be convicted of conspiracy absent either a consummated criminal agreement, or the prosecution and conviction of other conspirators, it is more accurate to characterize the distinction as being based on the premise that conspiracy involves at least the *potential* for concerted action. See, e.g., Marcus, *supra* note 6, at 21-25.

<sup>42</sup> See *Callanan v. United States*, 364 U.S. 587, 589 (1961); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 687-88 (3d ed. 1982). See generally *Berkowitz v. United States*, 93 F. 452, 455 (3d Cir. 1899); *United States v. Gardner*, 42 F. 829, 830-31 (C.C.N.D.N.Y. 1890).

<sup>43</sup> *Clune*, 159 U.S. at 590.

such.<sup>44</sup> After *Clune*, federal courts upheld compound liability for conspiracy and for substantive crimes resulting from such an agreement,<sup>45</sup> though some expressed concerns about the resulting “duplication” of liability.<sup>46</sup>

The Supreme Court returned to this issue fifty years later in *Pinkerton v. United States*, reiterating that a “substantive offense and a conspiracy to commit it are separate and distinct.”<sup>47</sup> But *Pinkerton* added a new element, a “criminal agency” theory, that made conspirators liable for substantive crimes that other conspirators committed to advance the goals of their agreement.<sup>48</sup>

The *Clune-Pinkerton* line of cases established two propositions that were crucial requisites for the advent of RICO and CCE. The first proposition is that, unlike attempt, conspiracy is an offense independent of any substantive crimes it generates.<sup>49</sup> By allowing liability to be imposed

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<sup>44</sup> *Clune*, 159 U.S. at 595. That the Court did not find it necessary to decide the application of merger until 1895 illustrates the limited use of conspiracy in the nineteenth century. The only prior decision addressing conspiracy as a distinct offense was *Callan v. Wilson*, which held that it was a charge of sufficient gravity to require a jury trial. See *Callan v. Wilson*, 127 U.S. 540, 556-57 (1887), (stating that conspiracy was not a “petty offence[ ]”).

<sup>45</sup> See, e.g., *Ford v. United States*, 273 U.S. 593, 619 (1927); *United States v. McElvain*, 272 U.S. 633, 639 (1926); *United States v. Rabinowich*, 238 U.S. 78, 85-86 (1915); *Heike v. United States*, 227 U.S. 131, 144 (1913); *United States v. Parrillo*, 299 F. 714, 716, (3d Cir. 1924); *Murry v. United States*, 282 F. 617, 618 (8th Cir. 1922).

<sup>46</sup> See, e.g., *United States v. Parrillo*, 299 F.2d 714, 716 (3d Cir. 1924) (“The effect . . . is to make the penalty for the substantive offense greater than was contemplated by Congress.”).

<sup>47</sup> *Pinkerton v. United States*, 328 U.S. 640, 643 (1946).

<sup>48</sup> *Id.* at 645. See also *id.* at 647-48 (stating that there was no liability if the act was not “in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement”); see also Susan W. Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*, 56 MO. L. REV. 931, 937-78 (1991).

<sup>49</sup> See Brenner, *supra* note 2, at 941:

If *Pinkerton* had held that conspiracy merged into substantive offenses, as an attempt merges into a completed crime, compound offenses would not have been possible. Instead of imposing liability for the predicates and the resulting “compound” offense, the latter could have been used only to enhance penalties, letting prosecutors elect between multiple predicates or a compound offense carrying greater penalties than a single predicate.

CCE was proposed as a penalty enhancer but became a separate offense due to concerns about the constitutionality of the original approach. See H.R. REP. NO. 1444, 91st Cong., 2d Sess. 3 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4651, 4576; 116 CONG. REC. 33,630-31 (1970) (remarks of Rep. Poff); 116 CONG. REC. 33,631 (1970) (remarks of Rep. Eckhardt).

for conspiracy and attendant substantive crimes, this sanctioned the practice of *compounding* liability for a course of conduct in a prosecution by one sovereign, a procedure that became increasingly common during the twentieth century.<sup>50</sup>

The other proposition was *Pinkerton's* theory of "criminal agency."<sup>51</sup> This principle "contributed to the development of offenses such as RICO and CCE because [it] introduced the idea that liability can derive from involvement in a criminal nexus, as well as establishing that the act of joining a conspiracy can support liability for multiple offenses."<sup>52</sup>

## 2. RICO and CCE

For various reasons, America discovered "organized crime" in the 1950s and 1960s:<sup>53</sup>

We have always had forms of organized crime . . . . But there has grown up in our society today highly organized, structured and formalized groups of criminal cartels, whose existence transcends the crime known yesterday, for which

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Unlike conspiracy, attempt and solicitation are regarded as preparatory steps that merge into a completed offense. See, e.g., MODEL PENAL CODE § 1.07(4)(b) (1985).

<sup>50</sup> See, e.g., Phillip E. Johnson, *The Unnecessary Crime of Conspiracy*, 61 CAL. L. REV. 1137 (1973); Marcus, *supra* note 6; Paul Marcus, *Conspiracy: The Criminal Agreement in Theory and in Practice*, 65 GEO. L.J. 925 (1977); Note, *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920 (1959); Francis B. Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922). In 1981, the Court upheld compound liability for multiple conspiracy charges. See *Albernaz v. United States*, 450 U.S. 333, 343 (1981) ("[A] conspiracy to import drugs and to distribute them is twice as serious as a conspiracy to do either object singly.").

Felony-murder was a common law compound offense. See Brenner, *supra* note 2, at 942; Nelson Roth & Scott Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446 (1985); see also BLACKSTONE, *supra* note 12, at \*200 (stating that "[i]f one intends to do another felony, and . . . kills a man, this is . . . murder."); see *infra* note 96. Under the influence of the simple model, the Court first held that merger barred liability for both the predicate felony and the resulting murder. See *Whalen v. United States*, 445 U.S. 684, 693 (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam). See generally *United States v. Dixon*, 113 S. Ct. 2849 (1993) (citing *Harris*). Subsequently, the Court upheld liability for predicates and a resulting compound offense. See *Missouri v. Hunter*, 459 U.S. 359, 368 (1983).

<sup>51</sup> See *supra* note 48 and accompanying text.

<sup>52</sup> Brenner, *supra* note 2, at 942.

<sup>53</sup> See, e.g., Bradley, *supra* note 6; Craig M. Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 IOWA L. REV. 837 (1980); DONALD R. CRESSY, *THEFT OF THE NATION: THE STRUCTURES AND OPERATIONS OF ORGANIZED CRIME IN AMERICA* (1969); ESTES KEFAUVER, *CRIME IN AMERICA* (1951).

our criminal laws . . . were primarily designed . . . . These hard-core groups . . . present[] a unique challenge to the administration of justice.<sup>54</sup>

Convinced of the existence of this peril and of its ability to avoid prosecution under existing laws, Congress set about devising weapons that could be used to eradicate organized crime.<sup>55</sup> One of its goals was to create offenses that could be used to prosecute continuing crime.<sup>56</sup> Another was to provide a means of attacking "criminal organizations."<sup>57</sup>

*a. RICO*

Acting on the unverified assumption that organized crime was equivalent to "racketeering,"<sup>58</sup> Congress enacted the "Racketeer Influenced and Corrupt Organizations" statute as Title IX of the Organized Crime Control Act of 1970.<sup>59</sup> Codified as 18 U.S.C. §§ 1961-1968, RICO was "to provide new weapons of unprecedented scope for an assault upon organized crime."<sup>60</sup>

<sup>54</sup> S. REP. NO. 1097, 90th Cong., 2d Sess. 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157.

<sup>55</sup> *See, e.g.*, S. REP. NO. 1097, 90th Cong., 2d Sess. 70 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2157 ("We inherited . . . a medieval system, devised . . . for a stable, homogeneous, primarily agrarian community . . . . Ignored entirely . . . was the possibility of . . . a phenomenon such as modern organized crime.").

<sup>56</sup> *See, e.g.*, S. REP. NO. 1097, 90th Cong., 2d Sess. 163 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112 ("The investigation of crimes normally presupposes . . . the 'crime complete'. . . . The modern concern of many law enforcement agencies has been . . . crimes which are in a continuous process of commission.").

<sup>57</sup> *See* G. Robert Blakey, *Foreword to Symposium: Law and the Continuing Enterprise: Perspectives on RICO*, 65 NOTRE DAME L. REV. 873, 874 (1991) ("Until . . . RICO, organizations as such were seldom the focus of the law.").

<sup>58</sup> *See, e.g.*, PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE IMPACT: ORGANIZED CRIME TODAY* 511 (1986) (stating that organized crime is an undefined concept). For its origins, *see* Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, *supra* note 6, at 661.

<sup>59</sup> Act of Oct. 15, 1970, Pub. L. No. 91-452, § 901(a), 1970 U.S.C.C.A.N. (84 Stat.) 941.

<sup>60</sup> *See* Act of Oct. 15, 1970, Pub. L. No. 91-452, § 1, 1970 U.S.C.C.A.N. (84 Stat.) 923, 941; *United States v. Russello*, 464 U.S. 16, 26 (1983). RICO has not been used exclusively or even primarily against the Mafia or kindred groups. *See* G. Robert Blakey, *Foreword to Symposium: The 20th Anniversary of The Racketeer Influenced and Corrupt Organizations Act: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 709-10 (1990); G. Robert Blakey et al., *Symposium: Law and the Continuing Enterprise: What's Next? The Future of RICO*, 65 NOTRE DAME L. REV. 1073, 1080-81 (1990); Barry Tarlow, *RICO Revisited*, 17 GA. L. REV. 291, 298-300 (1983).

RICO targets “enterprise criminality”—crimes committed by, or in the context of, an “enterprise.”<sup>61</sup> Statutorily defined as an “individual, partnership, corporation, association, . . . other legal entity,” or “group of individuals associated in fact,”<sup>62</sup> enterprise has been construed as comprising almost any form of organized activity.<sup>63</sup> That construction has been criticized as departing from the previously-noted concern with traditional forms of organized crime, but it is defensible given that Congress devised the concept of “enterprise” as a way to reach continuing crime, an activity that is not restricted to the Mafia.<sup>64</sup>

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<sup>61</sup> G. Robert Blakey & Brian Gettings, *Racketeer Influenced and Corrupt Organizations: Basic Concepts—Criminal and Civil Remedies*, 53 TEMP. L.Q. 1009, 1021 n.71 (1980). For RICO’s sanctions, see 18 U.S.C. § 1963 (1988) (stating that sanctions include fines, imprisonment, and forfeiture); 18 U.S.C. § 1964 (1988) (enumerating civil remedies).

<sup>62</sup> 18 U.S.C. § 1961(4) (1988). The definition states that enterprise “includes” these entities. See Blakey & Gettings, *supra* note 61, at 1023 (stating that the code section “works by illustration, not by limitation”). The enterprise must engage in, or its activities affect, interstate or foreign commerce. See 18 U.S.C. § 1962(a)-(c) (1988).

<sup>63</sup> See, e.g., Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, *supra* note 6, at 921 (“If two or three muggers . . . form a loosely knit gang and can be shown to have cooperated in two or more such robberies they have become . . . a RICO enterprise.”).

<sup>64</sup> See *supra* note 56 and accompanying text. This use of enterprise was introduced in an earlier anti-racketeering statute imposing compound liability—the Travel Act. See 18 U.S.C. § 1952(b)(i)(1) (1988). The Travel Act makes it a crime to travel in interstate or foreign commerce or use the mail or any facility in interstate or foreign commerce intending to (a) distribute the proceeds of unlawful activity, (b) commit a crime of violence to further unlawful activity, or (c) otherwise promote unlawful activity. See 18 U.S.C. § 1952(a) (1988). It defines “unlawful activity” as “any business enterprise involving” gambling, liquor, drug or prostitution offenses. See 18 U.S.C. § 1952(a) (1988). It imposes compound liability in that one can be convicted of, and punished for, both the Travel Act offense and the predicate crimes that constitute its “unlawful activity.” See, e.g., *United States v. Stafford*, 831 F.2d 1479, 1481-85 (9th Cir. 1987) (offense distinct from its predicates because Travel Act “does not require the commission of the predicate”). Accord *United States v. Teplin*, 775 F.2d 1261, 1265 (4th Cir. 1985); *United States v. Finazzo*, 704 F.2d 300, 307-08 (6th Cir. 1983), *cert. denied*, 463 U.S. 1210 (1983).

The drafters of the Travel Act included “business enterprise” in its definition of “unlawful activity” to ensure that the Act would not be used against “individual or isolated violations.” See H.R. REP. NO. 966, 87th Cong., 1st Sess. (1961), *reprinted in* 1961 U.S.C.C.A.N. 2664 (“‘Business enterprise’ requires that the activity be a continuous course of conduct”). See also *Hearings Before the Senate Comm. on the Judiciary: The Attorney General’s Program to Curb Organized Crime and Racketeering*, 87th Cong., 1st Sess. 16 (1961) (“continuous course of conduct” needed to constitute “business enterprise”). Those who drafted RICO adopted the Travel Act’s concept of “enterprise” and expanded it as noted above. See, e.g., Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, *supra* note 6, at 942-43; see also *supra* note 62 and

In RICO, Congress created three substantive crimes and the crime of RICO conspiracy.<sup>65</sup> The substantive crimes require that a "person" use the collection of unlawful debt, or a pattern of racketeering activity, to do any of the following to an enterprise:<sup>66</sup> acquire or maintain an interest in, or control of, it; establish it; operate it; and/or conduct or participate in conducting its affairs.<sup>67</sup> Very few RICO prosecutions charge that the defendant manipulated an enterprise through the collection of unlawful debt which resulted from illegal gambling or "loan-sharking."<sup>68</sup> Most prosecutions allege that the defendant used a "pattern of racketeering activity" against the enterprise.<sup>69</sup>

Engaging in a pattern of racketeering activity requires that one commit "at least two acts of racketeering activity" within ten years.<sup>70</sup> "Racketeering activity" is committing any of a number of specified state and federal offenses which are called "predicate offenses."<sup>71</sup> To perpetrate a

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accompanying text. *See generally* H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243-49 (1989) (stating that RICO not limited to traditional organized crime); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985) (stating that legitimate businesses "enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences"). As RICO has evolved, its "pattern of racketeering activity" element has become an additional device for ensuring that the statute is used only against continuing crime. *See, e.g., H.J. Inc.*, 492 U.S. at 243; *Sedima*, 473 U.S. at 497 n.14.

<sup>65</sup> *See* 18 U.S.C. § 1962 (1988).

<sup>66</sup> "Person" includes individuals or entities "capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3) (1988). Again, the definition is illustrative, not exhaustive. *See supra* note 62; Blakey & Gettings, *supra* note 61, at 1023.

<sup>67</sup> *See* 18 U.S.C. § 1962(a) (1988) (using income from racketeering or collection of unlawful debt to acquire interest in, establish, or operate enterprise); 18 U.S.C. § 1962(b) (1988) (using racketeering or collection of unlawful debt to acquire or maintain interest in or control of enterprise); 18 U.S.C. § 1962(c) (1988) (using racketeering or collection of unlawful debt to conduct or participate in conducting enterprise).

<sup>68</sup> 18 U.S.C. § 1961(6) (1988) (defining unlawful debt as debt incurred in gambling that was illegal under state or federal law "or which is unenforceable under State or Federal law . . . because of the laws relating to usury"); *see, e.g., Tarlow, supra* note 60, at 370-71.

<sup>69</sup> *See, e.g., Tarlow, supra* note 60, at 370-71.

<sup>70</sup> 18 U.S.C. § 1961(5) (1988) (stating that the ten year period "exclud[es] any period of imprisonment"). *See also infra* note 72.

<sup>71</sup> *See* 18 U.S.C. § 1961(1)(A) (1988) (specifying the state offenses); 18 U.S.C. § 1961(1)(B)-(E) (1988) (enumerating the federal offenses). *See also* Paul E. Coffey, *The Selection, Analysis, and Approval of Federal RICO Prosecutions*, 65 NOTRE DAME L. REV. 1035, 1036 (1990) (mentioning a prosecution which charged the defendant with "fifty-two other federal statutes, five generic references to federal labor and securities laws, and nine state offenses of murder, kidnapping, gambling, arson, robbery, bribery, extortion, narcotics, and obscenity"). Conspiracy to commit certain predicates can also serve as a RICO predicate. *See United States v. Licavoli*, 725 F.2d 1040, 1044-45 (6th Cir. 1984), *cert. denied*, 467 U.S. 1252 (1985) (charging defendants with conspiracy to

substantive RICO offense, therefore, one must commit at least two predicate offenses within ten years of each other and use this pattern of racketeering activity against an enterprise in a way proscribed by 18 U.S.C. § 1962(a)-(c).<sup>72</sup>

Prosecutors rarely allege substantive violations of § 1962(a) or § 1962(b).<sup>73</sup> Most substantive charges are brought under § 1962(c), which makes it a crime to use a pattern of racketeering activity to conduct, or participate in conducting, an enterprise's affairs.<sup>74</sup> The next most widely-used provision is § 1962(d), which prohibits conspiring to commit a substantive RICO offense.<sup>75</sup> This offense is complete upon formation of the agreement—no overt act is needed.<sup>76</sup> Moreover, because Congress meant to

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commit state predicates); *Kronfeld v. First New Jersey Nat'l Bank*, 638 F. Supp. 1454, 1472-73 (D.N.J. 1986) (charging conspiracy with an 18 U.S.C. § 1961(1)(D) (1988) offense).

<sup>72</sup> See *supra* note 67 and accompanying text. Substantive offenses based on collecting unlawful debt have an analogous structure: the predicate offense is collecting debt produced by usury or illegal gambling. See *supra* note 68 and accompanying text. The RICO violation arises in using this activity to manipulate an enterprise in one of the ways proscribed by 18 U.S.C. § 1962 (1988). See *supra* note 67 and accompanying text.

The Supreme Court has held that racketeering activity must exhibit "continuity plus relationship" to constitute a "pattern." *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 n.14 (1985). "Relationship" requires that such activity have "the same or similar purposes, results, participants, victims, or methods of commission" or be "otherwise related and not isolated." *H.J. Inc.*, 492 U.S. at 240 (quoting 18 U.S.C. § 3575(e) (1988)). "Continuity" requires repetitious activity. *H.J. Inc.*, 492 U.S. at 242.

<sup>73</sup> See *supra* note 67 and accompanying text. See also Tarlow, *supra* note 60, at 324.

<sup>74</sup> See, e.g., Pamela H. Bucy & Steven T. Marshall, *An Overview of RICO*, 51 ALA. LAW. 283, 286 (1990) (stating that of reported RICO cases "92 percent . . . charged a violation of 1962(c), or a conspiracy to violate 1962(c)"). See also J. RAKOFF & H. GOLDSTEIN, *RICO: CIVIL AND CRIMINAL LAW AND STRATEGY* 1-36 (1991); Tarlow, *supra* note 60, at 324.

For the elements of an 18 U.S.C. § 1962(c) violation, see *supra* note 67 and accompanying text.

<sup>75</sup> See, e.g., *supra* note 74. See also 18 U.S.C. § 1962(d) (1988) (stating that it is "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section").

The conspiracy must be to violate RICO, not to commit predicate crimes. See RAKOFF & GOLDSTEIN, *supra* note 74, at § 1.04[4].

<sup>76</sup> See, e.g., *United States v. Glecier*, 923 F.2d 496, 500 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 54 (1991) (stating that no overt act is required). *But cf.* *United States v. Kimble*, 719 F.2d 1253, 1256 (5th Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984) (stating that an overt act is required).

Most circuits hold that one need only agree that some member(s) of the conspiracy will commit predicate crimes, but a few insist that the defendants agree to commit them personally. See, e.g., *Pryba v. United States*, 498 U.S. 924, 924-25 (1990) (White, J., dissenting).

increase the sanctions imposed on "racketeers," RICO conspiracy and substantive offenses do not merge—one can be convicted of both.<sup>77</sup>

*b. CCE*

The Continuing Criminal Enterprise statute, codified as 21 U.S.C. § 848 (1988), has been described as "the 'RICO drug statute.'"<sup>78</sup> Like RICO, it was enacted in 1970 as the product of concerns about organized crime, and targets "enterprise criminality"; unlike RICO, it can be used against only one kind of organized criminal activity—that involving drugs.<sup>79</sup>

CCE makes it an offense to engage in a "continuing criminal enterprise."<sup>80</sup> A "continuing criminal enterprise" is defined as the perpetration of a "continuing series" of federal drug felonies "in concert with five or more others" as to whom one occupies a managerial role and from which one "obtains substantial income."<sup>81</sup>

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<sup>77</sup> See, e.g., *United States v. Coonan*, 938 F.2d 1553, 1566 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 1486 (1992). *Accord United States v. Rone*, 598 F.2d 564, 572 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980).

<sup>78</sup> Comment, *Constitutionality without Wisdom: Caplin & Drysdale and Monsanto Examined*, 17 HASTINGS CONST. L.Q. 659, 663 (1990). CCE received far less scholarly attention than RICO. See *id.* at 663. But see Richard Finacom, Comment, *Successive Prosecutions and the Continuing Criminal Enterprise: The Double Jeopardy Analysis in Garrett v. United States*, 13 HASTINGS CONST. L.Q. 785 (1986); Roger McDonough, Note, *Collaring Drug Kingpins: International Extradition and Continuing Criminal Enterprise in United States v. Levy*, 16 MD. J. INT'L L. & TRADE 127 (1992).

<sup>79</sup> See 21 U.S.C. § 848 (1988); H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1 (1970), *reprinted in*, 1970 U.S.C.C.A.N. 4566, 4567 (stating that CCE is to serve as a "more effective means" of controlling drug abuse). See also *infra* note 80. CCE was enacted per the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970).

<sup>80</sup> 21 U.S.C. § 848(a) (1988). See McDonough, *supra* note 78, at 127.

<sup>81</sup> 21 U.S.C. § 848(c) (1988). A "series" is three or more drug felonies. See *United States v. Young*, 745 F.2d 733, 747 (2d Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); *United States v. Ordonez*, 737 F.2d 793, 806 (9th Cir. 1984). CCE's usual penalties are imprisonment plus a fine and forfeiture of property obtained from the offense, but it can be a capital crime. See 21 U.S.C. § 848 (a), (e) (1988).

CCE is analogous to another offense which the Organized Crime Control Act of 1970 added to the federal criminal code. 18 U.S.C. § 1955 (1988), created by Title VIII of the Act, makes it an offense to conduct, finance, manage, supervise, direct, or own "an illegal gambling business." 18 U.S.C. § 1955(a) (1988). See also Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 803(a), 1970 U.S.C.C.A.N. (84 Stat.) 937. Such a business operates in violation of state or local law, involves "five or more persons who conduct, finance, manage, supervise, direct, or own all or part" of it, and has been "in substantially continuous operation for" more than thirty days or has produced "a gross revenue of \$2,000 in any single day." 18 U.S.C. § 1955(b) (1988). See generally *Iannelli v. United States*, 420 U.S. 770, 791 (1975) (holding that a conspiracy to violate § 1955 does not merge into substantive violation).



Here, again, Congress used "enterprise" to focus on "continued criminal activity."<sup>82</sup>

Like RICO, CCE is a compound offense that one commits by perpetrating predicate crimes.<sup>83</sup> Like RICO, its predicates do not merge into the compound offense; so one can be convicted of, and punished for, CCE and the predicate crimes.<sup>84</sup> As noted above, one major difference between RICO and CCE is that CCE is predicated solely on drug crimes, including a conspiracy defined by 21 U.S.C. § 846 (1988).<sup>85</sup> Another difference is that unlike RICO, CCE creates only one offense, which the Supreme Court has construed as resembling conspiracy more than a substantive offense.<sup>86</sup>

<sup>82</sup> See, e.g., *supra* note 56. See generally *supra* note 64 and accompanying text. The "series" is analogous to RICO's "pattern" requirement. See William G. Skaltzky, *Aider and Abettor Liability, The Continuing Criminal Enterprise and Street Gangs: A New Twist in an Old War on Drugs*, 81 J. CRIM. L. & CRIMINOLOGY 348, 356 (1990) (stating that the "series" requirement is meant to identify "propensity for continued criminal activity").

<sup>83</sup> See, e.g., *Mortell v. Mortell Co.*, 887 F.2d 1322, 1325 (7th Cir. 1989) ("RICO is a compound offense."); *United States v. Neapolitan*, 791 F.2d 489, 498 (7th Cir. 1986), *cert. denied*, 479 U.S. 939, 940 (1986) (noting RICO's "compound crime-within-a-crime nature"); *United States v. Martinez-Torres*, 556 F. Supp. 1255, 1267 (S.D.N.Y. 1983) (stating that CCE is a compound offense because it incorporates by reference other offenses and "compounds those offenses if certain additional elements are present"). See also *supra* part II.B.2.a.

<sup>84</sup> See *Garrett v. United States*, 471 U.S. 773, 785 (1985) (stating that Congress intended separate punishments for the underlying substantive predicates and CCE). *But cf. infra* note 85.

<sup>85</sup> See 21 U.S.C. § 848(c) (1988); 21 U.S.C. § 846 (1988). The § 846 conspiracy can be used to obtain a CCE conviction, but punishment cannot be imposed for both because this was not the intention of Congress. See *infra* note 86.

<sup>86</sup> See *Garrett v. United States*, 471 U.S. 773, 794 (1985); *Jeffers v. United States*, 432 U.S. 137, 149 (1977). *Garrett* applied merger to CCE, holding that because a § 846 conspiracy is a CCE predicate, cumulative punishment cannot be imposed for both but can be imposed for CCE and its substantive predicates. See *Garrett*, 471 U.S. at 794-95. This holding and the holding in *Jeffers*, suggests that CCE resembles conspiracy more than it does RICO substantive offenses, as cumulative sentences can be imposed for the latter even if conspiracies are used as their predicates. See, e.g., *United States v. Grayson*, 795 F.2d 278, 280 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987). See generally *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984) (stating that CCE "is a conspiracy statute of unique proportions"). Cumulative punishment can also be imposed for RICO conspiracy and conspiracies used as its predicate. See, e.g., *United States v. Deshaw*, 974 F.2d 667, 671 (5th Cir. 1992); *United States v. Pungitore*, 910 F.2d 1084, 1134-35 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991).

*c. Continuing Financial Crimes Enterprise*

Late in 1990, Congress adopted 18 U.S.C. § 225, which creates a white-collar version of CCE entitled conducting a “continuing financial crimes enterprise” (CFCE).<sup>87</sup> Prompted by the savings and loan crisis, CFCE makes it a crime to organize, manage, or supervise a continuing financial crimes enterprise from which one receives “\$5,000,000 or more in gross receipts” in “any 24-month period.”<sup>88</sup> A “continuing financial crimes enterprise” is defined as “a series of violations” of federal bank bribery, fraud, and false statement statutes which affect a financial institution and are committed by four or more persons “acting in concert.”<sup>89</sup>

CFCE is an interesting expansion of the approach to compound liability used in RICO and CCE.<sup>90</sup> But since it has been used in only one reported prosecution,<sup>91</sup> and involves a liability structure that is functionally identical to CCE,<sup>92</sup> CFCE is not discussed as a distinct entity in the remainder of this Article. Its strong resemblance to CCE makes this unnecessary, since propositions that apply to RICO and CCE will also apply to CFCE.

*C. Characteristics of Compound Liability*

Some commentators contend that neither RICO nor CCE added to the available categories of prohibited conduct because the acts needed to commit either offense—the predicate crimes—are already outlawed by other statutes.<sup>93</sup> According to this view, RICO and CCE are analogous to recidivist statutes in that they enhance the penalties imposed for committing established crimes.<sup>94</sup>

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<sup>87</sup> See *United States v. Harris*, 805 F. Supp. 166, 179 (S.D.N.Y. 1992); H.R. REP. NO. 681(I), 101st Cong., 2d Sess. (1990), reprinted in 1990 U.S.C.C.A.N. 6472.

<sup>88</sup> 18 U.S.C. § 225(a) (Supp. III 1991). See also Stanley S. Arkin, *Prosecutorial Vindictiveness and Big-Bang Statutes*, N.Y.L.J., June 10, 1993, at 3 (stating that CFCE had its origins in savings and loan scandal).

<sup>89</sup> 18 U.S.C. § 225(b) (Supp. III 1991).

<sup>90</sup> See, e.g., Arkin, *supra* note 88, at 32 (“stating that CFCE is another layer of punishment for prosecutors to pile on to conduct that otherwise constitutes mail, wire or bank fraud”).

<sup>91</sup> *Harris*, 805 F. Supp. at 179.

<sup>92</sup> *Id.* at 180.

<sup>93</sup> See, e.g., Blakey & Gettings, *supra* note 61, at 1021 n.71.

<sup>94</sup> See, e.g., *United States v. Neapolitan*, 791 F.2d 489, 495 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986) (holding that RICO does not create new offenses but merely imposes “increased sanctions for conduct which is proscribed elsewhere in both federal and state criminal codes”).

Aside from ignoring legislative history to the contrary,<sup>95</sup> this perspective fails to perceive the radical innovation these statutes effected—using extant crimes to create new, “compound” offenses.<sup>96</sup> The distinctive feature of compound offenses is that they let prosecutors further exploit a practice which emerged from the abrogation of merger: using essentially the same evidence to impose liability for multiple offenses.<sup>97</sup> A meaningless redundancy occurs when the criminal law functions merely “as a device for redressing personal injuries and simple violations of property interests.”<sup>98</sup> This feature can become important in a complex society plagued by the specter of increasingly intricate criminal behaviors.<sup>99</sup> Such a society will embrace compound liability if it is

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<sup>95</sup> See *supra* note 49; see also *Garrett v. United States*, 471 U.S. 773, 782 (1985) (“The intent to create a separate offense could hardly be clearer.”); *Lynch, RICO: The Crime of Being a Criminal, Parts III & IV*, *supra* note 6, at 939 (“RICO is plainly a criminal statute; each of its provisions . . . defines a certain cluster of behaviors as a new crime.”). See generally H.R. REP. NO. 1549, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S.C.C.A.N. 4007 (describing prohibitions established by RICO).

<sup>96</sup> Felony-murder, a common law compound crime, imposes liability for the aggregate consequences of a course of conduct by holding an offender liable for the felonies she set out to commit and the resulting deaths. See *supra* note 50.

Crimes like RICO and CCE also impute liability for the aggregate, foreseeable consequences of one’s acts, but they differ from felony-murder in that they are merely a device used to establish the causal nexus and mens rea, if any, needed to hold an actor liable for deaths resulting from the commission of felonies. See *Roth & Sundby, supra* note 50, at 453-60. Felony-murder exacts additive liability in the form of convictions for an unplanned act and for the premeditated felonies from which it arose, but goes no further. See generally MODEL PENAL CODE § 210.2(1)(b) (Official Draft 1980). If felony-murder conformed to the RICO-CCE model of compound liability, felony-murder would impose liability for intended felonies, for deaths ensuing from them, and for a distinct, compound offense that used the felonies and the deaths as its predicates. See *Brenner, supra* note 2, at 934-35.

<sup>97</sup> See, e.g., *United States v. Eufrasio*, 935 F.2d 553, 571 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 340 (1992) (“[S]ame evidence needed to prove the gambling and extortion predicates charged in the RICO counts would also prove the non-RICO gambling and extortion allegations.”). See generally *supra* part II.B.1.

For years, the development of compound offenses was hampered by the use of the “same evidence” test to determine if the double jeopardy clause barred multiple liability. See *Brenner, supra* note 2, at 923-29. See generally *supra* note 33. The Supreme Court has not yet disavowed the “same evidence” test as the benchmark of double jeopardy but has redefined this test so that it now poses little, if any, bar to the use of compound offenses. See *Brenner, supra* note 2, at 923-29.

<sup>98</sup> See *Brenner, supra* note 2, at 925-26.

<sup>99</sup> See *id.* at 926:

[S]ingle-offense liability ceases to be satisfactory once society comes to regard the criminal law as a device for regulating more complex behaviors, because controlling such behaviors requires that the diverse legal consequences they produce must each be sanctioned. This can be done by enhancing the penalties imposed for extant offenses

perceived as offering a means of addressing protracted, complicated activity against which simple liability is ineffectual.<sup>100</sup> The United States took this step, on the federal level, in 1970; the adoption of RICO and CCE that year made compound liability acceptable.

Neither statute would have been possible except for an evolutionary process that was triggered by the abrogation of merger in conspiracy prosecutions.<sup>101</sup> As an inchoate offense, conspiracy contemplates the commission of substantive crimes.<sup>102</sup> When it held that conspiracy is a crime distinct from the substantive offenses it achieves, the Supreme Court freed prosecutors to use evidence of a conspiracy's success in accomplishing its goals to impose liability both for the conspiracy and for the crimes it produced.<sup>103</sup> The duplicative liability that resulted was the first rent in the fabric of simple criminal liability and led to the multiplicative liability imposed by RICO, CCE, and their progeny.<sup>104</sup>

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and/or by creating new offense categories. New offense categories can address behaviors that have not previously been defined as offenses; they can also combine and/or subdivide behavior that has already been proscribed into a series of new, discrete offenses.

<sup>100</sup> The Supreme Court acknowledged this characteristic of compound liability in *Garrett v. United States*. See *Garrett*, 471 U.S. at 788-89 (stating that "significant differences" between simple and compound crimes "caution against ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation" addressed by the former "to the multilayered conduct, both as to time and to place" involved in CCE). *Garrett* is one of the few decisions in which the Court has considered the double jeopardy implications of compound offenses. See Brenner, *supra* note 2, at 937-40.

<sup>101</sup> See generally *supra* part II.B.1. (describing pre-1970 policies).

<sup>102</sup> See, e.g., Marcus, *supra* note 50, at 928 (stating that conspiracy is an agreement "formed for the purpose of committing a crime"); PERKINS & BOYCE, *supra* note 42, at 681 (stating that conspiracy is "a combination . . . to accomplish a criminal . . . act"). See also *United States v. Wallach*, 935 F.2d 445, 470 (2d Cir. 1991) ("[S]erves a preventive function by stopping criminal conduct in its early stages of growth before it has a full opportunity to bloom.").

<sup>103</sup> See, e.g., *United States v. Carpenter*, 143 F.2d 47, 48 (7th Cir. 1944) (defendant claiming "duplication of punishment in the imposition of a sentence on the conspiracy count, for the same evidence was used to gain a conviction on this count as was used to establish guilt under" three substantive counts). See generally *Heike v. United States*, 227 U.S. 131, 144 (1913) ("[L]iability for conspiracy is not taken away by its success—that is, by the accomplishment of the substantive offense at which the conspiracy aims."); *Sneed v. United States*, 298 F. 911, 913 (5th Cir. 1924), *cert. denied*, 265 U.S. 590 (1924) (stating that "conspiracy remains none the less a crime because by its success an additional crime was done").

<sup>104</sup> See *infra* part II.D. It is important to distinguish compound liability, which imposes additive liability for a single act or course of conduct, from the liability that is imposed for multiple acts. It has long been settled that an indictment can contain hundreds or even thousands of counts if each is predicated on a different criminal act. See *United States v.*

The most effective way to explain this distinctive liability is to outline the structure of a RICO case. Assume, therefore, that an indictment has been returned charging several defendants with one count of violating § 1962(c), one count of RICO conspiracy, and fifteen counts of mail and wire fraud, the latter also serving as predicates for the § 1962(c) charge.<sup>105</sup> The indictment alleges that the defendants used a pattern of racketeering activity consisting of the predicate acts of mail and wire fraud to conduct the affairs of an enterprise that is engaged in interstate commerce.<sup>106</sup>

To prove the § 1962(c) charge, the prosecutor must establish that the enterprise existed, that it affected interstate commerce, and that the defendants engaged in the charged acts of mail and wire fraud and used the resulting pattern of racketeering activity to conduct the affairs of the enterprise.<sup>107</sup> Aside from proving that the enterprise existed and was affected by the defendants' racketeering, the evidence that the prosecutor uses to establish the substantive RICO violation is the same evidence that she uses for the predicate offenses.<sup>108</sup> To prove the conspiracy, she must

Bernstein, 533 F.2d 775, 784 n.3 (2d Cir. 1976), *cert. denied*, 429 U.S. 998 (1976) (indictment containing "about 800 counts" of conspiracy, bribery and false statement involving FHA mortgages); *United States v. Williams-Davis*, 1991 WL 319692 \*6 n.1 (D.D.C. Dec. 16, 1991) (indictment containing 108 counts charging drug offenses, murder, attempted murder, and money laundering); *Faux v. Jones*, 728 F. Supp. 903, 905 (W.D.N.Y. 1990) (indictment containing "340 counts of rape, sodomy, sexual abuse and endangering the welfare of a child"); *United States v. Dempsey*, 768 F. Supp. 1256, 1265 (N.D. Ill. 1990) (indictment containing "more than 200 counts of mail and wire fraud"); *United States v. Beech-Nut Nutrition Corp.*, 677 F. Supp. 117, 119 (E.D.N.Y. 1987) (indictment containing 470 counts of selling adulterated and misbranded products); *Central R. Co. of N.J. v. United States*, 229 F. 501, 502 (3d Cir. 1915) (indictment containing 200 counts of carrying coal below tariff rate); *United States v. Bickford*, 24 F. Cas. 1144 (D. Vt. 1859) (No. 14591) (indictment containing 138 counts charging knowing transmission of false papers to pension office and subornation of perjury). Indictments such as these are permissible under the simple model of liability because each charge corresponds to a distinct criminal act.

<sup>105</sup> See, e.g., *United States v. Paccione*, 948 F.2d 851, 853 (2d Cir. 1992) (charging the defendant with 18 U.S.C. § 1962(c),(d) (1988) and multiple mail and wire fraud counts); *United States v. Marcello*, 876 F.2d 1147, 1149 (5th Cir. 1989) (same); *United States v. Zauber*, 857 F.2d 137, 140 (3d Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (same). See generally *supra* part II.B.2.a. (summarizing RICO).

<sup>106</sup> See generally *supra* note 105.

<sup>107</sup> See *supra* part II.B.2.a. To prove a "pattern" of racketeering activity, the prosecutor must show that the mail and wire fraud offenses were sufficiently "related" and "continuous" to form a RICO pattern. See *supra* note 64 (stating that acts must be "related" and "continuous").

<sup>108</sup> See, e.g., *United States v. Eufrasio*, *supra* note 97. See also *State v. Wallock*, 821 P.2d 435, 437 (1991) (rejecting argument that "convictions for promoting prostitution and unlawful racketeering activity" under Oregon version of RICO should merge "because proof of the [state RICO crimes] involved the same conduct as proof of the predicate crimes").

show that the defendants agreed to the commission of the § 1962(c) offense; if they were personally involved in perpetrating that crime, she can establish their liability under § 1962(d) by using the evidence she used to prove the § 1962(c) violation.<sup>109</sup> If the evidence shows that the defendants engaged in the conduct at issue in the charges, they can be convicted of:

- (1) the fifteen mail and wire fraud offenses constituting the pattern of racketeering activity involved in the § 1962(c) count;
- (2) the § 1962(c) count; and
- (3) the § 1962(d) count.<sup>110</sup>

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<sup>109</sup> See, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1115 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991) (stating that the “same evidence” proved 18 U.S.C. § 1962(c) (1988) and 18 U.S.C. § 1962(d) (1988) offenses). See also *United States v. Elliott*, 571 F.2d 880, 903-04 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978) (stating that the evidence that defendant participated in racketeering activity raises “unmistakable” inference of agreement to violate 18 U.S.C. § 1962(d) (1970)); *United States v. Bright*, 630 F.2d 804, 834 (5th Cir. 1980) (same). For the agreement required under 18 U.S.C. § 1962(d) (1988), see *supra* note 76.

As to defendants who did not actually perpetrate the § 1962(c) offense, the prosecutor can convict them of RICO conspiracy by presenting “slight evidence” that they acquiesced in the commission of the substantive RICO crime; here, too, she can recycle much of the evidence used to prove the § 1962(c) crime. See, e.g., *United States v. Truglio*, 731 F.2d 1123, 1133 (4th Cir. 1984), *cert. denied*, 469 U.S. 862 (1985).

<sup>110</sup> This scenario is typical of most RICO cases for it involves two offenses—§ 1962(c) and § 1962(d). See *supra* part II.B.2.a. Prosecutors can pursue multiple RICO charges but rarely do so. See *infra* note 114. This is attributable to self-imposed rules of restraint and the fact that prosecutors are still mastering the use of RICO. See generally *Dennis*, *supra* note 5, at 654-55.

It is possible to bring multiple CCE charges against one or more defendants. Since only one CCE crime exists, such a prosecution would require multiple violations of the statute. See, e.g., *United States v. McHan*, 966 F.2d 134, 137 n.1 (4th Cir. 1992) (charging the defendants with two CCE counts); *United States v. Wilson*, 894 F.2d 1245, 1247 (11th Cir. 1990) (same); *United States v. Chavez*, 845 F.2d 219, 220 (9th Cir. 1988) (same); *United States v. Van Horn*, 789 F.2d 1492, 1506 (11th Cir. 1986) (same). Charges such as these are permissible if the defendants conducted more than one continuing criminal enterprise. See generally *Ladner v. United States*, 358 U.S. 169 (1958) (whether one discharge from a shotgun that hits two federal officers should be seen as a single assault or two separate assaults); *Bell v. United States*, 349 U.S. 81 (1955) (stating that one transportation of two women for prostitution is one, not two, offenses).

The same conduct can be prosecuted under both RICO and CCE. See, e.g., *United States v. Deshaw*, 974 F.2d 667, 671 (5th Cir. 1992); *United States v. Pungitore*, 910 F.2d 1084, 1113 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991); *United States v. Ciancaglini*, 858 F.2d 928, 928 (3d Cir. 1988); *United States v. Sinito*, 723 F.2d 1250, 1262 (7th Cir. 1983). See also *infra* note 114.

In each of these permutations—multiple RICO charges, multiple CCE charges, and multiple combined RICO and CCE charges—if the predicates are federal crimes, the court

The liability configuration employed to achieve this outcome differs from the approach traditionally used in that the prosecutor can use the conduct involved in committing the predicate offenses to impose (a) simple liability for those crimes and (b) compound liability for the RICO crimes.<sup>111</sup> The model of simple liability would limit her use of this conduct to imposing liability for the predicate crimes.<sup>112</sup> The modification of that model produced by eliminating the merger of conspiracy charges would let her use it to establish the predicate crimes and conspiracy to commit those crimes, but would not allow her to use this conduct to “stack” substantive liability for the predicates and for a compound offense such as § 1962(c).<sup>113</sup> The liability structure outlined above, on the other hand, lets a prosecutor use evidence of identical conduct to layer liability for substantive crimes and for conspiracy.

This structure inheres in every RICO prosecution regardless of the number and nature of RICO and/or predicate crimes charged.<sup>114</sup> It is also

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can impose cumulative sentences for all the offenses of conviction. *See, e.g.,* United States v. Walsh, 700 F.2d 846, 856 (2d Cir. 1983), *cert. denied*, 464 U.S. 826 (1983) (stating that it is “well settled” that Congress intended cumulative sentences for RICO and its predicates). If state predicates are used to obtain federal RICO convictions, the federal court can impose consecutive sentences for the RICO offenses, but the state will have to prosecute for the predicates. Using state crimes to obtain a federal RICO conviction does not bar subsequent state prosecution for them, and one who has been acquitted of federal RICO charges based on state predicates can still be prosecuted for those offenses in a state court. *See* United States v. Pungitore, 910 F.2d 1084, 1105-07 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2010 (1991) (containing unsuccessful challenge to RICO prosecution following acquittal on predicate offenses in state court). *See also* United States v. Licavoli, 725 F.2d 1040, 1047 (6th Cir.), *cert. denied*, 467 U.S. 1252 (1984); United States v. Giovanelli, 945 F.2d 479, 492 (2d Cir. 1991).

<sup>111</sup> As this scenario illustrates, compound liability builds upon simple liability, rather than replacing it—just as a compound sentence is created from simple sentences. *See supra* part II.A. As noted earlier, predicates do not merge into a completed substantive offense. *See, e.g.,* United States v. Deshaw, 974 F.2d 667, 672 (5th Cir. 1992) (stating that predicates are “not lesser-included offenses of” RICO offense). *See also* State v. Johnson, 728 P.2d 473, 481 (N.M. 1986), *cert. denied*, 481 U.S. 1051 (1987) (stating that there is no merger under New Mexico RICO statute).

<sup>112</sup> *See supra* part II.A.

<sup>113</sup> Also, this model would not let her combine liability for the predicates and resulting substantive RICO crimes with substantive liability for other compound crimes and liability for RICO conspiracy plus conspiracy to commit the predicates and/or other compound crimes. *See infra* part II.D.1.

<sup>114</sup> The structure outlined above describes most RICO cases since, as noted earlier, the overwhelming majority involve alleged violations of § 1962(c) and § 1962(d). *See supra* part II.B.2.a. Charges under § 1962(a) or § 1962(b) are unusual; and because the pursuit of compound liability is still in its infancy, almost no criminal RICO cases allege multiple substantive violations. *But see* United States v. Sarbello, 985 F.2d 716, 718 (3d Cir. 1993) (charging under § 1962(a),(c),(d)); United States v. Romano, 736 F.2d 1432, 1434 n.1

an integral element of CCE prosecutions, although CCE's one offense offers a much more limited range of permutations.<sup>115</sup> The next portion of this discussion explains how this structure is being used,<sup>116</sup> but first it is necessary to distinguish it from other forms of compound liability.

Though compound liability is a new phenomenon, RICO and CCE are not the only extant varieties. Three methods have thus far been used to compound liability.<sup>117</sup> The oldest splits one crime into several, as when the Supreme Court's abrogation of merger produced liability for conspiracy and for the crimes it has achieved.<sup>118</sup> This method produces "serial" compounding by breaking what was one continuous criminal act into temporally discrete criminal acts.<sup>119</sup>

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(11th Cir. 1984) (charging under § 1962(a),(c)). This is more common in civil RICO cases. *See, e.g.,* Salzmann v. Prudential-Bache Securities, 1993 WL 77374 (S.D.N.Y. Mar. 1, 1993) (alleging violations of § 1962(b)-(d)); Bowman v. W. Auto Supply, 773 F. Supp. 174 (W.D. Mo. 1991), *cert. denied*, 113 S. Ct. 2459 (1993) (alleging violations of § 1962(a)-(c)); *In re Nat'l Mortgage Equity Corp. Mortgage Pool Certificates Sec. Litigation*, 636 F. Supp. 1138, 1170 (C.D. Cal. 1986) (alleged violations of § 1962(a),(d)); *Cincinnati Gas & Elec. Co. v. General Electric Co.*, 656 F. Supp. 49 (S.D. Ohio 1986) (alleging violations of § 1962(a)-(c)).

<sup>115</sup> As noted above, CCE consists of one crime—the predicates for which are limited to federal drug felonies. *See supra* part II.B.2.b. This eliminates RICO's options of charging multiple substantive violations and/or combining substantive violations with a RICO conspiracy count. *See supra* note 84. Like RICO, however, CCE does allow liability to be imposed both for the compound crime and its substantive predicates. *See supra* note 84.

<sup>116</sup> *See infra* part II.D.

<sup>117</sup> *See* Brenner, *supra* note 2, at 983. It is highly unlikely that these methods exhaust the possibilities. *See generally infra* parts II.D.2. and III.

<sup>118</sup> *See supra* note 103. *See also infra* note 119. Like attempt and solicitation, conspiracy is an inchoate offense used to strike at preparatory conduct before it matures into the completion of a substantive crime. *See supra* note 102. In holding that merger applies to the other inchoate offenses, but not to conspiracy, courts have relied on the proposition that conspiracy also serves another important purpose—that of guarding against the "special dangers" of group crime. *See, e.g.,* Callanan v. United States, 364 U.S. 587, 593-94 (1961); *United States v. Rabinowich*, 238 U.S. 78, 88 (1915). *See also supra* note 49. This proposition may justify imposing liability both for conspiracy and resulting substantive crimes; but it is beyond dispute that, like attempt and solicitation, the crime of conspiracy is empirically predicated on conduct which is taken in preparation for committing one or more substantive crimes. *See, e.g.,* Ford v. United States, 273 U.S. 593, 619 (1927) ("Substantive offense of importing liquor is . . . different one from the preparatory offense of conspiring to import liquor."); *State v. Hardison*, 492 A.2d 1009, 1013 (N.J. 1985) ("Conspiracy is similar to attempt, which is a lesser-included offense of the completed offense.").

<sup>119</sup> This approach became popular during Prohibition. *See, e.g.,* Albrecht v. United States, 273 U.S. 1, 11 (1927):

[F]our [counts] charged illegal possession of liquor, four illegal sale . . . . The contention is that there was double punishment because the liquor which the



Serial compounding is conceptually analogous to the slightly newer method of "lateral" compounding. Lateral compounding uses two or more independent offenses that encompass the same conduct to enhance the consequences of engaging in that conduct.<sup>120</sup> Like serial compounding, it generates iterative liability by letting identical conduct sustain liability for several offenses; unlike serial compounding, it utilizes unrelated offenses to this end.<sup>121</sup> The newest, most complex method, used to create

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defendants were convicted for having sold is the same that they were convicted for having possessed . . . . There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.

For statutes utilizing this approach, see 21 U.S.C. § 843(b) (1988) (using telephone to commit or facilitate certain felonies); 18 U.S.C. § 1958 (1988) (using interstate commerce facilities to commit murder-for-hire); 18 U.S.C. § 1952 (1988) (traveling in or using facilities of interstate or foreign commerce to aid racketeering); 18 U.S.C. § 924(c)(1) (1988) (possessing firearm in connection with crime of violence or drug trafficking crime).

<sup>120</sup> See, e.g., *State v. Wolske*, 420 N.W.2d 60 (Wis. 1988), *cert. denied*, 488 U.S. 1010 (1989) (imposing convictions for homicide by operating a motor boat while intoxicated and for homicide by negligent operation of a motor boat based on the death of one person).

<sup>121</sup> See *supra* note 120; see, e.g., *Blockburger v. United States*, 284 U.S. 299, 303-04 (1932):

Section 1 of the Narcotic Act creates the offense of selling any of the forbidden drugs except in or from the original stamped package; and section 2 creates the offense of selling any of such drugs not in pursuance of a written order . . . . [T]here was but one sale, and the question is whether, both sections being violated by the same act, the accused committed two offenses or only one . . . . [W]e must conclude that . . . two offenses were committed.

See also *Gore v. United States*, 357 U.S. 386, 389 (1958) (concerning three drug crimes based on one sale). The offenses used in serial compounding are related temporally, each representing a component of what was once a single, continuous offense. See *supra* note 119 and accompanying text. The offenses used in lateral compounding are an independent prohibition directed at a unit of conduct; unlike the crimes used in serial compounding—they bear no necessary relationship to each other. See *Gore*, 357 U.S. at 391 (one act as committing "three separate offenses created by Congress at three different times . . . seeking to throttle more and more by different legal devices, the traffic in narcotics"). For statutes using this approach, compare 18 U.S.C. § 2119 (1988) (stealing vehicle moved in interstate commerce) with 18 U.S.C. § 2313 (1988) (possessing or selling stolen vehicle moved in interstate commerce). See also 18 U.S.C. § 1959 (1988) (using violence to establish or maintain position in enterprise engaged in racketeering activity). See generally *United States v. Concepcion*, 983 F.2d 369, 380 (2d Cir. 1992) (§ 1959 "complements RICO by allowing the government not only to prosecute under RICO for conduct that constitutes a pattern of racketeering activity in connection with an enterprise, but also to prosecute . . . for violent crimes intended . . . to permit the defendant to maintain or increase his position in a RICO enterprise.").

RICO and CCE, is “tiered” compounding. It creates iterative liability by defining a compound offense that results from committing extant crimes in a way that satisfies specified requirements and by imposing liability for the compound crime and the predicate crimes.<sup>122</sup> The use of tiering to compound liability is explained below, but first it is necessary to distinguish it from the other two approaches.

Tiered compounding is analogous to lateral compounding insofar as it accomplishes iterative liability by using a new crime which targets conduct that has already been outlawed. The difference between the two methods is that tiered compounding makes a causal nexus between the predicate and compound offenses a prerequisite for iterative liability, while lateral compounding requires no relationship between the offenses it uses for compounding.<sup>123</sup>

Tiered compounding is analogous to serial compounding in that they share a concern with timing. Serial compounding divides the conduct formerly constituting one crime into consecutive offenses; the predicate crimes used in tiered compounding are the necessary temporal antecedents of a consummated substantive offense, so that the predicate-compound sequence could be regarded as a continuing offense. The obvious difference between these two methods is that instead of splitting an extant offense into discrete crimes, tiered compounding combines extant offenses into a new, greater crime.<sup>124</sup> The subtle difference between tiered compounding and both of its predecessors lies in their liability structures.

RICO and CCE use a complex structure which augments liability by tiering or layering; serial and lateral compounding use a flat structure which augments liability by increasing the number of crimes that encompass a course of conduct. Unlike structures used for tiered compounding, the serial-lateral liability structure is flat because it entails nothing more than identifying an available universe of offenses and seeking convictions therefor; the offenses share no relationship, each being prosecuted as an independent infraction, so compounding is an exercise in cumulating crimes, convictions, and penalties.

Tiered compounding, on the other hand, employs a structure which requires a relationship among offenses. As the RICO scenario discussed above illustrates, the relationship is one of cause and effect, and it is used

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<sup>122</sup> See Brenner, *supra* note 2, at 983-84.

<sup>123</sup> Such a relationship is inconsistent with lateral compounding’s operative premise, which is using a repertoire of functionally independent offenses to address the cumulative evils inherent in specific conduct. See, e.g., *Gore*, 357 U.S. at 390 (statutes resulting from Congress’ intent “to turn the screw of the criminal machinery . . . tighter and tighter”).

<sup>124</sup> The description of a compound offense as a “greater” crime is meant to reference the scope of, and/or penalties imposed for, such a crime and is not intended to suggest that the predicate crimes merge into it. See *supra* note 77 and accompanying text.

to apportion liability between two tiers: the first consists of primary liability for predicate crimes and for conspiracy to commit them,<sup>125</sup> and the second consists of derivative liability for RICO/CCE offenses resulting from the predicate crimes, and derivative liability for conspiracy to commit substantive RICO offenses.<sup>126</sup> “Primary” and “derivative” are used as tier designates instead of “simple” and “compound” because, as the next section illustrates, while second-tier liability is always based on compound liability, first-tier liability can be based on simple liability or on compound liability.

#### *D. Applications of Compound Liability*

This section is in two parts. The first part analyzes a prosecution involving RICO and CCE charges to illustrate how tiered compounding is employed at the federal level; the second examines the use of tiered compounding among the states.<sup>127</sup>

##### *1. Federal Law*

The number and complexity of prosecutions involving tiered compounding makes it impossible to itemize all its uses, so this section illustrates a representative prosecution as an example. Though white-collar cases can be more intricate, a “mob” case seems an especially fitting device for this purpose. Assume, therefore, that an indictment has been returned charging thirteen alleged members of the mafia with the following:<sup>128</sup>

<i>Count One:</i>	18 U.S.C. § 1962(c) (RICO);
<i>Count Two:</i>	18 U.S.C. § 1962(d) (RICO conspiracy);

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<sup>125</sup> As the next section illustrates, primary liability is not limited to the simple liability imposed by the “one act, one crime” model, but can itself encompass varieties of compound liability. *See infra* part II.D.1.

<sup>126</sup> The Supreme Court has construed CCE as a “super-conspiracy” offense that subsumes the predicate conspiracy defined by 21 U.S.C. § 846 (1988). *See supra* note 85.

<sup>127</sup> This section focuses on tiered compounding for two reasons, one pragmatic and one conceptual. Pragmatically, the limitations of this format make it impossible to survey all uses of compound liability in state and federal law, because, while no systematic empirical inquiries confirm this, the anecdotal evidence indicates that its use is widespread and growing. *See, e.g., supra* note 120. Conceptually, tiered compounding is the most complex method yet devised to impose iterative liability, and it is reasonable to assume that its incidence and permutations should provide reliable insights into the factors that are responsible for this increased use of compound liability.

<sup>128</sup> This prosecution is a modified amalgam of facts and charges involved in *United States v. Scarpa*, 913 F.2d 993 (2d Cir. 1990) and *United States v. Alvarez*, 860 F.2d 801 (7th Cir. 1988), *cert. denied*, 493 U.S. 829 (1989).

- Count Three:* 21 U.S.C. § 848 (CCE);
- Count Four:* 21 U.S.C. §§ 846 and 841 (conspiracy to distribute marijuana between July, 1989 and February, 1990);<sup>129</sup>
- Count Five:* 21 U.S.C. § 841(a)(1) (distributing marijuana between July, 1989 and February, 1990);<sup>130</sup>
- Count Six:* 18 U.S.C. § 1951 (conspiracy to commit extortion between September, 1989 and January 1, 1990);<sup>131</sup>
- Count Seven:* 18 U.S.C. § 924(c) (carrying a firearm in relation to drug trafficking crime in September, 1989);<sup>132</sup>
- Count Eight:* 18 U.S.C. § 1951 (conspiracy to commit extortion between January 15, 1990 and April 2, 1990);<sup>133</sup>
- Count Nine:* 18 U.S.C. § 1951 (committing extortion by use and threats of physical violence on February 20, 1990);<sup>134</sup>
- Count Ten:* 18 U.S.C. § 1959 (assault resulting in serious bodily injury meant to maintain a position in an enterprise engaged in racketeering on or about February 20, 1990);<sup>135</sup>
- Count Eleven:* 21 U.S.C. § 843(b) (using the telephone to facilitate the conspiracy to distribute and the actual distribution of marijuana);<sup>136</sup> and
- Count Twelve:* 18 U.S.C. § 1952(a) (traveling in interstate commerce to facilitate marijuana distribution).<sup>137</sup>

<sup>129</sup> 21 U.S.C. § 841 (1988) makes it an offense, *inter alia*, to distribute a controlled substance such as marijuana; 21 U.S.C. § 846 (1988) makes it an offense to conspire to commit a violation of the federal drug laws. *See supra* note 85 and accompanying text.

<sup>130</sup> *See supra* note 129.

<sup>131</sup> 18 U.S.C. § 1951 (1988) prohibits using robbery, extortion, or the use or threat of violence to affect commerce—it also makes it a crime to conspire to this end. Factually, this count alleges an agreement to use violence and/or the threat of violence to elicit payment of a debt owed by Sam Beck. The debt arose from drug deals Beck had with the enterprise alleged in Count One.

<sup>132</sup> *See supra* note 119. Factually, this count alleges that Rogers carried a firearm in the course of consummating the marijuana offense alleged in Count Five.

<sup>133</sup> This count alleges an agreement to use violence and/or the threat of violence to elicit payment of a debt owed by Larry Rice. He incurred the debt in drug deals with the enterprise alleged in Count One.

<sup>134</sup> *See supra* note 131. Factually, this count alleges a completed act of extorting money from Larry Rice. *See supra* note 133.

<sup>135</sup> *See supra* note 121. Factually, this count alleges an assault committed in the course of extorting money from Larry Rice.

<sup>136</sup> *See supra* note 119.

<sup>137</sup> *See supra* note 119.

The defendants are Roe, Doe, Brown, Black, White, Grey, Smith, Jones, Martin, Will, Rogers, Porter, and Lane.<sup>138</sup> The enterprise at issue in Counts One, Two, and Ten is described as an “association in fact” composed of the defendants plus others and led by Roe.<sup>139</sup> Count One alleges that the defendants violated § 1962(c) by using a pattern of racketeering activity consisting of the following predicate acts to conduct the affairs of this enterprise:

- (1) the conspiracy to distribute marijuana, involving Smith, Roe, Doe, Rogers, and Lane, alleged in Count Four;
- (2) the distribution of marijuana, by Smith, Rogers, and Lane, alleged in Count Five;
- (3) a conspiracy involving Smith, Grey, Porter, and Lane to distribute cocaine hydrochloride between September, 1989 and February, 1990 in violation of 21 U.S.C. § 846;
- (4) a conspiracy between Smith and Jones to distribute heroin hydrochloride and cocaine hydrochloride between January, 1991 and March, 1991 in violation of 21 U.S.C. § 846;
- (5) the murder of Fred Albert committed by Smith, Jones, Grey, and Black between December 8, 1989 and December 10, 1989 in violation of New York law;
- (6) the extortion conspiracy involving Smith, Grey, and Rogers, alleged in Count Six;
- (7) the extortion conspiracy involving Smith, Jones, Grey, Rogers, and Black, alleged in Count Eight;
- (8) the extortion alleged in Count Nine, perpetrated by Black; and
- (9) the bribing by Black of New York City police officers on ten occasions from November 9, 1989 to February 15, 1990 in violation of New York law.

Count Two charges all of the defendants with conspiring to commit the § 1962(c) offense alleged in Count One. Count Three charges Smith, Roe, Porter, and Lane with conducting a continuing criminal enterprise consisting of:

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<sup>138</sup> Much of this discussion includes references to the liability of the “defendants” collectively. The references are used for convenience—to avoid having to parse individual liability for each crime—and are not necessarily meant to indicate that every defendant can be held liable for every crime at issue in that portion of the discussion. *But see* Brenner, *supra* note 48 (use of imputed liability in RICO actions).

<sup>139</sup> *See generally supra* note 62 and accompanying text. For the propriety of pursuing such a group as an association in fact, see *United States v. Turkette*, 452 U.S. 576 (1981). For the enterprise at issue in Count Three, see *supra* note 81 and accompanying text.

- (1) the Smith-Roe-Doe-Rogers-Lane marijuana conspiracy alleged in Count Four;
- (2) the Smith-Rogers-Lane distribution of marijuana alleged in Count Five;
- (3) the Smith-Grey-Porter-Lane conspiracy to distribute cocaine alleged as predicate act (3) in Count One; and
- (4) the Smith-Jones conspiracy to distribute heroin and cocaine alleged as predicate act (4) in Count One.<sup>140</sup>

Based on the conduct alleged in this indictment, if this case were being prosecuted in federal court under the classic model of simple liability that included the merger of conspiracy charges, the defendants could be charged, at most, with the following five crimes:<sup>141</sup>

- (1) distributing marijuana;
- (2) committing extortion;
- (3) conspiring to commit extortion (1989-1990);
- (4) conspiring to distribute cocaine; and
- (5) conspiring to distribute cocaine and heroin.<sup>142</sup>

The marijuana distribution alleged in Count Five and the extortion alleged in Count Nine survive because each is a distinct substantive offense.<sup>143</sup> The conspiracy to extort alleged in Count Six does not merge into the extortion alleged in Count Nine because it sought the commission of a different act of extortion.<sup>144</sup> The cocaine conspiracy alleged as

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<sup>140</sup> See *supra* note 81 and accompanying text.

<sup>141</sup> The discussion that follows assumes, for the most part, that the conduct alleged in the indictment is encompassed by federal law and can be prosecuted in federal court. *Cf. infra* note 142. This assumption is necessary because many of the charges in the indictment are based on varieties of compound liability, which makes it difficult to translate the conduct at issue in those charges into simple liability. See, e.g., *supra* notes 135-37 and accompanying text.

<sup>142</sup> This list results from construing the facts in favor of the prosecution's ability to bring as many charges as possible. If the facts were analyzed under a stringent version of the simple model, the surviving drug conspiracies might merge into each other or into the substantive marijuana offense—the latter could be justified on the grounds that there was one continuing conspiracy, the object of which was to distribute drugs. See *supra* note 37 and accompanying text.

The defendants can be prosecuted for Albert's murder and the acts of bribery alleged in Count One; but since a federal court would not have jurisdiction over these crimes *per se*, they are not included in the list above. See *generally supra* note 110.

<sup>143</sup> The simple model would allow the charging of multiple counts of distributing marijuana if each were based on a distinct criminal act. See *supra* note 104.

<sup>144</sup> See *supra* note 133.

predicate act (3) and the heroin/cocaine conspiracy alleged as predicate act (4) in Count One would merge into consummated drug crimes had either conspiracy accomplished substantive crimes, but this did not occur; these conspiracies do not merge because they existed at different times and for different reasons.<sup>145</sup>

On the other hand, the conspiracy to distribute marijuana alleged in Count Four does merge into the distribution alleged in Count Five, and the conspiracy to extort alleged in Count Eight merges into the extortion alleged in Count Nine.<sup>146</sup> The charge of carrying a firearm in connection with drug trafficking alleged in Count Seven merges into the marijuana distribution because Rogers carried a weapon while perpetrating that crime.<sup>147</sup> The assault alleged in Count Ten merges into the extortion alleged in Count Nine because it was used to perpetrate that offense.<sup>148</sup> Additionally, the use of the telephone and travel alleged in Counts Eleven and Twelve, respectively, merge into the marijuana distribution because both types of conduct were used to commit that crime.<sup>149</sup>

Though it is difficult to translate RICO and CCE offenses into simple liability, it seems that the substantive RICO offense alleged in Count One would merge into the five crimes listed above because each constituted one of its predicates. Simple liability would presumably enforce its "one act-one crime" principle by construing a substantive RICO offense as nothing more than the sum of its parts—i.e., its predicate crimes—and imposing liability for as many of the latter as survive the effects of merger. The RICO conspiracy alleged in Count Two should merge into the same surviving predicates because it sought commission of the § 1962(c) offense of which they were substantive constituents; using the reductionist approach applied to Count One, the simple model would construe it as a conspiracy to commit the predicate offenses. This approach would clearly encompass the offense alleged in Count Three because CCE is regarded as a "super-conspiracy."<sup>150</sup> Because the simple model merges conspiracy into completed substantive crimes, it would merge this CCE count into the only completed drug offense, the marijuana distribution.

Under the simple model, therefore, these defendants can be prosecuted for two substantive offenses, distributing marijuana and extortion, and three conspiracies, to extort, to distribute cocaine, and to distribute heroin and cocaine. A prosecutor using compound liability, however, can create

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<sup>145</sup> See, e.g., *United States v. Albernaz*, 450 U.S. 333, 343 (1981). *But see supra* note 142.

<sup>146</sup> See, e.g., *supra* note 133.

<sup>147</sup> See *supra* note 132.

<sup>148</sup> See *supra* note 135.

<sup>149</sup> See *supra* note 119.

<sup>150</sup> See *supra* note 126.

a pattern of interlocking charges that generate the following two-tiered liability structure:<sup>151</sup>

*Primary Liability*

- Conspiracy to distribute marijuana\*
- Distributing marijuana
- Conspiracy to commit extortion (1989-1990)\*
- Carrying a firearm in drug trafficking\*
- Conspiracy to commit extortion (1990)\*
- Extortion
- Assault to maintain position in racketeering enterprise\*\*
- Using telephone to facilitate marijuana distribution\*
- Traveling to facilitate marijuana distribution\*
- [Smith-Grey-Porter-Lane cocaine conspiracy]\*
- [Smith-Jones heroin/cocaine conspiracy]\*

*Derivative Liability*

- 18 U.S.C. § 1962(c) (RICO)
- 18 U.S.C. § 1962(d) (RICO)\*
- 21 U.S.C. § 848 (CCE)

As noted earlier, the second-tier offenses—the derivative liability crimes—are products of tiered compounding.<sup>152</sup> The only way one can commit these offenses is to commit first-tier offenses—the primary liability crimes—because second-tier offenses result from committing first-tier offenses.<sup>153</sup> Second-tier offenses are inconceivable under the simple model because the conduct used to commit these crimes has already been

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<sup>151</sup> The structure includes the conspiracies to distribute cocaine and heroin/cocaine because these are federal crimes that could have been pursued independently, as well as being used as RICO predicates. Neither Albert's murder, nor the acts of bribing New York City police officers, are included because these are state offenses which could not be pursued in a federal court. *See supra* note 142. Of course, it might be possible to bring either or both crimes within the compass of federal statutes, in which case they too could be prosecuted in the action outlined above. *See, e.g.*, 18 U.S.C. § 1958 (1988) (using interstate commerce facilities to commit murder-for-hire).

<sup>152</sup> *See supra* part II.C.

<sup>153</sup> *See supra* part II.C. Of course, second-tier crimes like RICO and CCE also require the presence of additional elements, such as the use of a pattern of racketeering activity resulting from the commission of first-tier crimes, to have a prohibited impact on the affairs of an enterprise engaged in or affecting interstate or foreign commerce. *See supra* part II.C.



outlawed by other federal criminal statutes; the resulting duplication of liability violates the simple model's "one act-one crime" principle.<sup>154</sup>

Unlike second-tier offenses, which result exclusively from tiered compounding, first-tier offenses—primary liability crimes—are the products of simple liability or of varieties of compound liability other than tiered compounding. In other words, first-tier crimes derive from simple liability, serial compounding, or lateral compounding.<sup>155</sup> The liability structure given above illustrates this by indicating which option is responsible for each first-tier offense: crimes with no asterisk originate in simple liability,<sup>156</sup> crimes with one asterisk are the products of serial compounding;<sup>157</sup> and those crimes with two asterisks result from lateral compounding.<sup>158</sup>

<sup>154</sup> See *supra* part II.A.

<sup>155</sup> See *supra* part II.C.

<sup>156</sup> Distributing marijuana and extortion are the products of simple liability because each offense consists of a single course of conduct that achieves, or is designed to achieve, a given result. See, e.g., *supra* note 13 and accompanying text. Depending upon the facts, it might be possible to dissect the distribution of marijuana charge into multiple offenses, each representing a different instance of engaging in the conduct prohibited by that statute. See *supra* note 104. This would admittedly multiply the liability imposed on the defendants, but it would not violate the "one act-one crime" principle, since each offense would represent a distinct violation of the statute. See generally *supra* note 104.

<sup>157</sup> Serial compounding breaks a course of conduct into sequential offenses, each offense representing a step toward the consummation of some criminal goal. See *supra* note 119 and accompanying text. The above identified products of serial compounding fall into two categories: conspiracies and drug crimes. Conspiracy offenses transform what was once regarded as preparatory conduct into an offense distinct from any crime that ensues. See generally *supra* note 118. All five conspiracies listed above are, therefore, the result of serial compounding; each contemplates the commission of a specific substantive crime. With the abrogation of merger, it is irrelevant that two conspiracies culminated in substantive crimes while the others did not.

The other crimes—carrying a firearm in drug trafficking plus using the telephone and traveling to facilitate marijuana distribution—were created by dissecting conduct that was once generically attributable to drug trafficking into component offenses. It is as if, during Al Capone's reign in Chicago, Congress had made it a federal crime to, respectively, carry a weapon while dealing in illegal liquor, use the telephone to deal in illegal liquor, and travel to deal in illegal liquor.

<sup>158</sup> Lateral compounding uses independent offenses encompassing the same conduct to enhance liability. See *supra* note 120. Only one of the crimes listed above—assault to maintain a position in a racketeering enterprise—is the product of this method. While it can be difficult to determine if offenses result from serial or lateral compounding, especially when complex crimes like RICO and CCE are implicated, this crime obviously results from lateral compounding. It produces iterative liability for the conduct at issue because assault is almost certainly an offense under applicable state law; and assault is encompassed by the extortion offense established by 18 U.S.C. § 1951 (1988). See also MODEL PENAL CODE § 211.1 (1985); see, e.g., *supra* note 135. Also, the legislative history of 18 U.S.C. § 1959 reveals that Congress intended to enact this part of the Code as a means of enhancing liability imposed under RICO. See S. REP. NO. 225, 98th Cong.,

The effects of this derivation of first-tier offenses become apparent when one considers the role that compound liability plays in the liability structure given above.<sup>159</sup> Parsing the crimes according to the nature of the liability responsible for each produces the following configuration:

Simple Liability

Distributing marijuana  
Extortion

Compound Liability

Marijuana conspiracy  
Extortion conspiracy (1989-1990)  
Extortion conspiracy (1990)  
Carrying firearm in drug trafficking  
Assault to maintain position in racketeering enterprise  
Using telephone in marijuana distribution  
Traveling to facilitate marijuana distribution  
Cocaine conspiracy  
Heroin/cocaine conspiracy

Aside from the assault, which itself reiterates an offense cognizable at state law,<sup>160</sup> the conduct used to commit extortion and distribute marijuana gives rise to a multiplicity of charges, each of which can result in conviction and additive punishment.<sup>161</sup> When the second-tier RICO and CCE charges are factored in, conduct that empirically constitutes the commission of two crimes supports charges for committing fourteen crimes.<sup>162</sup> This figure represents a modest venture into compound liability;

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1st Sess. 307 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3486. *See also* United States v. Concepcion, 983 F.2d 369, 381 (2d Cir. 1992).

<sup>159</sup> *See supra* chart in text accompanying note 151.

<sup>160</sup> *See supra* note 158.

<sup>161</sup> *See, e.g., supra* note 86.

<sup>162</sup> This includes the cocaine and heroin/cocaine conspiracies that were alleged as predicates for the RICO offense charged in Count One. The original indictment did not charge these as distinct crimes, but could have done so subject to the condition that either or both crimes might merge into the CCE charge contained in Count Three. *See supra* note 86.

The figure given above does not include liability that can be imposed under state law in accordance with the dual sovereignty doctrine. *See supra* note 34 and accompanying text. Based on the facts, the defendants could be charged with, *inter alia*, assault, violating state drug laws, conspiracy to violate state drug laws, extortion at state law, conspiracy to commit extortion at state law, and violating state RICO laws. *See, e.g.,* Commonwealth v. Besch, 614 A.2d 1155 (Pa. Super. Ct. 1992) (prosecuting under both state drug and RICO statutes); MODEL PENAL CODE §§ 5.03, 211.2, 223.4 (1985) (creating model state assault, conspiracy, and extortion offenses). In addition, they could be prosecuted for Albert's murder and for the acts of bribery—neither of which were pursued under federal law. *See supra* note 142.

it could easily be increased without introducing evidence of additional conduct.

The prosecutor could, for example, add two substantive RICO counts by charging the defendants with using the same pattern of racketeering activity to acquire or maintain an interest in, or control of, the enterprise; and with using income derived from this pattern of racketeering activity to acquire an interest in the enterprise or to establish or operate it.<sup>163</sup> The distribution of marijuana charge, which is based on simple liability, may not be divisible into multiple crimes. If, however, the defendants made several phone calls and/or several interstate trips or trips abroad to facilitate that distribution, each call and each trip can become a new count.<sup>164</sup> If the defendants made ten such phone calls and three such trips, this activity, which was a necessary component of the marijuana distribution offense, sustains thirteen additional charges; these, in addition to the two new RICO counts, would bring the total federal charges to nineteen.

This charge inflation may seem remarkable, but it pales in comparison to the cases which have recently been brought to court. In *United States v. Williams-Davis*,<sup>165</sup> for example, twenty-four defendants were charged in 113 counts with 2 RICO offenses (§§ 1962(c) and 1962(d)), 1 CCE offense (21 U.S.C. § 846 conspiracy), and 108 substantive crimes that included murder, attempted murder, assault, weapons offenses, possessing drugs with intent to distribute, distributing drugs, laundering drug proceeds, and using telephones to facilitate drug crimes.<sup>166</sup> All of the charges were based on the allegation that the defendants had operated "an extensive narcotics conspiracy known as the R Street Organization."<sup>167</sup> Seventy-six of the 108 substantive crimes were used as predicates for the § 1962(c) count; the CCE count was predicated on the 21 U.S.C. § 846 conspiracy plus substantive drug offenses.<sup>168</sup> As occurred with the charges hypothesized in the preceding paragraph, here, too, conduct that was used to commit substantive drug crimes was allocated among numerous first-tier

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<sup>163</sup> See 18 U.S.C. § 1962(a)-(b) (1988). See also *supra* part II.B.2.a.

<sup>164</sup> See *United States v. Polizzi*, 500 F.2d 856, 899 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975) (stating that "[e]ach act of travel" is a separate violation of § 1952); 21 U.S.C. § 843(b) (1988) (stating that each use of telephone is "a separate offense"). See generally *supra* note 119.

<sup>165</sup> 1991 WL 319692 (D.D.C. Dec. 16, 1991).

<sup>166</sup> *Id.* at \*1, \*6 n.1. Federal jurisdiction existed over the murders, attempted murders, and assaults because the case arose in the District of Columbia. See *United States v. Williams-Davis*, 1992 WL 38448, at \*1 (D.D.C. Feb. 5 1992).

<sup>167</sup> *United States v. Williams-Davis*, 1991 WL 319692, at \*1 (D.D.C. Dec. 16, 1991).

<sup>168</sup> See, e.g., *United States v. Williams-Davis*, 1993 WL 147937, at \*10 (D.D.C. Apr. 27, 1993).

and second-tier offenses so as to impose an iterative liability far exceeding that which the simple model would impose for those drug crimes.

Neither the charges in *Williams-Davis* nor those hypothesized above are unusual.<sup>169</sup> The incidence of charge configurations such as these is too great even to summarize.<sup>170</sup> Given the popularity of these configurations, it is surprising that federal law remains content with first-tier and second-tier offenses, and has not experimented with multi-tiered compounding or other variations of compound liability.<sup>171</sup>

## 2. State Law

At least thirty-three states have adopted statutes comparable to RICO and/or CCE.<sup>172</sup> Like their prototypes, many state statutes resulted from a

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<sup>169</sup> See, e.g., *United States v. Casamento*, 887 F.2d 1141, 1147 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081 (1990) (prosecuting for 16 counts charging 35 defendants with RICO conspiracy, CCE, conspiracies under 21 U.S.C. § 846 (1988) and 18 U.S.C. § 371 (1988), false statements to Internal Revenue Service, and currency transportation offenses); *United States v. Kopituk*, 690 F.2d 1289 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983) (prosecuting for 70 counts charging 22 defendants with violating § 1962(c), (d), extortion, labor crimes, obstructing justice, and filing false income tax returns).

<sup>170</sup> See Marcus, *supra* note 6.

<sup>171</sup> Even CFCE, the newest compound offense, uses two-tiered compounding. See *supra* part II.B.2.c. But see Brenner, *supra* note 2, at 972-78 (proposing a third-tier offense).

<sup>172</sup> Most of the statutes are RICO variations. See ALASKA STAT. § 11.71.010(a)(3) (1992); ARIZ. REV. STAT. ANN. §§ 13-2301 to -2317 (1993); ARK. CODE ANN. § 5-64-414 (Michie 1991); CAL. PENAL CODE § 186-6.8 (West 1993); COLO. REV. STAT. ANN. §§ 18-17-101 to -109 (West 1993); CONN. GEN. STAT. ANN. §§ 53-393 to 55-403 (West 1982); DEL. CODE ANN. tit. 11, §§ 1501-11 (1993); FLA. STAT. ANN. § 893.20, §§ 895.01-.09 (West 1993); GA. CODE ANN. §§ 16-14-1 to -15 (Michie 1992); HAW. REV. STAT. §§ 842-1 to -12 (1993); IDAHO CODE §§ 18-7801 to -7805 (1993); ILL. ANN. STAT. ch. 56-1/2, paras. 1651-1659 (Smith-Hurd 1993); IND. CODE ANN. §§ 35-45-6-1 to -2 (Burns 1993); KAN. STAT. ANN. § 21-4401 (1993); LA. REV. STAT. ANN. § 15:1351, § 15:1356 (West 1993); MINN. STAT. ANN. §§ 609.902 to .912 (West 1993); MISS. CODE ANN. §§ 97-43-1 to -11 (1993); MONT. CODE ANN. § 45-9-125 (1993); NEV. REV. STAT. ANN. §§ 207.350 to .520 (Michie 1993); N.J. REV. STAT. §§ 2C:41-1 to -6.2 (1993); N.M. STAT. ANN. §§ 30-42-1 to -6 (Michie 1993); N.Y. PENAL LAW §§ 460.00 to .80 (McKinney 1989); N.C. GEN. STAT. §§ 75D-3 to -4, § 90-95.1 (1993); N.C. GEN. STAT. §§ 75D-1 to -14, § 90-95.1 (1993); N.D. CENT. CODE §§ 12.01-06.1 to -06.8 (1993); OHIO REV. CODE ANN. §§ 2923.31 to .36 (1993); OKLA. STAT. ANN. tit. 22, §§ 1401 to 1419 (West 1993); OR. REV. STAT. §§ 166.715 to .735 (1993); 18 PA. CONS. STAT. ANN. § 911 (1993); R.I. GEN. LAWS §§ 7-15-1 to -11 (1993); TENN. CODE ANN. §§ 39-12-201 to -210 (1993); UTAH CODE ANN. §§ 76-10-1601 to -1609 (1993); WASH. REV. CODE ANN. §§ 9A.82.001 to .904 (West 1993); WIS. STAT. ANN. §§ 946.80 to .87 (West 1993).

A number of states, however, have versions of CCE. See, e.g., ALASKA STAT. § 11.71.010(a)(3) (1992); ARK. CODE ANN. § 5-64-414 (Michie 1991); FLA. STAT. ANN. § 893.20 (West 1993); MONT. CODE ANN. § 45-9-125 (1993); N.J. STAT. ANN. § 2C:35-3 (West 1992); N.C. GEN. STAT. § 90-95.1 (1993); WIS. STAT. ANN. § 946.85 (West 1993).

legislative discovery of organized crime.<sup>173</sup> Since most are based, often quite literally,<sup>174</sup> on their federal counterparts, courts in these states use RICO/CCE jurisprudence in construing the state provisions.<sup>175</sup>

State statutes that track RICO and CCE are useful indicators of the growing popularity of compound liability, and especially of tiered compounding; but aside from that, they are not of particular significance to this discussion.<sup>176</sup> This article is an effort to ascertain why compound liability is popular. Data concerning the adoption and use of RICO/CCE clones does not appreciably advance this endeavor because states with

See also *infra* note 203, for Kentucky's version of CCE. See generally P.R. LAWS ANN. tit. 24, § 2408 (1992); V.I. CODE ANN. tit. 19, § 611 (1991).

<sup>173</sup> See, e.g., CAL. GOV'T CODE §§ 15025 to 15026 (West 1992); COLO. REV. STAT. ANN. § 18-10-101 (West 1993); N.Y. PENAL LAW § 460.00 (McKinney 1989); 18 PA. CONS. STAT. ANN. § 911(a) (1993).

<sup>174</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-2312 (1992) (RICO); COLO. REV. STAT. ANN. § 18-17-104 (1993) (RICO); CONN. GEN. STAT. ANN. § 53-395 (West 1982) (RICO); FLA. STAT. ANN. § 895.03 (West 1993) (RICO); GA. CODE ANN. § 16-14-4 (Michie 1993) (RICO); IDAHO CODE § 18-7804 (1987) (RICO); IND. CODE ANN. § 35-45-6-2 (Burns 1993) (RICO); LA. REV. STAT. ANN. § 15:1353 (West 1993) (RICO); MISS. CODE ANN. § 97-43-5 (1993) (RICO); N.J. STAT. ANN. § 2C:41-2 (1993) (RICO); OHIO REV. CODE ANN. § 2923.32 (1992); OKLA. STAT. ANN. tit. 22, § 1403 (West 1993) (RICO); OR. REV. STAT. § 166.720 (1993) (RICO); 18 PA. CONS. STAT. ANN. § 911 (1993) (RICO); WIS. STAT. ANN. § 946.83 (West 1993) (RICO); ALASKA STAT. ANN. § 11.71.010(b) (CCE); ARK. CODE ANN. § 5-64-414 (CCE); FLA. STAT. ANN. § 893.20 (1992) (CCE); MONT. CODE ANN. § 45-9-125 (1993) (CCE); N.J. STAT. ANN. § 2C:35-3 (1993) (CCE); N.C. GEN. STAT. § 90-95.1 (1993) (CCE); WIS. STAT. ANN. § 946.85 (West 1993) (CCE). See generally UNIFORM CONTROLLED SUBSTANCES ACT § 411 (1990) (model CCE statute).

<sup>175</sup> See, e.g., *State v. Tocco*, 750 P.2d 868, 873 (Ariz. Ct. App. 1988), *aff'd*, 750 P.2d 874 (Ariz. 1988) (using federal case law in construing state CCE statute); *Carroll v. State*, 459 So. 2d 368, 370 (Fla. Dist. Ct. App. 1984), *review denied*, 464 So. 2d 554 (Fla. 1985) (using federal cases in construing state RICO statute); *State v. Wynne*, 767 P.2d 373 (N.M. Ct. App. 1988), *review denied*, 767 P.2d 354 (N.M. 1989) (same); *State v. Hughes*, 767 P.2d 382 (N.M. Ct. App. 1988), *review denied*, 767 P.2d 354 (N.M. 1989) (same); *State v. Blossom*, 744 P.2d 281 (Or. Ct. App. 1987), *review denied*, 749 P.2d 136 (Or. 1988) (same); *State v. Evers*, 472 N.W.2d 828, 831-32 (Wis. Ct. App. 1991), *review denied*, 475 N.W.2d 164 (Wis. 1991) (same); *State v. Judd*, 433 N.W.2d 260, 262-63 (Wis. Ct. App. 1988), *review denied*, 439 N.W.2d 142 (Wis. 1989) (same).

<sup>176</sup> This Article is concerned with analyzing compound liability as a generic phenomenon consisting of serial, lateral, tiered, and any other identifiable varieties of compounding. The spatial constraints of this format, however, make it impossible to analyze all uses of compound liability in the fifty states. The discussion above, therefore, concentrates on tiered compounding, assuming that its use is a reliable indicator of the utilization of other kinds of compound liability.

For state prosecutions involving the type of charge configurations discussed in the preceding section, see, e.g., *State v. Hughes*, 1992 WL 52473 (Ohio Ct. App. Mar. 13, 1992); *State v. Wallock*, 821 P.2d 435 (Or. Ct. App. 1991); *Commonwealth v. Besch*, 614 A.2d 1155, 1146 (Pa. Super. Ct. 1992). See *supra* part II.D.1.

statutes such as these are merely recapitulating the federal experience with tiered compounding.<sup>177</sup> One can, therefore, confidently attribute compound liability's popularity in these jurisdictions either to the same forces that are producing this effect on the federal level or to some level of calculated mimicry. In either instance, investigating the use of compound liability in these states would not appreciably promote this undertaking.

What seems more promising is an examination of morphogenic sports—products of tiered compounding that are quite unlike RICO or CCE. These somewhat idiosyncratic statutes can be grouped into three categories: gang statutes,<sup>178</sup> criminal syndicate statutes,<sup>179</sup> and leading organized crime statutes.<sup>180</sup> A few states combine statutes from these categories with each other and/or with their RICO/CCE statutes to create even more distinct versions of compound liability.<sup>181</sup> The sections below examine the basic categories before exploring these permutations.

### *a. Gang Statutes*

A surprising number of states have adopted gang statutes,<sup>182</sup> that typically make it a crime to commit, to abet another's commission of, and/or to conspire to commit crimes that are intended to further the activities of a "criminal street gang."<sup>183</sup> Like RICO and CCE, these

<sup>177</sup> See generally *Carroll v. State*, 459 So. 2d 368 (Fla. Dist. Ct. App. 1984) (prosecuting under RICO clone); *State v. Wallock*, 821 P.2d 435 (Or. Ct. App. 1991), review denied, 828 P.2d 458 (Or. 1990) (same); *State v. Evers*, 472 N.W.2d 828 (Wis. Ct. App. 1991) (same). See also *supra* note 174.

Some state RICO/CCE statutes explicitly indicate that both first and second-tier liability are to be imposed. See, e.g., CONN. GEN. STAT. ANN. § 53-396(c) (West 1985) ("The court shall impose a separate sentence on any separately charged offense of which the defendant has been found guilty notwithstanding that the offense also constitutes an incident of racketeering activity.").

<sup>178</sup> See *infra* part II.D.2.a.

<sup>179</sup> See *infra* part II.D.2.b.

<sup>180</sup> See *infra* part II.D.2.c.

<sup>181</sup> See *infra* part II.D.2.d.

<sup>182</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-2301 (1992); CAL. PENAL CODE § 186.22 (West 1993); GA. CODE ANN. §§ 16-15-3 to 16-15-5 (Michie 1992); ILL. ANN. STAT. ch. 740, para. 147/10 (Smith-Hurd 1992); IND. CODE ANN. §§ 35-45-9-1 to 35-45-9-5 (Burns 1992); IOWA CODE ANN. §§ 723A.1 to 723A.2 (West 1992); LA. REV. STAT. ANN. §§ 15:1403 to 15:1404 (West 1993); MINN. STAT. ANN. § 609.229 (West 1992); NEV. REV. STAT. § 193.168 (1991); OKLA. STAT. ANN. tit. 21, § 856 (West 1992); TEX. PENAL CODE ANN. §§ 71.01 to 71.03 (West 1993).

<sup>183</sup> See, e.g., TEX. PENAL CODE ANN. § 71.02(a) (West 1993) ("A person commits an offense if, with the intent to establish, maintain, or participate in . . . a criminal street gang, he commits or conspires to commit one or more" crimes that include murder, arson, robbery, burglary, kidnapping, assault, sexual assault, forgery, gambling offenses,

statutes are prompted by the perceived dangers of organized crime; but they target a new incarnation, "street gang" entities, which in one legislature's words, "commit a multitude of crimes against . . . peaceful citizens."<sup>184</sup> Iowa's statute gives a representative definition of this concept:

'Criminal street gang' means any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more criminal acts, which has an identifiable name or identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.<sup>185</sup>

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prostitution offenses, illegal weapons offenses, drug crimes, obscenity offenses, and various other felonies.). *Accord* ARIZ. REV. STAT. ANN. § 13-2308(F) (1992); CAL. PENAL CODE § 186.22(a) (West 1993); GA. CODE ANN. § 16-15-4(a) (Michie 1992); IND. CODE ANN. § 35-45-9-3 (Burns 1992); IOWA CODE ANN. § 723A.2 (West 1992); LA. REV. STAT. ANN. § 15:1403(a) (West 1993); MINN. STAT. ANN. § 609.229(2) (West 1992). *See generally* NEV. REV. STAT. § 193.168 (1991) (imposing additional penalty for crimes committed to benefit criminal gang but does not create separate offense). *Cf.* ILL. ANN. STAT. ch. 38, para. 1755(d) (Smith-Hurd 1993) ("[I]ntent of the General Assembly in enacting this Act to create a civil remedy against streetgangs and their members.").

<sup>184</sup> CAL. PENAL CODE § 186.21 (West 1993) (citing "a state of crisis"). *Accord* GA. CODE ANN. § 16-15-2(b) (1992) (same); LA. REV. STAT. ANN. § 1402(B) (West 1992) (same). *See also* ILL. ANN. STAT. ch. 740, para. 147/5 (Smith-Hurd 1993) (citing a "clear and present danger to public order and safety"). For evidence that gang activity is not a recent phenomenon, see, e.g., *Olmstead v. United States*, 19 F.2d 842 (9th Cir. 1927), *aff'd*, 277 U.S. 438 (1928) (indicting 91 members of "Olmstead gang" for Prohibition violations); *People v. Ford*, 191 N.E. 315, 316 (Ill. 1934) (referring to "Touhy gang"); *State v. Silsby*, 152 So. 323, 326 (La. 1933), *cert. denied*, 292 U.S. 599 (1934) (referring to member of "Egan Rats Gang of St. Louis"); *People v. Salimone*, 251 N.W. 594, 596-97 (Mich. 1933) (referring to gang which conspired to violate Prohibition Act); *People v. Giordano*, 259 N.Y.S. 178, 182 (1932) (referring to murder of "rival gang" members); *Makley v. State*, 197 N.E. 339, 342 (Ohio Ct. App. 1934) (stating that gang members "experts in the use of machine guns and other firearms" and "equipped with high-powered automobiles").

<sup>185</sup> IOWA CODE ANN. § 723A.1(2) (West 1992). *See also* ARIZ. REV. STAT. ANN. § 13-2301(2) (1992) (defining criminal syndicate as "composed of three or more persons" that commits or intends to commit felonies); GA. CODE ANN. § 16-15-3(1) (Michie 1992) ("[A]ny ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more [enumerated] criminal acts . . . and which has a common name or common identifying sign or symbol and the members of which, individually or collectively, engage in or have engaged in a pattern of criminal gang activity."); IND. CODE ANN. § 35-45-9-1 (Burns 1993) (defining as group of at least five persons that promotes, assists or participates in, and "requires as a condition of membership" commission of one or more felonies); LA. REV. STAT. ANN. § 15:1404(A) (West 1993)

Most of the statutes are products of lateral compounding,<sup>186</sup> though some originate in serial compounding.<sup>187</sup> An Iowa case illustrates how the two methods can work in tandem.<sup>188</sup>

Anthony Browne, Buddy Black, and other members of the Black Gangster Disciples had an altercation with rival gang member Dewey Lamp, whom they followed home.<sup>189</sup> There, Black, who was carrying a handgun, "approached a window. When a figure came into view, some member of the gang yelled 'cap the bitch.' Black then fired . . . . The bullet struck Dewey Lamp's mother, puncturing her lung."<sup>190</sup> Charged with aiding and abetting attempted murder, willful injury, and criminal gang participation, Browne was acquitted on the murder charge but was convicted of the other offenses.<sup>191</sup>

The Iowa Supreme Court upheld Browne's conviction for willful injury because it found that he aided and abetted the shooting of Lamp's mother, if only by accompanying Black to her home.<sup>192</sup> The third charge required the prosecutor to prove that Browne had aided and abetted a criminal act "committed for the benefit of, at the direction of, or in association with"

(same); MINN. STAT. ANN. § 609.229(1) (West 1992) (same); NEV. REV. STAT. § 193.168(6) (1991) (same); OKLA. STAT. ANN. tit. 21, § 856 (West 1992) (same); TEX. PENAL CODE ANN. § 71.01(d) (West 1993) ("[T]hree or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities.").

<sup>186</sup> See *supra* note 120 and accompanying text. See, e.g., CAL. PENAL CODE § 186.22(a) (West 1993) (abetting felony committed by gang); GA. CODE ANN. § 16-15-4(a) (1992) (same); IOWA CODE ANN. § 723A.2 (West 1992) (abetting crime committed for benefit of gang); LA. REV. STAT. ANN. § 15:1403(A) (West 1993) (furthering or assisting "pattern of criminal gang activity"); MINN. STAT. ANN. § 609.229(2) (West 1992) (committing crime to promote, further, or assist "criminal conduct by gang members"); TEX. PENAL CODE ANN. § 71.02(a) (West 1993) (committing or conspiring to commit offenses listed in the statute quoted in *supra* note 183). See generally IND. CODE ANN. § 35-45-9-3 (Burns 1992) ("participating" in criminal gang). For other statutes targeting such conduct, see, e.g., CAL. PENAL CODE § 12022.4 (West 1992); GA. CODE ANN. §§ 16-4-8, 16-13-33 (Michie 1992); IND. CODE ANN. § 35-41-5-2 (Burns 1992); IOWA CODE ANN. §§ 703.1, 706.1 (West 1992); LA. REV. STAT. ANN. § 14:26 (West 1993); MINN. STAT. ANN. § 609.175 (West 1992); TEX. PENAL CODE ANN. § 15.02 (West 1993).

<sup>187</sup> See *supra* note 119 and accompanying text. See, e.g., ARIZ. REV. STAT. ANN. § 13-2308(F) (1992) (organizing, directing, or financing criminal syndicate to benefit criminal street gang or assist crimes perpetrated by it). See also ARIZ. REV. STAT. ANN. § 13-2301(C)(2) (1992) (defining criminal syndicate).

<sup>188</sup> See *State v. Browne*, 494 N.W.2d 241 (Iowa 1992), *cert. denied*, 113 S. Ct. 3051 (1993).

<sup>189</sup> *Id.* at 242.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 242-43.

<sup>192</sup> *Id.*



a criminal street gang as defined above.<sup>193</sup> To bring the Black Gangster Disciples within that definition, the prosecution had to show that the gang had engaged in a "pattern of criminal gang activity," statutorily defined as, "[t]he commission, attempt to commit, conspiring to commit, or solicitation of two or more criminal acts, provided the criminal acts were committed on separate dates or by two or more persons who are members of, or belong to, the same criminal street gang."<sup>194</sup>

The Iowa Supreme Court affirmed Browne's conviction on this count because it found that the evidence established a pattern of criminal gang activity consisting of two criminal acts—"going armed with intent and terrorism."<sup>195</sup> Specifically, the acts were Black's taking his gun to Lamp's home and shooting it at Mrs. Lamp.<sup>196</sup> By accompanying Black and other gang members, Browne simultaneously committed willful injury by aiding and abetting Black's shooting Mrs. Lamp and criminal gang participation by aiding and abetting Black's taking a weapon to Lamp's home and firing it with the intent to provoke fear or anger.<sup>197</sup>

Under the model of simple liability, Browne could, at most, have been convicted of aiding and abetting Black's shooting of Mrs. Lamp.<sup>198</sup> That model would construe all of his actions as one course of conduct designed to achieve this end, as opposed to dissecting them into acts taken to abet the weapons transportation, the firing of the weapon, and the injury to Mrs. Lamp.<sup>199</sup> The net effect of these Iowa statutes is an iterative liability that is the joint product of lateral compounding, using the willful injury and criminal gang participation statutes against the same conduct, and serial compounding, splitting the conduct that led to the injury into three

<sup>193</sup> *Id.* (quoting IOWA CODE ANN. §§ 723A.1 to 723A.2 (West 1992)) (stating that it is an offense to "aid and abet any criminal act committed" by or for street gang). *See also* IOWA CODE ANN. § 723A.1(1) (West 1992) (defining "criminal act"). *See supra* note 185 and accompanying text.

<sup>194</sup> *Browne*, 494 N.W.2d at 242 (quoting IOWA CODE ANN. § 723A.1(3) (West 1992)).

<sup>195</sup> *Id.* at 243-44. *See also id.* at 244 (stating that it is "not necessary" that "offenses be committed on separate dates if two or more gang members were involved in" committing them). *See generally* IOWA CODE ANN. § 708.8 (West 1992) (stating that it is an offense to go "armed with any dangerous weapon with the intent to use" it against another); IOWA CODE ANN. § 708.6 (West 1992) (stating that terrorism includes discharging dangerous weapon into occupied building with "intent to injure or provoke fear or anger"). Both offenses are Class D felonies. *See id.*

<sup>196</sup> *See Browne*, 494 N.W.2d at 244.

<sup>197</sup> *Id.* *See also supra* note 195.

<sup>198</sup> *See supra* parts II.A. and II.C. For general principles of aider and abettor liability, *see* MODEL PENAL CODE § 2.06 (1985).

<sup>199</sup> *See, e.g., Browne*, 494 N.W.2d at 244 ("[T]he offense of going armed with intent clearly preceded the willful injury offense. The State's theory of 'terrorism' was predicated on Black's act of shooting into a building. That act preceded the injury sustained by the victim upon the impact of the bullet.").

temporal parts, and using the two types of compounding to sustain liability for criminal gang participation and the other to sustain liability for aiding and abetting willful injury.<sup>200</sup>

Although the gang participation statute is structurally dissimilar to RICO or CCE, it is, as *Browne* illustrates, at least partially attributable to tiered compounding. The statute parsed Browne's conduct into two first-tier, predicate crimes, courtesy of serial compounding, and used those crimes to impose second-tier, derivative liability for gang participation.<sup>201</sup> At least six other states have statutes that would achieve a similar result.<sup>202</sup>

### *b. Criminal Syndicate Statutes*

Two states, Arizona and Nevada, have statutes outlawing "criminal syndicates,"<sup>203</sup> while North Dakota has a functionally identical provision

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<sup>200</sup> See *supra* part II.C.

<sup>201</sup> See *supra* parts II.C. and II.D.1. The major difference between the Iowa statute as applied in *Browne* and RICO/CCE is that the former did not impose liability for both the first and second-tier offenses. See *supra* note 200 and accompanying text. The opinion does not indicate whether this was an option that the prosecutor chose not to pursue or whether first-tier predicates merged into second-tier offenses under this statute. See generally IOWA CODE ANN. § 701.9 (West 1992) (referring to merger of lesser included offenses). But see LA. REV. STAT. ANN. § 15:1403(A) (West 1992) ("Any sentence of imprisonment imposed pursuant to this Section shall be in addition and consecutive to any sentence imposed for an underlying offense committed in the pattern of criminal gang activity."). The substantive provisions of the Louisiana statute are quoted *infra* note 202.

<sup>202</sup> See CAL. PENAL CODE § 186.22(a) (West 1992) (stating that it is illegal to participate in gang and promote "any felonious criminal conduct" by gang members); GA. CODE ANN. § 16-15-4(a) (1992) (same); IND. CODE ANN. § 35-45-9-3 (Burns 1993) (stating that it is illegal to "knowingly or intentionally actively" participate in gang); LA. REV. STAT. ANN. § 15:1403(A) (West 1992) (stating that it is illegal to participate, direct, or assist "pattern of criminal gang activity"); MINN. STAT. ANN. § 609.229(2) (West 1992) (stating that it is illegal to commit "a crime for the benefit of, at the direction of, or in association with a criminal gang" to promote criminal conduct by gang); TEX. PENAL CODE ANN. § 71.02(a) (West 1992) (stating that it is illegal to commit or conspire to commit predicate crimes to establish, maintain, or participate in street gang). See also ARIZ. REV. STAT. ANN. § 13-2308(F) (1992) (stating that it is illegal to promote criminal syndicate to further street gang or its activities). Indiana and Iowa make gang participation a felony; Georgia makes it a misdemeanor. IND. CODE ANN. § 35-45-9-3 (Burns 1993); IOWA CODE ANN. § 723.A2 (West 1992). See GA. CODE ANN. § 16-15-4(a) (Michie 1992); *supra* note 195. See also ARIZ. REV. STAT. ANN. § 13-2308(F) (1992) (creating a "class 2 felony"); MINN. STAT. ANN. § 609.229(3) (West 1992) (citing offense classifications); TEX. PENAL CODE ANN. § 71.02(b),(c) (West 1992) (same). For Louisiana's approach, see *supra* note 201.

<sup>203</sup> See ARIZ. REV. STAT. ANN. § 13-2308(A), (C) (1992); NEV. REV. STAT. §§ 207.370, 207.400(d)-(h) (1991).

that prohibits "leading organized crime."<sup>204</sup> Ohio had a syndicate statute until 1980, when the Ohio Supreme Court held that it was unconstitutionally vague.<sup>205</sup>

The Arizona Supreme Court upheld Arizona's statute against a similar challenge in 1988.<sup>206</sup> This statute makes it a crime to "participate in" or "assist" a criminal syndicate,<sup>207</sup> which it defines as a "combination of

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A Kentucky statute makes it a crime to commit any of seven specified acts to "establish or maintain a criminal syndicate or to facilitate any of its activities." See KY. REV. STAT. ANN. § 506.120(1) (Michie/Bobbs-Merrill 1990) (organizing or participating in the organization syndicate or its activities; aid syndicate or its activities; manage or direct syndicate activities; furnish legal, accounting or managerial services; commit, conspire to commit, attempt to commit or be accomplice to a crime which a syndicate commits). The statute defines "criminal syndicate" as five or more persons who collaborate to "promote or engage in" any of certain specific crimes "on a continuing basis." KY. REV. STAT. ANN. § 506.120(3) (Michie/Bobbs-Merrill 1990). The specific crimes are: extortion, prostitution, theft, illegal gambling, illegal trafficking in controlled substances, liquor offenses, "destructive devices or booby traps," and "loan-sharking." *Id.*

The Kentucky statute is actually a version of CCE that targets crimes other than drug offenses. See KY. REV. STAT. ANN. § 506.120(1) (Michie/Bobbs-Merrill 1990); *supra* part II.B.2.b. Of the seven acts that serve as predicates, two acts resemble conspiracy in that they entail concerted action directed toward unlawful ends; but neither is a crime in itself, so they only support liability for the criminal syndicate offense. See KY. REV. STAT. ANN. § 506.120(1) (Michie/Bobbs-Merrill 1990) (organizing, participating in organizing, managing, or directing syndicate or its activities). This outcome is identical to that which ensues under CCE when a 21 U.S.C. § 846 (1988) conspiracy is used as a predicate offense. See *supra* note 85 and accompanying text. Two other predicate acts—providing aid or services to a syndicate or its activities—seem to impose aider and abettor liability, since neither constitutes an offense in itself. See Brenner, *supra* note 48, at 932-35, 965-66. These provisions are also consistent with federal law, which imposes liability for aiding and abetting a CCE offense. See, e.g., *United States v. Pino-Perez*, 870 F.2d 1230, 1237 (7th Cir. 1989) (en banc), *cert. denied*, 493 U.S. 901 (1989). Like CCE's substantive predicates, the Kentucky statute's last three predicate acts encompass conduct that is independently punishable under Kentucky's criminal code, so liability can be imposed for these acts and for the criminal syndicate offense. Kentucky's method parallels the result that ensues under CCE when crimes other than the 21 U.S.C. § 846 (1988) conspiracy are used as predicates. See *supra* note 85 and accompanying text. For interpretations of this statute, see *Cohoon v. Rees*, 820 F.2d 784 (6th Cir. 1987); *Cooper v. Comm.*, 786 S.W.2d 875 (Ky. 1990); *Comm. v. Phillips*, 655 S.W.2d 6 (Ky. 1983), *cert. denied*, 465 U.S. 1072 (1984); see also *infra* II.D.2.c. for a discussion of an analogous New Jersey statute.

The Kentucky statute also bears some resemblance to the offense created by 18 U.S.C. § 1955 (1988). See *supra* note 81.

<sup>204</sup> See N.D. CENT. CODE § 12.1-06.1-02 (1991).

<sup>205</sup> See *State v. Young*, 406 N.E.2d 499, 504 (Ohio 1980), *cert. denied*, 449 U.S. 905 (1981). See *supra* note 174.

<sup>206</sup> See *State v. Tocco*, 750 P.2d 874, 878 (Ariz. 1988).

<sup>207</sup> See ARIZ. REV. STAT. ANN. § 13-2308(A), (C) (1992).

persons or enterprises engaging, or having the purpose of engaging, on a continuing basis" in one or more felonies under Arizona law.<sup>208</sup> Arizona adopts the federal definition of "enterprise" except for omitting "individual" as a possibility,<sup>209</sup> and defines a "combination" as "persons who collaborate" to carry out or promote a syndicate's activities.<sup>210</sup> One "participates" in a syndicate by doing any of the following: organizing, managing, or financing it; inducing others to engage in violence or intimidation to promote it; giving advice on conducting or financing its affairs; inducing a public servant to violate an official duty to promote its goals; or using a minor to commit an offense under the statute.<sup>211</sup> One "assists" a criminal syndicate by committing any felony "with the intent to promote or further" its criminal objectives.<sup>212</sup>

Under North Dakota's statute, one "leads organized crime" by engaging in any of four activities that are directed at a "criminal syndicate."<sup>213</sup> North Dakota uses the same definition of criminal syndicate as Arizona,<sup>214</sup> and the prohibited activities listed in the North Dakota statute are identical to the first four varieties of conduct that constitute "participating in a criminal syndicate" in Arizona.<sup>215</sup> The Arizona offense was known as "leading organized crime" until 1990<sup>216</sup> and probably provided the model for the North Dakota statute.<sup>217</sup>

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<sup>208</sup> ARIZ. REV. STAT. ANN. § 13-2301(C)(2) (1992) (referring to "any" felony under Arizona law). See also *Tocco*, 750 P.2d at 877 (" '[C]ontinuing basis' refers to a course of conduct involving a series of transactions over a period of time. ").

<sup>209</sup> See ARIZ. REV. STAT. ANN. §§ 13-2301(C)(2), 13-2301(D)(2) (1992); see also *supra* note 62 and accompanying text. See generally *State v. Ivanhoe*, 798 P.2d 410, 412 (Ariz. 1990) (" [D]efinition of enterprise that, while identical in all other respects to that used in RICO, excludes 'individual.' ").

<sup>210</sup> ARIZ. REV. STAT. ANN. § 13-2301(C)(1) (1992).

<sup>211</sup> ARIZ. REV. STAT. ANN. § 13-2308(A) (1992).

<sup>212</sup> ARIZ. REV. STAT. ANN. § 13-2308(C) (1992) (referring to acts "whether completed or preparatory"). For the grading of both offenses, see ARIZ. REV. STAT. ANN. § 13-2308(D)-(G) (1992), amended by S.B. 1049, 1993 Ariz. Legis. Serv. 255, § 32 (West).

<sup>213</sup> See N.D. CENT. CODE § 12.1-06.1-02(1) (1991).

<sup>214</sup> Compare N.D. CENT. CODE § 12.1-06.1-02 (1991) with ARIZ. REV. STAT. ANN. § 13-2301(C)(1)-(2) (1992).

<sup>215</sup> See N.D. CENT. CODE § 12.1-06.1-02(1) (1991) (organizing, managing or financing syndicate; inducing violence or intimidation to further its goals; furnishing assistance or direction in conducting or financing it; inducing violation of official duty to further its goals); see also *supra* note 211.

<sup>216</sup> See 1990 Ariz. Sess. Laws, ch. 366, § 3 (amending ARIZ. REV. STAT. ANN. § 13-2308(A)); 1991 Ariz. Sess. Laws, ch. 316, § 1 (amending ARIZ. REV. STAT. ANN. § 13-2301(4)(m)). See generally *infra* part II.D.2.c.

<sup>217</sup> Arizona adopted its leading organized crime statute in 1977. See 1977 Ariz. Sess. Laws, ch. 142, § 82. North Dakota did not adopt its statute until 1983. See 1983 N.D.

Nevada defines a "criminal syndicate" as a group of persons who engage in, or intend to engage in, "racketeering activity."<sup>218</sup> "Racketeering activity" is the equivalent of federal law's pattern of racketeering activity, i.e., committing at least two related predicate crimes.<sup>219</sup> A companion statute lists the predicates.<sup>220</sup> Substantively, Nevada's statute is comparable to Arizona's, except that Nevada omits the reference to using minors to commit the crime<sup>221</sup> and adds a conspiracy provision.<sup>222</sup>

None of the syndicate statutes stand alone. Nevada and North Dakota tie their statutes to RICO offenses, and Arizona's syndicate statute is juxtaposed with RICO and gang provisions.<sup>223</sup> Therefore, further consideration of these statutes will be resumed in the discussion of liability configurations produced by combining RICO/CCE and comparable, non-RICO/CCE statutes.<sup>224</sup>

### *c. Leading Organized Crime Statutes*

Except for the North Dakota statute discussed above, only New Jersey and Washington have statutes of this type.<sup>225</sup> Washington's statute is the more unusual of the two and thus is considered first.

Under the Washington statute, one leads organized crime by organizing, by managing, or by financing "three or more persons with the intent to engage in a pattern of criminal profiteering activity;" or by inducing violence or intimidation to promote a pattern of criminal

Sess. Laws 163, § 2. Until 1985, Washington's "leading organized crime" offense resembled the North Dakota crime. *See* WASH. REV. CODE ANN. § 9A.82.010, Historical Notes (West 1988); 1985 Wash. Sess. Laws, Ch. 455, § 7.

<sup>218</sup> NEV. REV. STAT. ANN. § 207.370 (Michie 1992). The group must be "so structured" that it will "continue its operation even if individual members enter or leave the organization." *Id.*

<sup>219</sup> *Id.* § 207.390 (referring to "interrelated" and not "isolated incidents"). *See, e.g.,* H. J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 243-49 (1989); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 499 (1985). The predicates are called "crime[s] related to racketeering." NEV. REV. STAT. ANN. § 207.360 (Michie 1992).

<sup>220</sup> *See* NEV. REV. STAT. ANN. § 207.360 (Michie 1992) (listing murder, manslaughter, felony battery, kidnapping, sexual assault, arson, robbery, theft, extortion, forgery, burglary, bribery, assault with a deadly weapon, embezzlement, perjury, various stolen property, and other felonies).

<sup>221</sup> NEV. REV. STAT. ANN. § 207.400(1)(d)-(g) (Michie 1992).

<sup>222</sup> NEV. REV. STAT. ANN. § 207.400(1)(h) (Michie 1992).

<sup>223</sup> *See* NEV. REV. STAT. ANN. § 207.400 (1991); N.D. CENT. CODE § 12.1-06.1-01 to 12.1-06.1-03 (1991); ARIZ. REV. STAT. ANN., tit. 13, ch. 23 ("Organized Crime and Fraud") (1992).

<sup>224</sup> *See infra* part II.D.2.d.

<sup>225</sup> *See* N.J. STAT. ANN. § 2C:5-2(g) (West 1982); WASH. REV. CODE ANN. § 9A.82.060 (West 1992). *See also supra* part II.D.2.b.

profiteering activity.<sup>226</sup> The statute defines a "pattern of criminal profiteering activity" as committing "at least" three related acts of criminal profiteering in five years.<sup>227</sup> "Criminal profiteering" consists of committing any of twenty-seven specified offenses "for financial gain."<sup>228</sup>

At first, this statute seems to prohibit attempts to commit substantive RICO crimes, since it does not require that the pattern of criminal profiteering activity be put to any unlawful end, and since the Washington RICO statute makes it a crime to use such a pattern to affect an enterprise in any of the ways forbidden by 18 U.S.C. § 1962(a)-(b).<sup>229</sup> But the RICO statute explicitly prohibits attempts to commit its equivalents of § 1962(a) or § 1962(c).<sup>230</sup> If leading organized crime does not encompass completed substantive RICO crimes or attempts to commit such crimes, it can only address conduct taken to facilitate the commission of these offenses.

Traditionally, the nature of the liability imposed on one who sought to facilitate an offense has depended on whether it was completed and if so, by whom. If the offense was not completed, attempt liability is imposed on the facilitator.<sup>231</sup> If the offense was completed by the facilitator, she is liable for the completed substantive crime.<sup>232</sup> If it was completed by someone other than the facilitator, she is liable as an aider and abettor of the completed substantive crime.<sup>233</sup> So far, criminal law does not impose any distinct liability for the conduct involved in aiding and abetting a substantive crime; instead, in a result reminiscent of that achieved by applying the rule of merger to conspiracy, it imposes liability only for the completed substantive crime.<sup>234</sup>

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<sup>226</sup> WASH. REV. CODE ANN. § 9A.82.060(1) (West 1988). This statute is only in effect until 1995. *See* WASH. REV. CODE ANN. § 9A.82.903 (West 1988).

<sup>227</sup> WASH. REV. CODE ANN. § 9A.82.010(15) (West 1988). *See supra* note 72.

<sup>228</sup> WASH. REV. CODE ANN. § 9A.82.010(14) (West 1988) (specifying murder, robbery, kidnapping, forgery, theft, child selling or buying, bribery, gambling, extortion, collecting unlawful debt, drug crimes, dealing in stolen property, leading organized crime, money laundering, obstructing justice, securities fraud, sexual exploitation of children, pornography, prostitution, arson, and assault).

<sup>229</sup> *See* WASH. REV. CODE ANN. § 9A.82.080 (West 1988). *See also supra* part II.B.2.a.

<sup>230</sup> *See* WASH. REV. CODE ANN. § 9A.82.080(3) (West 1988). The federal statute does not explicitly encompass attempts. *See* 18 U.S.C. § 1962 (1988).

<sup>231</sup> *See, e.g.,* MODEL PENAL CODE § 5.01(3) (1985).

<sup>232</sup> *See generally* MODEL PENAL CODE §§ 2.01 to 2.03 (1985).

<sup>233</sup> *See* MODEL PENAL CODE § 2.06 (1985); 18 U.S.C. § 2 (1988).

<sup>234</sup> *See* Brenner, *supra* note 2, at 977 n.324. *See also* PERKINS & BOYCE, *supra* note 42, at 757-58. The aiding and abetting principle described above is an ad hoc rule of merger, which incorporates liability for the conduct used to facilitate commission of substantive crimes into the liability imposed for those crimes. *See id.*

Federal law imposes liability for aiding and abetting RICO offenses; and Washington's statute might be intended to achieve a similar result—to provide a means of reaching those who facilitate such offenses.<sup>235</sup> This interpretation is undercut by Washington's RICO statute, which lists leading organized crime as a predicate crime, the commission of which can create a "pattern of criminal profiteering activity."<sup>236</sup> If leading organized crime is a RICO predicate, it is a means of committing a RICO offense, not merely a means of facilitating such an offense.<sup>237</sup> Instead of imposing aiding and abetting liability, the leading organized crime statute carves another offense out of the conduct involved in committing a substantive violation of Washington's RICO statute.<sup>238</sup> Using this statute, a prosecutor could pursue one who committed a RICO offense in concert with others for conspiring to commit a substantive RICO crime, leading organized crime, and actually committing the substantive RICO crime.<sup>239</sup>

At first glance, New Jersey's statute seems similar, making it an offense to be a "leader of organized crime."<sup>240</sup> A leader of organized crime "conspires with others as an organizer, supervisor or manager" to commit a pattern of racketeering activity under the state RICO statute.<sup>241</sup> Aside from adding a number of state offenses as predicate crimes, New Jersey's RICO statute is almost identical to its federal counterpart.<sup>242</sup>

The leader of organized crime statute states that a conviction for that offense does "not merge with the conviction of any other crime which constitutes racketeering activity" under New Jersey law.<sup>243</sup> This statement clearly indicates an intent to impose some form of compound liability; the unresolved issue is the nature and extent of that liability.

<sup>235</sup> See, e.g., *United States v. Pungitore*, 910 F.2d 1084, 1132 n.68 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991) ("[B]eyond dispute that a RICO conviction may rest upon the defendant's aiding and abetting of charged predicate offenses.").

<sup>236</sup> WASH. REV. CODE ANN. § 9A.82.010(14)-(15) (West 1988). See also *supra* note 228.

<sup>237</sup> See *supra* part II.B.2.a. Since leading organized crime is a RICO predicate, and RICO predicates do not merge into a completed substantive RICO violation, liability can be imposed both for the RICO violation and for leading organized crime as a predicate. See *id.*

<sup>238</sup> See *supra* note 119.

<sup>239</sup> See *supra* note 119. For further consideration of this offense, see *infra* part II.D.2.d.

<sup>240</sup> N.J. STAT. ANN. § 2C:5-2(g) (West 1982 & Supp. 1993).

<sup>241</sup> *Id.* See also N.J. STAT. ANN. §§ 2C:41-1 to 2C:41-2 (West 1982) (RICO statute).

<sup>242</sup> See N.J. STAT. ANN. §§ 2C:41-1 to 2C:41-2 (West 1982). The statute incorporates all the predicates listed in 18 U.S.C. § 1961(1) (1988). See N.J. STAT. ANN. § 2C:41-1(a)(2) (West 1982); *supra* part II.B.2.a. The statute also includes versions of 18 U.S.C. § 1962(a)-(d) (1988). See N.J. STAT. ANN. § 2C:41-2 (West 1982).

<sup>243</sup> N.J. STAT. ANN. § 2C:5-2(g) (West 1992).

The statute was developed to target “upper echelon members” of a group engaged in racketeering activity.<sup>244</sup> Instead of being part of the state RICO statute, however, it appears in the statute that defines conspiracy.<sup>245</sup> This placement and the explicit disavowal of merger strongly suggest that the leader of organized crime offense is akin to CCE, a “super-conspiracy” aimed at criminal executives.<sup>246</sup> That construction is validated by the provisions of other statutes which define the offenses of being a “leader of [a] narcotics trafficking network” and a “leader of [an] auto theft trafficking network.”<sup>247</sup> These statutes specifically provide that neither crime merges into “any offense which is the object of the conspiracy.”<sup>248</sup>

All three “leader” crimes are, therefore, CCE analogues, in that they function as alternatives to a general conspiracy offense established elsewhere in the criminal code. Like CCE, none of the “leader” crimes merge into completed substantive offenses,<sup>249</sup> but lesser conspiracy offenses merge into them.<sup>250</sup> What initially appears to be a product of serial compounding is simply a more specific conspiracy provision.<sup>251</sup>

#### *d. Permutations*

Some states imitate federal law and use lateral compounding to enhance the liability imposed by their versions of RICO and CCE.<sup>252</sup> But the most interesting uses of compound liability in state law occur in Arizona and North Dakota, both of which link RICO statutes with other provisions to create what could be a new order of tiered compounding. Nevada has a superficially similar structure that actually has a far less interesting effect.

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<sup>244</sup> See, e.g., *State v. Alexander*, 624 A.2d 48 (N.J. Super. Ct. App. Div. 1993).

<sup>245</sup> See N.J. STAT. ANN. § 2C:5-2(g) (West 1992 & Supp. 1993).

<sup>246</sup> See *supra* note 126.

<sup>247</sup> N.J. STAT. ANN. § 2C:35-3 (West 1992 & Supp. 1993) (narcotics); N.J. STAT. ANN. § 2C:20-18 (West 1992 & Supp. 1993) (auto theft). Like the leader of organized crime offense, neither offense merges into a conviction for the substantive crime. See *id.*

<sup>248</sup> *Id.*

<sup>249</sup> See *supra* note 84 and accompanying text.

<sup>250</sup> See generally *State v. Alexander*, 624 A.2d 48, 50 (N.J. Super. Ct. App. Div. 1993) (leading a narcotics trafficking network versus “such lesser offenses as distributing or conspiring to distribute a controlled dangerous substance”).

<sup>251</sup> The features noted above—placement in the state conspiracy statute, the disavowal of merger, and explicit references to conspiracy in comparable provisions—clearly differentiate this statute from the CCE-style gambling offense discussed in *supra* note 81.

<sup>252</sup> See, e.g., R.I. GEN. LAWS § 11-57-1 (1992) (stating that it is an offense to commit violent crime to maintain or enhance position in racketeering enterprise); R.I. GEN. LAWS § 11-57-2 (1992) (stating that it is a crime to solicit this offense). For a comparable federal provision, see *supra* note 135 and accompanying text.



As noted earlier, Arizona makes it a crime to participate in or assist a criminal syndicate.<sup>253</sup> It also has equivalents of the three RICO substantive offenses.<sup>254</sup> One commits the RICO offenses by using "racketeering or its proceeds" to control or conduct an enterprise.<sup>255</sup> Arizona's statute uses the federal definition of "enterprise" except for excluding individuals as an option.<sup>256</sup> It substitutes "any act" of racketeering for the federal statute's pattern of racketeering activity and defines "racketeering" as a "preparatory or completed offense" that is committed "for financial gain" and involves specified predicate crimes.<sup>257</sup>

Participating in a criminal syndicate is one of the predicate crimes.<sup>258</sup> Since participating in a criminal syndicate is itself a crime,<sup>259</sup> and RICO predicates do not merge with a substantive RICO offense, it seems that the act(s) by which one "participates" in a criminal syndicate simultaneously generate liability for that crime and for a RICO violation if they are used to conduct or control an enterprise. Unlike the New Jersey offense considered earlier,<sup>260</sup> participating in a criminal syndicate seems to be a substantive crime distinct from those created by the state's RICO statute.<sup>261</sup> This conclusion results from parsing the elements of the two statutes:

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<sup>253</sup> See *supra* part II.D.2.b.

<sup>254</sup> ARIZ. REV. STAT. ANN. § 13-2312(a)-(b) (1992). The statute does not include a version of 18 U.S.C. § 1962(d) (1988), but conspiracy to commit RICO crimes may be addressed through Arizona's general conspiracy statute. See ARIZ. REV. STAT. ANN. § 13-1003(a) (1992). No reported cases discuss conspiracy to violate the state's RICO statute.

<sup>255</sup> See ARIZ. REV. STAT. ANN. § 13-2312(a)-(b) (1992).

<sup>256</sup> See *supra* note 209.

<sup>257</sup> See ARIZ. REV. STAT. ANN. § 13-2301(D)(4) (1992) (stating that predicate crimes include homicide, robbery, kidnapping, forgery, theft, bribery, gambling, usury, extortion, drug crimes, trafficking in explosives, weapons or stolen property, the syndicate crime, obstructing justice, false claims, fraud, obscenity, prostitution, restraint of trade, terrorism, money laundering, and obscene telephone communications to minors for commercial purposes).

<sup>258</sup> See ARIZ. REV. STAT. ANN. § 13-2301(D)(4)(m) (1992). See also *supra* note 257.

<sup>259</sup> Cf. *supra* note 203 (Kentucky CCE statute).

<sup>260</sup> See *supra* part II.D.2.c.

<sup>261</sup> See *supra* note 223 and accompanying text.

	<i>Syndicate</i>	<i>RICO</i>
<i>Conduct:</i>	Organize Manage Finance Advise Induce violence Induce breach of duty <sup>262</sup>	Control Conduct
<i>Focus:</i>	“Syndicate”— Combination engaging or intending to engage in one or more felonies <sup>264</sup>	“Enterprise” <sup>263</sup> — Corporation Partnership Association Labor union Group of persons
<i>Predicate:</i>	Any felony <sup>265</sup>	Specified felonies

Except for inducing violence and breach of trust, which could be encompassed by RICO's homicide and bribery predicates, the conduct used to commit the crimes is distinct.<sup>266</sup> For the syndicate crime, it is facilitating the organized commission of any two felonies; in other words, the syndicate exists to commit these crimes.<sup>267</sup> For RICO, on the other hand, the predicate crime is a tool used to conduct or control an enterprise; instead of the enterprise's existing to commit the crime, the crime is used to exploit the enterprise.<sup>268</sup>

Admittedly, there can be some overlap between the two, because the RICO predicates are a subset of the felonies that can serve as objectives for a criminal syndicate,<sup>269</sup> and because a syndicate could qualify as a RICO enterprise.<sup>270</sup> Despite the empirical replication of some elements, the

<sup>262</sup> See *supra* note 211 and accompanying text. The final option is using a minor in violating one of the provisions noted above. See *id.*

<sup>264</sup> ARIZ. REV. STAT. ANN. § 13-2301(C)(2) (1992).

<sup>263</sup> See *supra* note 62.

<sup>265</sup> See *supra* note 208.

<sup>266</sup> See *supra* note 211 and accompanying text. See also ARIZ. REV. STAT. ANN. § 13-2301(D)(4)(y) (1992) (Note that the predicate offense of terrorism is another possibility.).

<sup>267</sup> See *supra* part II.D.2.b.

<sup>268</sup> See *supra* part II.B.2.a.

<sup>269</sup> Compare *supra* note 257 with *supra* note 208.

<sup>270</sup> Like Arizona's criminal syndicate, an enterprise can consist of a group of persons associated together for unlawful ends. See *supra* note 62; see also *supra* note 139.

statutes may not necessarily define these as distinct offenses.<sup>271</sup> The relationship these crimes actually bear to each other can be illustrated by means of an example.

Assume, therefore, that six persons—Roe, Doe, Grey, Black, Green, and White—used the following conduct, committed in Arizona, to establish and operate an organization analogous to a Mafia-style crime family:<sup>272</sup> distributing marijuana, possessing marijuana with intent to distribute, bribery, extortion, and murder.<sup>273</sup> Can this conduct be used to impose liability for participating in a criminal syndicate and for violating the state RICO statute? It can, using the above analysis.

Assume that the six individuals united in 1990 to sell marijuana. As that is a felony under Arizona law, the group qualified as a “criminal syndicate.”<sup>274</sup> Roe and Doe organized it, thereby “participating” in this syndicate.<sup>275</sup> Grey and Black contributed money from drug crimes perpetrated on their own as its initial working capital; by financing it they, too, participated in the syndicate.<sup>276</sup> Green and White participated by serving as the syndicate’s managers and using threats of violence to coerce marijuana suppliers into cooperating with it.<sup>277</sup> Also, all six individuals engaged in conduct involving the distribution of marijuana that constituted various felonies under Arizona law.<sup>278</sup>

The syndicate was doing so well by the beginning of 1992 that the six members expanded their operation. Among other things, they assassinated two rivals to acquire their business, and then bribed law enforcement officers to avert a rigorous investigation of the rivals’ deaths.<sup>279</sup> The members also continued to buy and sell marijuana.<sup>280</sup> All of these acts constituted felonies under Arizona law and predicate crimes under Arizona’s RICO statute.<sup>281</sup>

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<sup>271</sup> See, e.g., *supra* part II.D.2.a. (referring to replication in *Browne*).

<sup>272</sup> See *supra* note 139 and accompanying text.

<sup>273</sup> This example is based on the federal prosecution hypothesized in *supra* part II.D.1. See generally ARIZ. REV. STAT. ANN. § 13-3405 (1992) (stating that it is a felony to use, possess, transport, sell, or offer to sell marijuana).

<sup>274</sup> See *supra* note 273; see also *supra* part II.D.2.b.

<sup>275</sup> See *supra* part II D.2.b.

<sup>276</sup> See *id.*

<sup>277</sup> See *id.*; see also ARIZ. REV. STAT. ANN. § 13-1804(A) (1992). The discussion implicitly assumes that others were involved in the syndicate’s activities.

<sup>278</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-3405 (1992) (stating that it is a felony to use, possess, transport, sell, or offer to sell marijuana).

<sup>279</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-1105(A) (1992) (murder); ARIZ. REV. STAT. ANN. § 13-2602(A) (1992) (bribery of public servant).

<sup>280</sup> See *supra* note 273.

<sup>281</sup> See *supra* note 257.

As noted above, Roe, Doe, Grey, Black, Green, and White can be convicted of participating in a criminal syndicate based on the acts each committed while establishing that organization.<sup>282</sup> They are also liable for the drug crimes it perpetrated,<sup>283</sup> and for RICO violations resulting from their 1992-1993 activities. The syndicate constitutes an enterprise under Arizona's RICO statute,<sup>284</sup> and the conduct described in the preceding paragraph supports liability for substantive RICO charges because the six members used their marijuana transactions to maintain control of the enterprise,<sup>285</sup> and used the assassinations and acts of bribery to conduct its affairs.<sup>286</sup>

This example splits the conduct at issue into two time periods to make it easier to see how these statutes can work in conjunction with each other. The syndicate members' 1990-1992 conduct is used to impose liability for participating in a criminal syndicate and for the drug crimes perpetrated by that syndicate.<sup>287</sup> Their 1992-1993 conduct is used to hold them liable for two substantive RICO offenses plus the predicate crimes for those offenses, i.e., the homicides, acts of bribery, and drug offenses committed during that period. In addition, although Arizona's RICO statute does not

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<sup>282</sup> See *supra* part II.D.2.b.

<sup>283</sup> See *supra* part II.C.

<sup>284</sup> See *supra* note 270 and accompanying text.

<sup>285</sup> See ARIZ. REV. STAT. ANN. § 13-2312(A) (1992) ("A person commits illegal control of an enterprise if such person, through racketeering or its proceeds . . . maintains . . . control of any enterprise.").

<sup>286</sup> See ARIZ. REV. STAT. ANN. § 13-2312(B) (1992) ("A person commits illegally conducting an enterprise if such person . . . conducts such enterprise's affairs through racketeering.").

<sup>287</sup> Arizona's statute also makes it a crime to assist a criminal syndicate, but it is likely that this offense is intended to merge into the "participating" offense. Compare ARIZ. REV. STAT. ANN. § 13-2308(D)-(E) (1992) ("participating" offense is class 2 felony) with ARIZ. REV. STAT. ANN. § 13-2308(G) (1992) ("assisting" offense is class 4 felony). The statute contains a separate provision specifying that it is a class 2 felony to commit a "participating" offense "for the benefit of, at the direction of or in association with any criminal street gang, with the intent to promote, further or assist any criminal conduct by the gang." ARIZ. REV. STAT. ANN. § 13-2308(F) (1992). A "[c]riminal street gang" is "a criminal syndicate which is composed of three or more persons and which engages in," or is intended to engage in, drug or violent felonies. ARIZ. REV. STAT. ANN. § 13-2301(A)(2) (1992). One could argue that this is a separate offense from the "participatory" offense, and that the six defendants described above can be held liable for participating in a "generic" criminal syndicate and for participating in a criminal street gang, since their syndicate was composed of more than three persons and engaged in both drug and violent felonies. While the statute creates the possibility that these could be separate offenses, this seems unlikely. Compare ARIZ. REV. STAT. ANN. § 13-2308(F) (1992) (participating in street gang is offense is class 2 felony) with ARIZ. REV. STAT. ANN. § 13-2308(D)-(E) (1992) (stating that "generic" participation offense is class 2 felony).

include a conspiracy provision, the general conspiracy statute can presumably be used to impose liability for conspiracy to commit the substantive RICO crimes, as well as for conspiracy to commit the drug crimes, assassinations, and acts of bribery.<sup>288</sup> It might also be possible to use this statute to impose liability for conspiring to participate in a criminal syndicate.<sup>289</sup>

Because this example used temporally distinct conduct to impose liability under the two statutes, it suggests that the statutes derive from serial compounding, which splits a course of conduct into sequential offenses.<sup>290</sup> The same facts can, however, be used to assemble a charge configuration which indicates that they are actually the products of a new approach to tiered compounding.

Similar to its federal counterpart, Arizona's RICO statute is the result of tiered compounding.<sup>291</sup> One commits a substantive crime under the latter by using "racketeering or its proceeds" to have a proscribed effect on an enterprise.<sup>292</sup> Statutes like this impose two tiers of liability.<sup>293</sup> If one uses racketeering or its proceeds to manipulate an enterprise, she becomes liable for the first-tier, predicate crime(s) that constitute(s) racketeering and for the RICO violation, a second-tier, derivative crime produced by using the predicates to manipulate an enterprise.<sup>294</sup> The syndicate statute can be used to add a third tier of liability.<sup>295</sup>

The RICO statute makes it an offense to use specified crimes to manipulate an enterprise;<sup>296</sup> the syndicate statute makes it an offense to facilitate the operations of a criminal syndicate which exists to commit any Arizona felony.<sup>297</sup> The syndicate statute could, therefore, be used to impose an additional level of liability for conduct that facilitated the operations of a criminal syndicate that has committed RICO violations.<sup>298</sup> This approach

<sup>288</sup> See *supra* note 254.

<sup>289</sup> See generally *Iannelli v. United States*, 420 U.S. 770, 790-91 (1975) (upholding liability for offense comparable to Arizona criminal syndicate crime). See also *supra* note 81.

<sup>290</sup> See *supra* note 119 and accompanying text.

<sup>291</sup> See *supra* part II.C.

<sup>292</sup> See *supra* note 255 and accompanying text.

<sup>293</sup> See *supra* part II.C.

<sup>294</sup> See *supra* note 254 and accompanying text; see also *supra* part II.C.

<sup>295</sup> See Brenner, *supra* note 2, at 972-78 (proposing such a statute).

<sup>296</sup> See, e.g., *supra* note 255 and accompanying text.

<sup>297</sup> See *supra* note 208 and accompanying text. This attribute of the Arizona syndicate statute distinguishes the Arizona syndicate statute from New Jersey's "leader of organized crime" statute, since the latter is RICO-specific and the former is not. See *supra* part II.D.2.c.

<sup>298</sup> The grading of the offenses provides inferential support for this use of the syndicate statute, as it is a class 2 felony while the RICO offenses are class 3 felonies. Compare

would make the six persons whose activities were described above liable for the following:

Third-tier offense

- participating in a criminal syndicate that committed RICO violations

Second-tier offenses

- using marijuana and extortion offenses to establish and maintain control of an enterprise
- using assassinations, bribery, and marijuana offenses to conduct the affairs of an enterprise

First-tier offenses

- distributing marijuana
- possessing marijuana with intent to distribute
- bribery
- extortion
- murder

In this charge configuration the marijuana, bribery, extortion, and homicide crimes are the predicates for the RICO violations, which become the predicates of the syndicate offense. Just as first-tier predicates do not merge into a second-tier offense, these second-tier RICO predicates do not merge into the third-tier syndicate offense.<sup>299</sup>

No reported cases indicate that Arizona's syndicate statute has been used to achieve third-tier liability or was intended to achieve this effect.<sup>300</sup>

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ARIZ. REV. STAT. ANN. § 13-2308(D)-(F) (1992) *with* ARIZ. REV. STAT. ANN. § 13-2312(D) (1992). This suggests that the syndicate statute defines a "greater" offense. *See generally* ARIZ. REV. STAT. ANN. § 13-601 (1992) (creating offense hierarchy).

<sup>299</sup> *See supra* part II.C. The syndicate statute is used to impose a separate third-tier liability for the conduct used to facilitate the commission of the second-tier RICO crimes. *See* Brenner, *supra* note 2, at 977 n.324; *see also supra* note 234 and accompanying text.

<sup>300</sup> One can use the status of the syndicate offense as a RICO predicate to dispute the permissibility of this effect. *See supra* note 258 and accompanying text. While this may suggest that the offense was not designed to be used as described above, it does not necessarily establish that it cannot be used in this fashion—just as the status of the syndicate crime as a "greater" felony does not conclusively establish that it was intended to impose third-tier liability. *See supra* note 298. Although the criminal law has

As the charge configuration sketched above illustrates, it can be applied to this end, as can North Dakota's almost identical "leading organized crime" statute.<sup>301</sup>

Nevada's statutes do not create any possibility of third-tier liability. Nevada's syndicate offense resembles the Arizona crime, but is codified with the state RICO provisions, which recapitulate 18 U.S.C. § 1962.<sup>302</sup> Unlike Arizona, Nevada defines a syndicate as an organization that engages in or intends to engage in a pattern of racketeering activity, which conflates a syndicate's activities with those used to commit RICO offenses.<sup>303</sup> The RICO/syndicate statute makes it a crime to conspire to commit either offense,<sup>304</sup> so the syndicate provisions cannot define a conspiracy offense and must create a new substantive crime.<sup>305</sup>

Nevada's syndicate offense statute makes it a crime to engage in a pattern of racketeering activity, as well as to use such a pattern to manipulate an enterprise.<sup>306</sup> Presumably, this is a RICO attempt provision, since it reaches conduct that could be used against an enterprise before it has been put to this purpose.<sup>307</sup> By not requiring such a contemplated use, however, it also creates the independent offenses of facilitating the

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traditionally treated "greater" and "lesser" offenses as categorical entities, this system breaks down with the emergence of compound liability. See Brenner, *supra* note 2, at 951-48; *supra* note 298. The syndicate offense could, therefore, have been designed to function in both the capacities outlined in the text above, i.e., as a precursor offense in the first scenario and as a third-tier offense in the second.

Of course, the syndicate crime may well be a product of serial compounding, meant to be used only as described in the first scenario presented in this section. See *supra* text accompanying note 298. It is equally possible that this discussion reads more into the structure of these statutes than was ever intended.

<sup>301</sup> For a comparison of the statutes, see *supra* part II.D.2.b. Like Arizona, North Dakota makes its offense a RICO predicate. N.D. CENT. CODE § 12.1-06.1-01(2)(d)(12) (1991); N.D. CENT. CODE § 12.1-06.1-02 (1991). See *supra* note 300. Unlike Arizona, it makes leading organized crime and substantive RICO violations felonies of the same grade. See N.D. CENT. CODE § 12.1-06.1-01(3) (1991); N.D. CENT. CODE § 12.1-06.1-03(3) (1991). Cf. *supra* note 298.

<sup>302</sup> See NEV. REV. STAT. ANN. §§ 207.390, 207.400(1) (Michie 1992); see *supra* part II.D.2.b.

<sup>303</sup> See NEV. REV. STAT. ANN. § 207.370 (Michie 1992); see also *supra* part II.D.2.b. The syndicate crime is not a RICO predicate. See NEV. REV. STAT. ANN. §§ 207.360, 207.390 (Michie 1992).

<sup>304</sup> See NEV. REV. STAT. ANN. § 207.400(1)(h) (Michie 1992).

<sup>305</sup> Cf. *supra* part II.D.2.c (New Jersey statute).

<sup>306</sup> See NEV. REV. STAT. ANN. §§ 207.390, 207.400(1)(a)-(h) (Michie 1992).

<sup>307</sup> Some states outlaw attempts to commit RICO offenses, but the federal statute does not include such a provision. See, e.g., FLA. STAT. ANN. § 895.03(4) (1992); LA. REV. STAT. ANN. § 1353(D) (West 1992); OR. REV. STAT. ANN. § 166.720(4) (1991); WASH. REV. CODE ANN. § 9A.82.080(3) (West 1992); see also *supra* part II.B.2.a.

activities of a group that engages in a pattern of racketeering activity and that conspires to this end.<sup>308</sup>

The Nevada RICO/syndicate statute, therefore, creates seven offenses: three substantive RICO crimes, conspiring to commit one or more substantive RICO crimes, attempting to commit one or more substantive RICO crimes, facilitating the activities of a group engaged in a pattern of racketeering activity per se, and conspiring to facilitate the activities of such a group. Attempts merge into a completed offense, so the attempt crime is an alternative to substantive RICO charges.<sup>309</sup> The last two crimes should be used only when persons engage in racketeering activity for its own sake, not to commit substantive RICO crimes; it is highly improbable that these offenses are products of serial compounding designed to be used in conjunction with substantive RICO charges, since the conduct they encompass is subsumed by a completed RICO offense.<sup>310</sup> Instead of imposing an additional layer of liability, the Nevada statute merely creates a new second-tier offense, engaging in a pattern of racketeering activity per se.

#### *e. Observations*

It seems that like the RICO/CCE clones, idiosyncratic state products of tiered compounding are reactions to a perceived threat posed by organized crime. The gang statutes address a specific, identifiable threat; the syndicate and leading organized crime statutes are directed against more amorphous entities, but share the former's concern with the dangers of concerted criminal action. The next section speculates as to why tiered compounding and its products are the weapons of choice against this perceived peril.

### III. WHY IS "THE PROSECUTION ARM" DOING THIS?

This section could be captioned "WHY ARE WE DOING THIS?", since the statutes described in the preceding sections are not solely attributable to the efforts of prosecutors, though the uses to which the statutes are being put are attributable to prosecutors. The section heading refers to prosecutors because it is reasonable to assume that even if prosecutors are not the only force driving the expansion of compound liability, they exert

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<sup>308</sup> See *supra* note 304 and accompanying text. See generally N.C. GEN. STAT. § 75D-4(a)(1) (1991) (stating that it is a "civil offense" to "engage in a pattern of racketeering activity").

<sup>309</sup> For the merger of attempts, see *supra* note 49. See NEV. REV. STAT. ANN. § 193.330 (Michie 1991).

<sup>310</sup> See, e.g., *supra* note 119; see *supra* part II.B.1.



the most influence over the process.<sup>311</sup> Therefore, a logical means of identifying causes of this expansion is to consider the advantages compound liability offers prosecutors, on the premise that such advantages will indicate the extent to which prosecutors have an incentive to promote the adoption and use of such liability.

Before embarking on this venture a caveat is in order. The suggestions which follow are merely that—speculations intended to provoke discussion and deliberation about a still extraordinary phenomenon; these comments may or may not account for the rise and spread of this singular approach to criminal liability. They are offered to call attention to this almost overlooked process in the hopes that whatever compound liability's future course may be, it will be shaped by reflection rather than expediency.

### *A. Because It Can*

The most simple explanation for the rise of compound liability avoids any need to inquire into the benefits it offers prosecutors. It may well be that no deliberative processes are responsible for the recent explosion of this type of liability, that it is a purely ad hoc phenomenon precipitated by the adoption of RICO and CCE in 1970. Perhaps these statutes acclimated prosecutors to using a very different model of criminal liability, and their habituation to those uses led prosecutors to seek new and different ways to employ this type of liability.

Something like this certainly occurred at the federal level. As noted earlier, RICO, which is by far the more complex of the two statutes, was almost ignored for the first decade of its existence because prosecutors had not learned how to use it.<sup>312</sup> Once prosecutors did learn how to use RICO, federal RICO cases exploded.<sup>313</sup> CCE, too, is now more widely used, and used in conjunction with RICO, although its limited scope ensures that RICO and RICO/CCE prosecutions will always outnumber CCE-only prosecutions.<sup>314</sup>

The increased use of these statutes seems more the product of heightened familiarity than calculated effect. The inadvertence of this

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<sup>311</sup> See, e.g., H.R. REP. NO. 966, 87th Cong., 1st Sess. (1961), reprinted in 1961 U.S.C.C.A.N. 2664, 2666 (letter from Attorney General Robert Kennedy accompanying his proposal for what would become the Travel Act). See *supra* note 64; see also Bradley, *supra* note 6, at 242-54.

<sup>312</sup> See, e.g., Dennis, *supra* note 5, at 653.

<sup>313</sup> *Id.* ("In 1983 and 1984 an explosion of RICO cases occurred that is still being felt.").

<sup>314</sup> See, e.g., William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 790 (1988) (prosecutions under both CCE and RICO "have increased dramatically in recent years").

expanded application of RICO and CCE is supported by the provisions of the CFCE statute, adopted in 1990.<sup>315</sup> Credited to the savings and loan scandal, it is a white-collar version of CCE.<sup>316</sup> Instead of using extant or new methods of compounding to craft a provision uniquely tailored to combat the evils that prompted its adoption, Congress simply cloned CCE.<sup>317</sup> This cloning process lends inferential credence to the premise that the federal escalation of compound liability, in principle and in practice, has not been a deliberative process. If this is true of federal law, then it is likely to be true of state law, since the latter's ventures into compound liability are based on models devised by federal law.<sup>318</sup>

It may be that America's experience with compound liability has so far been a process of reacting to the consequences of an event analogous to Aladdin's releasing the genie from the bottle, or perhaps to Pandora's releasing a multitude of ills from the box given her by Zeus. If this interpretation is accurate, then no answer yet exists to the question posed at the beginning of this section.

### *B. Because Organized Crime Remains a Perceived Threat*

One can make a credible argument that the rise of compound liability in American law is a reaction to the threat posed by organized crime, whether actual or perceived.<sup>319</sup> At the federal level, this reaction provided the impetus for the adoption of RICO and CCE, and much of the earlier, common law expansion of compound liability was prompted by the proliferation of gang activity during and after Prohibition.<sup>320</sup> Many states adopted RICO/CCE statutes because of a perceived threat posed by new varieties of organized crime.<sup>321</sup>

One problem with this argument is that very few federal or state RICO cases are brought against groups that conform to the conventional image of "organized crime."<sup>322</sup> Since CCE can be used only against drug traffickers, it is admittedly less problematic in this regard—of course, it is

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<sup>315</sup> See *supra* part II.B.2.c.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> See *supra* part II.D.2.

<sup>319</sup> See *supra* part II.B.

<sup>320</sup> See Bradley, *supra* note 6, at 213-25; see, e.g., *supra* note 184.

<sup>321</sup> See *supra* part II.D.2.

<sup>322</sup> See *supra* note 60; see also Russell D. Leblang, *Controlling Prosecutorial Discretion Under State RICO*, 24 SUFFOLK U. L. REV. 79, 82 (1990); Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, *supra* note 6, at 920; see, e.g., Terra Resources I v. Burgin, 664 F. Supp. 82, 84 (S.D.N.Y. 1987) (referring to "flood" of RICO cases "which have nothing at all to do with organized crime as it is understood commonly or was understood by Congress at the time of the enactment of the statute").

used much less often for that very reason.<sup>323</sup> But if RICO and statutes modeled after it were developed as responses to organized crime, should that not be their primary use? If that is not their primary use, can the expansion of compound liability be ascribed to concerns about organized crime?

If it is attributable to such concerns, the future will almost certainly see an even greater increase in the use and varieties of compound liability. This reasonably reliable forecast is based on congressional and other inquiries which report that gang activity, especially international gang activity, is increasing rapidly and presents new challenges for law enforcement.<sup>324</sup> Whether this is true or not is less important than whether the perception that it is true takes hold and prompts further expansions of compound liability. Of course, if RICO, CCE, and their extant brethren are such admirable weapons against organized crime, one wonders why they have not been more effective against this threat.

If this threat, or this perceived threat, is the driving force behind compound liability, the answer to the question posed by this section must be that "the prosecution arm" is doing this because what was once regarded as simple street crime is now perceived as a manifestation of organized crime and must be treated as such. One of many problems with this answer, and with the interpretation that gave rise to it, is that no principled way seems to exist to distinguish between organized and individual crime, or among gradations of organized crime. As others have noted, RICO and its progeny let prosecutors define almost any conduct as organized crime and pursue it as such.<sup>325</sup> Even if one assumes that this flexibility is an essential aspect of using products of tiered compounding against complex criminal activity, it is difficult to believe that all criminal behavior has attained, or will attain, sufficient complexity to warrant its being pursued by this means. The organized crime rationale seems to beget

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<sup>323</sup> See *supra* part II.B.2.b.

<sup>324</sup> See, e.g., 137 CONG. REC. S8309-01 (daily ed. June 20, 1991) (statement of Sen. Specter introducing "bill to implement a Federal crime control and law enforcement program to stem gang violence"); 137 CONG. REC. S1368-01 (daily ed. Jan. 31, 1991) (statement of Sen. Deconcini introducing "a bill to enhance the Federal Government's authority and ability to eliminate violent crime committed by outlaw street and motorcycle gangs"); Douglas Frantz, *Chasing a New Type of Mob*, L.A. TIMES, May 20, 1991, at A1; PRESIDENT'S COMMISSION ON ORGANIZED CRIME, THE IMPACT: ORGANIZED CRIME TODAY 33-128 (1986) (stating that groups then active in United States included Mafia, oriental tongs and triads, outlaw motorcycle gangs, Columbian cartels, Japanese Yakuza, Jamaican Posses, Russian, Irish, Cuban, Vietnamese, and Canadian gangs).

<sup>325</sup> See, e.g., *United States v. Dennis*, 458 F. Supp. 197 (E.D. Mo. 1978) (a RICO prosecution of factory worker who made usurious loans to fellow workers); see also *supra* note 63.

a very real potential for inflating the use of compound liability, or at least the use of tiered compounding, beyond the needs of necessity or justice.<sup>326</sup>

The proponents of these statutes contend that this is not a cause for concern because the decision to bring such charges is in the hands of responsible prosecutors and often entails a review process which guards against abuse.<sup>327</sup> Most state provisions do not, however, require such a review process.<sup>328</sup> Even if provisions did, the organized crime rationale is sufficiently amorphous to leave a significant potential for abuse. If compound liability is in fact needed to combat the encroachments of organized crime, it is still reasonable to believe that simple liability can serve a useful role in the American criminal justice system. Compound liability gives rise to weapons of sufficient magnitude that its evolution should be overseen by persons other than those who, as the next section points out, markedly benefit from its implementation.<sup>329</sup>

### *C. Because Compound Liability Increases Prosecutor Control Over Criminal Proceedings*

A number of authors have noted that prosecutors are exerting increased control over the criminal justice process, one going so far as to suggest that this control has made "the adversary system almost obsolete."<sup>330</sup> Prosecutors have traditionally exercised "virtually unlimited" discretion in bringing charges.<sup>331</sup> Compound liability gives them even more latitude in exercising this discretion.<sup>332</sup>

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<sup>326</sup> See, e.g., *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 503 (1985) ("[R]esponsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions . . . given the extremely severe penalties authorized.").

<sup>327</sup> See, e.g., Coffey, *supra* note 71, at 1043 ("All RICO prosecutions . . . brought by the Department of Justice must first be reviewed and approved for filing by the Criminal Division's Organized Crime and Racketeering Section.").

<sup>328</sup> See, e.g., Leblang, *supra* note 322, at 92 (stating that states have "no review mechanism comparable to that which exists at the federal level"). But see N.Y. CRIM. PROC. LAW § 200.65 (McKinney 1988) (Prosecutor must state that "he has reviewed the substance of the evidence presented to the grand jury and concurs . . . that the [RICO] charge is consistent with" legislative findings prompting adoption of the statute).

<sup>329</sup> See generally H.R. REP. NO. 1444, 91st Cong., 2d Sess. 85 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4652 (additional views of Moss, Dingell, Adams & Eckhardt) ("Unfortunately, prosecutor's discretion is sometimes like the discretion of the hound on the scent of the hare.").

<sup>330</sup> Bennett L. Gershman, *Symposium: The New Prosecutors*, 53 U. PITT. L. REV. 393, 315 (1992). See also Genego, *supra* note 314, at 853; Leblang, *supra* note 322, at 81.

<sup>331</sup> Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 B.Y.U. L. REV. 669, 672.

<sup>332</sup> See, e.g., Gershman, *supra* note 330, at 411 (RICO and CCE provide "greater prosecutorial flexibility to join parties and crimes" and make "convictions more

Among other things, prosecutors can use statutes like RICO and CCE to construct charges that provide a significant incentive for plea bargaining, as they would impose varying degrees of iterative liability if a defendant were to insist on going to trial.<sup>333</sup> RICO and CCE give a prosecutor the ability to craft charges that allow her to use otherwise inadmissible evidence<sup>334</sup> and to use one defendant's conduct against others who may have been peripherally involved in the activity at issue.<sup>335</sup> Federally, RICO and CCE have spawned the "megatrial," a "gargantuan criminal trial" involving "numerous defendants, a myriad of varying charges and disparate criminal acts, a vast number of witnesses and exhibits, and an accompanying large number of defense counsel."<sup>336</sup> Defense attorneys contend that prosecutors exploit RICO and CCE to produce megatrials that enhance the advantages noted above, as well as producing others.<sup>337</sup>

These advantages arguably skew "the balance of power in the adversary system" in favor of the prosecution.<sup>338</sup> They clearly provide an incentive for prosecutors to employ the products of compound liability, and

likely."); Marcus, *supra* note 6, at 16 (RICO "significantly broadened the scope of the government's authority to bring defendants together in one indictment."); *id.* at 17 (quoting letter from Phillip E. Johnson, Professor of Law, University of California, "[A]ll of the opportunities for abuse and excess have been magnified in RICO.").

<sup>333</sup> See, e.g., Marcus, *supra* note 6, at note 89 (quoting letter from Abner J. Mikva, Chief Judge, United States Court of Appeals, District of Columbia Circuit, RICO "substantially affected the way that criminal charges are drawn, bargained over, and tried."); see also *supra* part II.D.1.

<sup>334</sup> See, e.g., Leblang, *supra* note 322, at 87 (referring to "introduction of evidence to prove the existence of the enterprise that would normally be excluded as evidence of prior bad acts"); see also Giuliani, *Legal Remedies for Attacking Organized Crime*, reprinted in NATIONAL INSTITUTE OF JUSTICE, MAJOR ISSUES IN ORGANIZED CRIME 103, 106 (1988) (RICO "permits proof of the defendant's whole life of crime.").

<sup>335</sup> See, e.g., Gershman, *supra* note 330, at 410 ("[I]n a long and complex case, it is virtually impossible for jurors to compartmentalize proof against individual defendants."); see also *id.* (referring to use of evidence against "major players" and "likelihood of 'spillover taint'" to convict "minor participants").

<sup>336</sup> Gershman, *supra* note 330, at 410. See also Marcus, *supra* note 6, at 37 (referring to 320 counts tried; indictment originally contained over 700 counts). The prosecution described in the Introduction is, if not a megatrial, a lesser variety of this phenomenon. See *supra* part I.

<sup>337</sup> See, e.g., Gershman, *supra* note 330, at 410-11:

'[T]here are conspiracies within conspiracies, and conspiracies to conceal other conspiracies, conspiracies which are discrete and finite, and those which are amorphous and indefinite, involving conspirators joining and leaving the conspiracy at various times.' Asking jurors to make such factual distinctions over the course of many months 'would be virtually impossible without the aid of a computer.'

(quoting *United States v. Gallo*, 668 F. Supp. 736, 751-52 (E.D.N.Y. 1987)).

<sup>338</sup> Genego, *supra* note 314, at 819.

may also provide an inducement for them to seek an expansion in the available universe of those products. Indeed, one reason for the rise of compound liability may be that it lets prosecutors at least partially avoid procedural constraints that appeared when criminal trials became an adversary process.<sup>339</sup> The evolution of compound liability, beginning with the demise of merger in conspiracy prosecutions, can be seen as a spontaneous reaction to the restrictions imposed by the rules of evidence and the limitations of charging in a system of simple liability, as a means of ensuring that the jury is given as complete a picture as possible of the conduct actually attributed to the defendant(s).<sup>340</sup>

However accurate this speculation may be, compound liability obviously increases prosecutor control over criminal proceedings. One answer to the question posed by this section is, therefore, that "the prosecution arm" is doing this because by using compound liability the prosecution secures advantages that diminish the adversary character of a prosecution.

#### *D. Because It Ensures Adequate Punishment*

Compound liability is no doubt popular because it is a means of ensuring that the punishment imposed for a course of conduct is commensurate with the evils produced thereby. Compounding offense liability permits the imposition of punishment for several distinct crimes, all arising from the same conduct.<sup>341</sup> This aspect of RICO and CCE is responsible for their being incorrectly characterized as penalty enhancement provisions, rather than substantive crimes.<sup>342</sup>

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<sup>339</sup> See, e.g., Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 603 (1990) ("To ensure the probity of the process prosecutors were restrained in a variety of ways."); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 306 (1978) (stating that rules of evidence were devised to control lawyers in adversarial proceeding); see also *id.* at 315 ("[W]ell into the eighteenth century" English criminal trials "resembled the modern Continental more than the modern Anglo-American procedure.").

<sup>340</sup> It may be a pragmatic effort to recover, in part, the experience of trying criminal charges to a jury possessing some degree of personal knowledge about the defendant and/or her alleged crime. See generally GEOFFREY GILBERT, *THE LAW OF EVIDENCE* 95 (photo. reprint 1979) (Garland Publishing Inc. 1754) ("Jury of their own Knowledge may have further Light in the Fact than what they have from the Witness in Court."); THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE* 245 (1985) (stating that jurors relied on private knowledge as late as the eighteenth century); J.B. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW* 90 (1898) (stating that medieval jurors were "likely to be already informed" about a case).

<sup>341</sup> See *supra* part II.C.

<sup>342</sup> See *supra* part II.C.

A less overt aspect of the punitive nature of compound liability is that it conforms to the Eighth Amendment's prohibition against cruel and unusual punishment. By "stacking" offense liability to secure an appropriate quantum of punishment, it permits the imposition of significant penalties in a manner that is not likely to run afoul of the proportionality guarantee the Supreme Court has identified as part of the Eighth Amendment's prohibition.<sup>343</sup> Under this guarantee, too much punishment for an offense is violative of the Amendment.<sup>344</sup>

Compound liability, however, provides a means of avoiding this principle, since a specified quantum of punishment is being imposed for a collection of discrete offenses, all of which are predicated on the same conduct, rather than for one offense. Punishment that might well be considered disproportionate for one crime is unlikely to be held disproportionate when it is imposed for several crimes, particularly when it is imposed for several different crimes.<sup>345</sup>

This facet of compound liability has seldom been litigated,<sup>346</sup> and has received no scholarly attention. It has undoubtedly been a minor theme in the growing acceptance of compound liability, but it is nonetheless a significant aspect of that liability, one which is likely to become even more so if compound liability continues to flourish. Applied to the question posed at the beginning of this section, this attribute of compound liability suggests that "the prosecution arm" is doing this to obtain substantial penalties that withstand proportionality reviews.

#### IV. CONCLUSION

*I fear we have created a monster and will live to regret it.*<sup>347</sup>

To appreciate the extent to which compound liability has successfully infiltrated American law, it is only necessary to consider compound liability's status in the nation whose common law was the source of

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<sup>343</sup> See *Solem v. Helm*, 463 U.S. 277, 292 (1983); see, e.g., *United States v. Phillips*, 664 F.2d 971, 1043 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982) (same); *United States v. Darby*, 744 F.2d 1508, 1525 (11th Cir. 1984), cert. denied, 471 U.S. 1100 (1985) (an unsuccessful proportionality challenge to CCE sentences).

<sup>344</sup> See, e.g., *Darby*, 744 F.2d at 1525.

<sup>345</sup> See, e.g., *Vickery v. State*, 539 So. 2d 499, 501-03 (Fla. Ct. App. 1989) (rejecting argument that sentences imposed under Florida RICO statute were disproportionate because it acted to enhance the penalties for the predicate crimes).

<sup>346</sup> *Id.*

<sup>347</sup> Marcus, *supra* note 6, at 17 (quoting letter from Phillip E. Johnson, Professor of Law, University of California, referring to RICO).

American criminal law.<sup>348</sup> Basically, compound liability does not exist in Great Britain.<sup>349</sup>

The codification of criminal law is a recent phenomenon in Great Britain, much of it occurring in the last three decades.<sup>350</sup> Until then, England relied heavily on common law crimes and defenses.<sup>351</sup> Codification eliminated felony-murder, the only common law crime to implicate compound liability.<sup>352</sup> It also discouraged the only other means of compounding liability—combining liability for conspiracy with liability for substantive crimes resulting from a conspiracy.

In 1976, the Law Commission, created to reform British law, issued a report on conspiracy.<sup>353</sup> Conceding that conspiracy does not merge with completed substantive crimes, the Commission noted that conspiracy charges were “frequently brought in cases where the object of the agreement . . . has been achieved.”<sup>354</sup> It concluded, however, that joining charges for conspiracy with charges for the substantive crimes resulting from a conspiracy could undermine the fairness of criminal trials.<sup>355</sup> The Commission recommended that if “an indictment contains substantive counts and a related conspiracy count, the prosecution should be required to justify the joinder to the judge or, failing justification, to elect whether to proceed on the substantive or conspiracy counts.”<sup>356</sup>

In 1977, this recommendation became a directive addressed to judges hearing criminal proceedings.<sup>357</sup> The directive influenced the Code for Crown Prosecutors, which cautions that

<sup>348</sup> See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* § 2.1(c) (2d ed. 1986) (stating that English common law was first American criminal law).

<sup>349</sup> But see ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 288-90 (1991) (stating that “public order offences” added in 1986 to cope with “group offending”).

<sup>350</sup> See, e.g., *Id.* at 16-17 (stating that most statutes adopted in last two decades); see also 1 THE LAW COMMISSION, *A CRIMINAL CODE FOR ENGLAND AND WALES: REPORT AND DRAFT CRIMINAL CODE BILL* 5-6 (1989) (citing reasons to codify).

<sup>351</sup> See THE LAW COMMISSION, *supra* note 350, at 5-6.

<sup>352</sup> See Homicide Act, §1 (1957) (Eng.) (abrogating felony-murder doctrine). See also *supra* note 50.

<sup>353</sup> THE LAW COMMISSION, *REPORT ON CONSPIRACY AND CRIMINAL LAW REFORM* (1976). See also Law Commissions Act, § 1 (1965) (Eng.); see also *supra* note 50.

<sup>354</sup> THE LAW COMMISSION, *supra* note 353, at 27.

<sup>355</sup> See *id.* at 27-28 (conspiracy count increases “length and complexity of trials,” “tends to obscure questions of fact vital to a decision on the substantive charges” and evidence relevant to conspiracy “may have . . . a prejudicial effect on an accused in relation to” substantive counts).

<sup>356</sup> *Id.* at 30.

<sup>357</sup> See Practice Direction, 1977 E.R. 540; 1977 1 W.L.R. 537. The Practice Direction was promulgated by the presiding judge of the Court of Queen’s Bench, which exercises supervisory jurisdiction over criminal cases. See R. J. WALKER, *THE ENGLISH LEGAL SYSTEM* 196-97, 492 (6th ed. 1985).



[w]here substantive counts meet the justice of the case a conspiracy count will rarely need to be added . . . . Where a Crown Prosecutor is proposing to lay a conspiracy count, before doing so he should give consideration to the risk of the trial being lengthy and complicated or otherwise causing unfairness to defendants.<sup>358</sup>

The Code also instructs that “[e]very effort should be made to keep the number of charges as low as possible,” since “[a] multiplicity of charges imposes an unnecessary burden on the . . . Courts . . . and often tends to obscure the essential features of the case.”<sup>359</sup>

As the above quote illustrates, Great Britain retreated from compound liability at the same time American law was embracing it, which leads one to wonder why these closely related criminal justice systems reacted so very differently to this phenomenon. The obvious explanation is America’s experience with organized crime.<sup>360</sup> American advocates of compound liability are likely to point out that Great Britain has not yet encountered problems with organized crime comparable to those found in the United States.<sup>361</sup> Recent developments in the United Kingdom support this explanation; a rise in terrorist activity and the anticipated arrival of foreign gangs have led some to call for adoption of a British version of RICO.<sup>362</sup> Others would still agree with a British professor of criminal law who, in discussing “group offences,”<sup>363</sup> noted that conspiracy “may be defended

<sup>358</sup> *Code for Crown Prosecutors*, LAW SOC. GAZ., July 23, 1993, p. 2308. *See also id.* at 2310 (noting substance of Practice Direction). The Code issued pursuant to § 10 of the Prosecution of Offenses Act, 1985, is a “public declaration of the principles upon which the Crown Prosecution Service will exercise its functions,” *Id.* at 2308.

<sup>359</sup> *Id.* at 2309.

<sup>360</sup> *See supra* part II.B.

<sup>361</sup> *See, e.g., First Super Crime Squad Launched*, Reuter Textline-Guardian, March 24, 1993, available in LEXIS, International Library, UK file (new squad to “provide greater capacity to deal with organised crime”); *Michael Jack Launches National Criminal Intelligence Service*, Reuter Textline-Hermes, October 19, 1992, available in LEXIS, International Library, UK file (stating that criminals “increasingly organised and sophisticated activities threaten all ordered societies”). *See generally supra* note 349.

<sup>362</sup> *See U.S.-Style Law Against IRA Urged*, Reuter Textline-Irish Times, November 7, 1990, available in LEXIS, International Library, UK file (recommending a RICO, “guilt-by-association law” to deal with IRA “racketeering”); *Government May Change the Law to Give Its Agencies More Teeth in the Fight against Paramilitary Rackets in Northern Ireland*, Reuter Textline-Construction News, February 25, 1988, available in LEXIS, International Library, UK file (same); *see also Russian “Criminal Elite” Eyes London*, Reuter Textline-Guardian, March 8, 1993, available in LEXIS, International Library; *Police Fear Japanese Mafia Is Moving into Britain*, Reuter Textline-Guardian, September 28, 1992, available in LEXIS, International Library.

<sup>363</sup> *See ASHWORTH, supra* note 349, at 411.

as a vital tool against organized crime, but the difficulty is that it bears oppressively on individuals who are prosecuted . . . . [T]he same law could be used against both Mafia leaders and a couple of bungling burglars who happened to meet in a pub.”<sup>364</sup>

Whatever the reasons for their divergence, England’s attitude toward compound liability reveals how profoundly American criminal law has altered in the last century.<sup>365</sup> Compound liability is a distinct approach to criminal liability that alters certain working assumptions of the criminal justice system.<sup>366</sup> Its first successes came in federal law and those successes, most notably RICO and CCE, led to its acceptance by many of the states.<sup>367</sup>

The most remarkable aspect of compound liability’s progress in American law is neither the rapidity nor the permutations of its achievements; it is that a process which fundamentally alters the shape of criminal law has so far proceeded without reflection, its revolutionary nature unremarked by legislators and members of the legal profession. This inattentiveness is evident in the state statutes analyzed above, if nowhere else;<sup>368</sup> it is clear that few, if any, are the products of careful deliberation about the significant consequences of a shift to compound liability. These statutes are reactive artifacts prompted by the perception of threat and/or by the desire to realize the prosecutorial advantages ensuing from statutes like RICO and CCE.

Even the proponents of compound liability must agree that an unacceptable state of affairs exists, and that steps of this magnitude should be the products of careful deliberation, rather than “quick, rimfire legislative reflex action.”<sup>369</sup> Organized crime may pose dangers that can only be addressed through compound liability, but the consequences of this shift require that such a decision be made only after thoroughly investigating the nature and imminence of the perils to be guarded against, and weighing those perils against the impact of implementing compound liability, even on a modest scale.

Such a process ostensibly preceded the adoption of RICO and CCE, but unfortunately, it was strongly influenced by inflated concerns about “mob” activities, and therefore tended to overlook the unprecedented

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<sup>364</sup> *Id.* at 412.

<sup>365</sup> See *supra* part II.B.1.

<sup>366</sup> See *supra* parts II.A. and II.B.

<sup>367</sup> See *supra* part II.D.

<sup>368</sup> See *supra* part II.D.2; see also *supra* part II.B.2.c. (cloning of CCE into CFCE).

<sup>369</sup> H.R. REP. NO. 1444, 91st Cong., 2d Sess. 81 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4648 (additional views of Moss, Dingell, Adams & Eckhardt).

nature of the liability they introduced.<sup>370</sup> It may be too late to return the genie to the lamp or the ills to Pandora's box, but it is not too late to assess, and perhaps limit, compound liability's role in our criminal justice system. Such an assessment must distinguish perceived from actual threats, and not overstate the latter or become caught up in threats of the moment. In this regard, it is instructive to recall a judge's comments from sixty years ago:

[S]ociety is confronted today with the shocking and continuous depredations of organized, desperate, and merciless gangsters and racketeers . . . . In the midst of this chaos of crime, disorder, and defiance of constituted authority, courts and officers of the law have proven wholly inadequate for the necessary protection of either life or property. Times change and we change with them, and the law must fit the necessities of the times in which we live, in order to afford adequate protection to society.<sup>371</sup>

Judge Land was arguing for a landowner's right to set a spring gun in his barn to protect his property, even though the spring gun in this case killed a trespasser who was stealing chickens.<sup>372</sup> He maintained that such a rule would "relax[ ] the technicalities that usually surround and protect the felon, and is more in harmony with the temper of the times and the urgent need of society today for protection against violent and atrocious crimes."<sup>373</sup> Criminal law rejected Judge Land's position because, on careful reflection, it determined that the danger averted by using spring guns was not commensurate with the evil resulting from that use.<sup>374</sup> The author hopes that this Article will evoke a similar process of reflection as to the costs and benefits of compound liability.

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<sup>370</sup> But see H.R. REP. NO. 1444, 91st Cong., 2d Sess. 81-85 (1970), reprinted in 1970 U.S.C.C.A.N. 4566, 4648-52 (additional views of Moss, Dingell, Adams & Eckhardt, expressing concern about potential abuse of CCE).

<sup>371</sup> *State v. Plumlee*, 149 So. 425, 433 (La. 1933) (Land, J., dissenting) (arguing for farmer's right to set spring gun to protect barns and outbuildings, even though spring gun killed intruder who was stealing chickens).

<sup>372</sup> *Id.* at 432.

<sup>373</sup> *Id.* at 433.

<sup>374</sup> See, e.g., MODEL PENAL CODE § 3.06(5) (1985); PERKINS & BOYCE, *supra* note 42, at 1158-66.