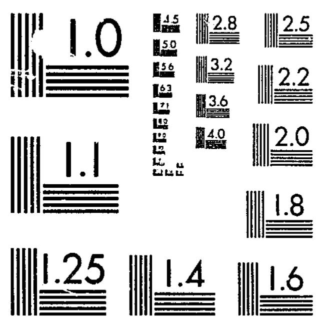

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All phases of preventive and correctional activities in delinquency and crime come within the fields of interest of FEDERAL PROBATION. The Quarterly wishes to share with its readers all constructively worthwhile points of view and welcomes the contributions of those engaged in the study of juvenile and adult offenders. Federal, state, and local organizations, institutions, and agencies—both public and private—are invited to submit any significant experience and findings related to the prevention and control of delinquency and crime.

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Federal Probation

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This Issue in Brief

Shadows of Substance: Organized Crime Reconsidered.—Authors Martens and Longfellow discuss contemporary perceptions of organized crime and how they affect public policy. Arguing that organized crime is neither parasitic nor exclusively functional to the maintenance of the social order, they suggest that organized crime must be perceived as a process. At historical times, organized crime is functional and at other times it is exploitive. The authors assert that contemporary research is empirically weak, ethnically biased, and inappropriately focused by a poor data collection methodology.

Organized Crime, RICO, and the Media: What We Think We Know.—RICO was legislated to combat Mafia-style organized crime. Authors Wynn and Anderson maintain, however, that the precise Congressional target is unclear. RICO provides a formal notion of organized crime whose key is the proof of a "pattern of racketeering activity." But this means only the commission of two predicate offenses within a 10-year period. One result is a body of cases whose only common denominator is unfettered prosecutorial discretion. In addition, Federal jurisdiction and surveillance powers are greatly increased.

Adolphe Quetelet: At the Beginning.—Professor Sawyer F. Sylvester of Bates College reveals that an empirical approach to the study of crime can be found in the history of criminology as early as 1831 in the writings of the Belgian statistician, Adolphe Quetelet. In his work, *Research on the Propensity for Crime at Different Ages,* Quetelet makes use of government statistics of crime to determine the influence of such things as education, climate, race, sex, and age on the incidence of criminal behavior. He not only establishes relationships between these factors and crime but, in so doing, develops a methodology for the social sciences which is still largely valid.

Behavioral Objectives in Probation and Parole: A New Approach to Staff Accountability.—Many probation and parole agencies have initiated programs of risk and needs assessments for clients in an effort to manage caseloads more effectively,

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reports Dr. Alvin Cohn of Administration of Justice Services. By taking such programming one step further, namely by developing behaviorally anchored objectives, workers can maximize available resources in directing clients toward realistic and relevant outcomes, he states. Workers can thus be held accountable in the delivery of specific services.

The Use of "Third Sector" Organizations as Vehicles for Community Service Under a Condition of Probation.—The increasing use of community service as a condition of probation has provided probation officers with improved opportunities to use such assignments as a way of teaching responsible citizenship as well as achieving community improvement. This article, by Deputy Chief Probation Officer Jack Cocks of the U.S. District Court in Los Angeles, reflects some of the recent developments in formalizing service programs in public benefit "third sector" organizations designed to carry out new strategies of networking.

Not Without the Tools: The Task of Probation in the Eighties.—Traditionally, the role of the probation officer has been viewed as dichotomous with supervision involving maintaining surveillance and helping the clientele. This dilemma is likely to remain with us in the next decade as the field of probation faces the challenge of stiffer sentencing policies. Authors Marshall and Vito outline some of the difficulties to be faced by probation officers and suggest some methods of dealing with them.

Inside Supervision: A Thematic Analysis of Interviews With Probationers.—This article by Dr. John J. Gibbs of Rutgers University contains an analysis of taperecorded and transcribed interviews with 57 probationers in two New Jersey counties. The interviews were structured to elicit the clients' perceptions of probation and to explore their concerns. Each subject was asked to describe his probation experience, and to respond to an orally administered Self-Anchoring Striving Scale, a measure of satisfaction.

Writing for the Reader.—Nancy Hoffman and Glen Plutschak of the Maryland Division of Parole and Probation discuss the pitfalls of the bureaucratic style of writing often developed by criminal justice professionals. Such writing is generally characterized by poor organization, extremely long sentences, over-used jargon and unnecessarily complex words. The results are documents which are difficult to read. The authors stress the importance of writing readable communications which are clear, concise, and to the point.

The Male Batterer: A Model Treatment Program for the Courts.—Authors Dreas, Ignatov, and Brennan examine the male batterer from the perspective of court-ordered treatment. A 30-week group treatment program is described in which various aspects of domestic violence are considered, with the ultimate goal being cessation of abusive behavior. Specific steps taken regarding program development and implementation are presented and a description of additional adjunct services is also provided.

Issues in Planning Jail Mental Health Services.—One impact of deinstitutionalization of state mental hospitals noted by many authors is an increased need for mental health services in local jails. Given current fiscal constraints and community attitudes, program development in the 3,493 jails in the United States is often very difficult. In this article, Messrs. McCarty, Steadman, and Morrissey assess the range and structure of mental health services in a national sample of 43 jails.

Victim Offender Reconciliation: An Incarceration Substitute?—Howard Zehr and Mark Umbreit describe the Victim Offender Reconciliation Program (VORP) operated by PACT in Indiana. The program allows for a face-to-face meeting between victim and offender in which facts and feelings are discussed and a restitution contract agreed upon. Trained community volunteers serve as mediators. VORP can serve as a partial or total substitute for jail or prison incarceration. Eighty-six percent of all cases represent felony offenses, with burglary and theft being the most common.

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Organized Crime, RICO, and the Media: What We Think We Know

BY SIMON WYNN AND NANCY ANDERSON, Ph.D.*

ORGANIZED CRIME has long been a topic of intense interest to the media, which has in turn, fuelled and moulded public attitudes towards racketeering. The enactment in 1970 of RICO (the inspired acronym for the Federal Racketeer Influenced and Corrupt Organizations Act), however, has substantially changed both the law relating to organized crime and Federal enforcement practices. In this article, we examine the operation of the new racketeering law and some responses to it. We argue that there has been a failure to assess the implications of the legislation, and that the media has continued to provide a picture of organized crime that conceals reality and hinders informed criticism.

It is now a sociological truism that mass media plays an active role in shaping the news and images that it disseminates. (Tuchman, 1973; Connell, 1978; Fishman, 1978) Questions of simple error, censorship, or overt political partisanship aside, it is a widely accepted notion among students of the media that occupationally, institutionally and conceptually, newsmakers *cannot* be neutral or naive about their business and its product, reportage. Let it be stated at the outset: we are uninterested in flogging the horse of news "objectivity"; that, if not dead, will take us nowhere. Our study, instead, relies on newspaper coverage as much as a resource for our examination of organized crime and RICO as a subject of critical scrutiny.

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In particular, we are concerned with the coverage of "organized" crime (typically described as the Mafia, the Mob, La Cosa Nostra or crime families) in contrast to news items on "organizational" crime (usually an *ad hoc* collection of white collar crimes, or industrial and governmental misconduct).[1] This distinction reflects conventional views regarding criminal agency, types of infractions alleged or committed and the practicality of enforcement. Such duality, together with the logic of its categories and descriptions of its boundaries, is unquestioningly, if implicitly, disseminated and thereby fostered by news accounts. Collapsing together conventional wisdom, sociological perspectives on crime and juridical categories and strategies of enforcement can only increase public confusion about crime, law enforcement and their consequences.[2]

Such confusion is particularly alarming at a time when the Reagan administration is calling for an expansion of local and Federal police powers and a contraction of judicial scope and discretion. The administration also fosters a political climate that stridently insists upon the failures of "liberals" on the bench and in academia to deal adequately with crime in the United States (*New York Times*,

[1]The term is not used by the news media; rather it is drawn from sociology. "Organizational crimes are illegal acts of omission or commission of an individual or group of individuals in a legitimate, formal organization in accordance with the operative goals of the organization, which have serious physical or economic impact on employees, consumers or the general public." (Schrager and Short, 1978, 25, see also McIntosh, 1975).

[2]We conceive of law and the state both as mechanisms for perpetuating the current arrangment between the social classes and a study of the wording of RICO, its utilization as mediated and possibly altered through the specific institutions of police, prosecutors and courts, and its presence (or absence) in news reports, may shed new light on the relationship between the state and diverse sectors and institutions of civil society.

Oct. 15 and 30, 1981). We do not assert that the American press is always the mouthpiece of the state. Nor do we maintain that the conservative political and institutional forces which seek to monopolize the public discourse on crime and society will go unchallenged. Still, the informed concern from which such challenge may arise is not best served by current news accounts of "organized" and "organizational" crime. Indeed, the process of evaluating our knowledge in this area is, we believe, hampered by the failure of the media to reassess its own knowledge.

If, to borrow from the positivist tradition in legal philosophy and the labeling tradition in sociology, we can agree that an essential aspect of crime is the activity of the state in terms of legislation, patterns of enforcement or inactivity, as well as the closely held control over investigation and data collection on crime, then it is reasonable to inquire into the news media's treatment of RICO. For RICO, we believe, is the most significant piece of Federal legislation ever enacted pertaining to patterned criminal conduct.

While RICO indictments and convictions appear in daily news coverage, the law itself and its emerging potential for general police surveillance as well as for specific prosecutions have been largely ignored (compare Donner, 1980). Moreover, RICO draws for some of its most important elements on concepts created, or at least defined, by sociologists (see Abadinsky, 1981; Cressey, 1969; Ianni and Ianni, 1976). In this article, we attend to some issues arising when sociology and law enforcement are united by a marriage of convenience in which the interests and identities of the parties to the union remain unexamined.

The Legislation

There is no doubt that RICO, the "new darling of the prosecutor's nursery,"[3] was steered through Congress on the basis of its ability to combat organized crime (see Blakey, 1980), as that term was understood by all those persons who had viewed the parade of Mafia members and fellow-travellers passing before the television cameras covering the proceedings of the Kefauver Committee (see Moore, 1974) and later the McClellan Committee. Congress was not so naive as to believe that the entirety of organized crime was to be equated with the Mafia (organized crime is described in the preamble to the legislation—though not defined—as an "activity" rather than as an entity or group, for example) but the Congressional Statement of Findings and Purposes makes it clear that "The Mob" was the target of the legislation:

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

Despite the references to organized crime in this statement, and further despite the fact that RICO is part of the Organized Crime Control Act of 1970, Congress did not attempt to define the term organized crime in the legislation. Nevertheless, the references to income derived from control over gambling and narcotics trafficking are certain indicators that the Mafia, plus those non-Italians routinely associated with them by police, prosecutors and the media (typified by the routine appearance of Jewish gangsters in *The Untouchables*), were clearly in mind.

In fact, the legislation as enacted had a far broader reach. RICO, creates four offenses, the first three penalizing the involvement of the defendant in an "enterprise" (broadly defined to include any group, organization or individual) either through the investment of illegally derived income or through control or influence over the enterprise. There is also an offense of conspiracy to commit any of these three crimes. The penalty specified for any of these offenses is up to 20 years imprisonment, $25,000 fine and forfeiture of assets.

The offenses are united by the inclusion within each of a common material element; the participation by the defendant in a "pattern of racketeering activity." That element is defined in the vaguest of inclusionary terms. RICO states that a

> Pattern of racketeering activity requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.

Senator John L. McClellan (1970, 144) the chief architect of RICO, wrote of this definition

> The term "pattern" itself requires the showing of a relationship and the [Senate] committee report thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern. . . .

This is a somewhat naive view of judicial interpretation of legislation in that it expects the courts to read the word "requires" in the definition to be nonexhaustive, so that two or more crimes would be a necessary but not sufficient condition for a finding of a pattern. It is hardly surprising that *some* courts have in fact not followed this invitation to second guess Congress. The Southern District Court for New York held (*U.S.* v. *Field*) that Congress could define a pattern as the commission of two acts within a specified period, even though the act would not constitute a pattern as that term is usually understood.

The list of acts of "racketeering activity" is compendious, ranging from murder and kidnapping to any crime chargeable and punishable under *state* law by imprisonment for more than 1 year. It is in fact insufficiently broad as to include virtually any crime other than the most trivial. It includes threats as well as actual acts and extends from sports bribery and securities fraud to arson and robbery. There is nothing in this list of predicate offenses which distinguishes between the activities of the Mafia and those of, for example, a political or national liberation group engaging in a campaign of violence or threats of violence.

Thus, all that needs to be proven for a RICO conviction, in addition to the commission of the two crimes, is that they are part of a "pattern." But, as already indicated, this term has been very loosely defined by the courts and, in a number of cases, it has been held that *nothing* more is needed than the commission of the two predicate crimes. Even those courts which have stressed the requirements of an extra "connection" between the racketeering acts have spoken in terms of a "common scheme" requiring only something more than accidental or unrelated series of criminal acts (see, e.g. *U.S.* v. *Tofsky*).

Another limitation on the power of the government to prove racketeering activity merely through the commission of two crimes is that there must be a "nexus" between the crimes and the conduct of the enterprise. In other words, it is not enough to prove simply that the officers of a corporation (for example) committed a number of crimes. It must be shown that these crimes were somehow, directly or indirectly, connected to or predicated upon the existence and activity of the corporation. This is not, generally, a major problem.

RICO also provides civil remedies (including treble damages claims) for persons whose businesses have suffered loss due to defendants' engaging in racketeering activity. In these cases, which are essentially legislatively created tort actions, it is not necessary that the RICO defendant actually be convicted of *any* crime. It is sufficient that he be shown, on the civil preponderence of evidence rather than the criminal standard of proof beyond a reasonable doubt, to have committed acts which constitute a crime (see Brodsky, 1981). Although a *criminal* conviction under RICO could not be justified under these circumstances, the broad reach of the law is obvious and, whether civil or criminal sanctions are sought, the verdict is still "guilty of racketeering."

One of the most important features of RICO is its extension of Federal criminal jurisdiction. This is a consequence of two features of the legislation. First, it is not necessary for the government to prove as part of a RICO prosecution that the particular racketeering *activity* affects interstate commerce. It is sufficient, probably due to the express assertion of Congress that organized crime seriously affects interstate and foreign commerce, that the *enterprise* being used in the pattern of racketeering activity should affect interstate commerce. This will rarely present a problem. Second, the inclusion within the list of predicate offenses of state crimes punishable by imprisonment for more than 1 year effectively invests the Federal authoritites with potential jurisdiction to investigate offenses under state law.

Finally, the RICO conspiracy offense demands special attention. It has been ruled in at least one appellate case that the conspiracy court under RICO has a broader reach than "general" conspiracy. It seems that conspirators may be convicted under RICO even if they do not know of each other's existence (something generally impossible under previous law). This is a result of the fact that the "enterprise" and "pattern" concepts provide some sort of link between conspirators which may transcend *factual* connections.

RICO Prosecutions and Enforcement Efforts

Although, as we have argued, RICO was designed to eradicate organized crime, during the years since its enactment it has come to play an increasingly important role in government enforcement efforts against a wide variety of organizational

[3]The reference derives from Judge Learned Hand's description of conspiracy law in *Harrison* v. *U.S.* 7 F. 2d 259, 263.

crimes. This usage encompasses not only conspiracies involving persons who do not fit the traditional conception of organized crime, such as the Weather Underground, but also defendants in corruption, fraud, business crime, misconduct and a host of other cases which have as their only common element the fact that prosecutors have exercised their unfettered discretion so as to characterize the criminal behavior as a pattern of racketeering activity taking place in association with an enterprise, defined again by the prosecutors themselves.

Between 1970 and 1975 very few cases were brought. This is probably due to the fact that constitutional problems existed as to prosecution for acts committed before the enactment of the legislation. By 1979, however, well over 200 criminal prosecutions had been instigated and perusal of the later law reports reveals an ever-increasing volume of cases.

Targets under RICO range from "known" organized crime figures such as Frank ("Funzi") Tieri and Dominick Brooklier to former Governor Mandel of Maryland. Recent cases in New York have involved the conviction of Carmine and Peter Romano, local union leaders, for labor racketeering in the Fulton Street Fish Market and the conviction of six New York City marshalls in respect of official misconduct and extortion. RICO is by no means restricted to Italian defendants.

In recent times RICO has played a significant role in the investigation and prosecution of violent crimes committed by groups claiming political motivation. A Croation nationalist group and, very recently, members of the Black Liberation Army and the Weather Underground have been indicted for engaging in racketeering activity.

"Enterprises" identified under RICO include a Mafia "family"; the Hell's Angels Motorcycle Club (this case resulted in a rare jury acquittal of the defendants); the Macon, Georgia, Police Department; a General Motors factory (loansharking amongst workers'; the Marubeni Electrical Corporation (a bribery case); a pool hall; a nightclub and an arson ring.

The effect of RICO transcends prosecution and conviction. The legislation justifies government surveillance and other intelligence-gathering efforts in a wide range of circumstances, including situations which might, before RICO, have been restricted to state law enforcement agencies. Wiretapping, the use of informants and sting operations are all tactics which can be used under RICO to remedy the "defects in the evidence gathering process" asserted by Congress to be partly responsible for the inability of the law to eradicate organized crime.

What We Think We Know

At this point it is essential to note that we do not regard the application of RICO to cases falling outside the traditional conceptions of organized crime as inherently wrong. We believe that many criminal activities committed within the framework of what sociologists have identified as organizational crime are wholly deserving of prosecution. We are concerned rather to demonstrate that, whatever the rationale for the enactment of RICO once was, the broad discretion given in the legislation to the executive has, in fact, already been used to extend its reach in what seems to be an ever-widening net. Only 2 years ago, a Federal District Court (*U.S.* v. *Aleman*) stated that it hoped that "government prosecutorial policy will reserve use of this statute for racketeers, leaving local crimes to local authorities." The example of the New York City marshalls' case shows how forlorn that hope has become. The point is that the government has, effectively, redefined both racketeering and organized crime. It is time that we examined both this redefinition and our understanding of what we "know" about organized crime.

Unfortunately, in this regard the concerned public is hindered by a number of factors. First, there is very little known about the activities of organized crime at any level which does not come from the police (see Reuter, *et al.*, 1981). The police, understandably, guard closely their sources of information. Outsiders have thus far been either unwilling or unable to generate alternative information sources.

Second, and perhaps more important, is the continued fascination of the public in general, and the media in particular, with the Mafia. Now it is of course beyond question that the Mafia exists and is important. The brief discussion of RICO cases above indicates, however, that the government views the Mafia as only a part of the racketeering menace. Yet, the media continues to cast its reports in terms which suggest that only Italians and labor leaders (together with a few Jewish businessmen) are subject to racketeering law. A simple example is the press treatment of the conviction, on guilty plea, of two officials of a major communications company. This case grew out of the investigation of the collapse of the Westchester Premier Theatre in Terrytown, New York, in which Frank Tieri was associated. Mr. Tieri was convicted under RICO of being the head of a Mafia family (the first case ever made in which the existence of the Mafia was proved in criminal court). It was well known to all those aware of the case involving the two executives that the Federal RICO Strike Force was involved. Yet the newspaper accounts do not mention RICO, restricting themselves to the predicate offenses covered by the plea.

This attitude is not restricted to the news media. In a recently broadcast episode of *Today's F.B.I.* the crooks wound up being arrested "under the RICO statute." This presumably indicates that the producers believed that the name "RICO" would be recognized by the viewing public. The crooks were, naturally enough, Mafia members and labor racketeers. It is worth noting also that this program is produced with the support of the F.B.I.

Third, we are hindered in our analysis of racketeering by the imprecision of the concepts developed by sociologists and others upon which our whole understanding of collective criminal activity is based. Early descriptions of the structure of organized crime families and affiliations caused law enforcement agencies in search of means to organize their own intelligence gathering efforts to adopt network analysis and its progeny, the association matrix. Absent a formal, recognized group structure, relationships between persons within and outside informal groupings were the only way to make sense of the mass of data being generated from wiretaps and other information sources. These relationships could not, however, be used in court to secure convictions. They were simply too tenuous, resembling nothing more than alleged guilt by association. RICO, with its broad definition of "enterprise" seeks to overcome this problem. Ultimately, it cannot do so, for the underlying concept seems incapable of definition.

Conclusion

One standard by which to evaluate criminal legislation is the specificity of the prohibited behavior. Here, RICO's notions of enterprise and racketeering are deficient. Clearly, the statutory list of offenses that consitutes a pattern of racketeering activity offers nothing new; such legal prohibitions antedate RICO. What then is new and why should it be valued?

Perhaps the value of the legislation lies in the argument that the particular crimes are more heinous when they emanate from and are carried out by definable and boundable aggregates, enterprises. Thus only to punish particular offenses committed by members of such an organized, aggregate, collective entity is to attack symptoms but not causes, to cut off Hydra's heads without slaying the monster.

If so, can RICO, through criminal or economic sanction, neutralize or obliterate such an organization? It seems not. The reason for such failure stems not, we maintain, from the juridical, organizational, or occupational incapacities, errors or failures of those responsible for utilizing RICO. Rather, the problem is inherent in the logic and application of the law. In a RICO case, the state has power not only to define the crime (through both the wording of the legislation and indictment) but also the nature and size of the enterprise involved. On the one hand, this enterprise may be made up of only those persons charged with racketeering. If so, then it is difficult to understand what RICO adds (other than the seldom-used forefeiture procedure) to the predicate racketeering offenses. On the other hand, if the offenders are part of a larger organization then the nature and legal status of that organization need to be studied. There are very few formal or informal organizations in the United States in which membership *per se* is illegal. The conviction of Frank Tieri as a member of the Mafia is almost unique. For clarity, let us contrast the Mafia with the Ku Klux Klan; much of the Klan's activity is reprehensible, illegal, or both. But it is not against the law simply to belong to the Klan.

Furthermore, if the defendants constituting an enterprise are members of formal, legitimate organizations, such as business corporations, labor unions or governments, then the prosecutor's goal is unlikely to be the complete destruction of organization. What then of economic sanctions in such cases, in particular what of forfeiture? Whatever one's personal or political sympathies may be, it would be clearly illegal and probably impossible to seize the assets, let us say, of General Motors in the event that several of its stockholders are found guilty under RICO in connection with a long-lasting heroin importing operation and can be shown to have invested their heroin profits in General Motors stock.

Ultimately, RICO adds to governmental investigative, surveillance and prosecutorial power by failing to set out precise parameters by which to define the identity and boundary of an "enterprise" or of "racketeering." We remain unconvinced that, given the extension of RICO into cases of organizational crime as discussed above, there are now (or ever have been) serious defects in either the evidence-gathering process or in substantive law which would prevent a sufficiently-motivated

Federal Government from pursuing such cases. What we are convinced of is that there has been an effective redefinition of racketeering by the state. We do not yet know what that new definition is, and will not know until there is a full analysis of the processes of prosecutorial decisionmaking in this area. But it is now clear that it is time for a speedy re-examination of everything we think we know about organized crime.

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