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THE MOB AND FORD MOTOR COMPANY: THE SEVENTH CIRCUIT’S ENTERPRISING APPROACH TO THE RICO DOUBLE JEOPARDY PROBLEM

RITA GREGGIO*


INTRODUCTION

A recent WALL STREET JOURNAL article described the purpose of the Racketeer Influenced Corrupt Organizations (RICO) Act as enacted “to pursue the Mafia as a whole, tying the big bosses to the crimes of their underlings by claiming they were all part of a ‘criminal enterprise.’”¹ The WALL STREET JOURNAL’s description fairly captures Congress’ impetus for passing the expansive RICO statute that gives prosecutors a powerful tool² for convicting “insulated ring leaders”³ of

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the mafia. Yet the statute’s extensive scope and accompanying grant of broad prosecutorial discretion has been criticized for “expanding the net so wide that unintended fringe actors are also brought within the purview of RICO.”

In the recent Seventh Circuit RICO conspiracy case, *United States v. Schiro*, the court cast an even wider net by allowing prosecutors to convict underlings who rose through the ranks for their roles at various positions within the mafia as separate conspiracies. In holding that subordinate branches of the mob are individual and independent enterprises, the Seventh Circuit permitted multiple conspiracy prosecutions based on essentially the same conduct. By carving the mob’s internal divisions into independent enterprises, the Seventh Circuit has broadened the prosecutor’s reach under an already expansive RICO statute and chipped away at defendants’ double jeopardy protections.

This Note examines whether the court’s decision in *Schiro* stems from a conscious policy choice favoring Congress’ intent to use RICO as a broad tool in the fight against organized crime over the constitutional protections of double jeopardy. Part I explains the protections that the double jeopardy clause grants criminal defendants and the importance of such protections. Part II examines the RICO statute’s purpose and how its structure effectuates that purpose. In Part III, the *Schiro* decision is reviewed. The majority and dissent’s divergent conclusions on how to establish the parameters of an enterprise are examined: the majority’s attempt to solve the enterprise issue via analogy to corporate law is deconstructed and contrasted with the dissent’s practical assessment of the actual overlap of the conduct charged in each conviction. Finally, this Note concludes that the

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4 *Id.*


6 See *id*.

7 See *id*.
dissent’s contextual, conduct-based approach results in a more accurate portrayal of the defendants’ offenses and sustains the policies underlying our justice system’s constitutional double jeopardy protection.

I. THE DOCTRINE OF DOUBLE JEOPARDY

Freedom from multiple prosecutions or punishments for the same offense is enshrined in the Bill of Rights: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”\(^8\) The Supreme Court has held that double jeopardy is a fundamental concept of American justice, extending the clause’s protections to the states through the Fourteenth Amendment.\(^9\) Several broad policies underlie the concept of double jeopardy, including protecting individuals from the power of the state, promoting efficiency in the criminal justice system, and preserving public confidence in the legal system.\(^10\) Although the double jeopardy guarantee serves principally as a restraint on the power of courts and prosecutors,\(^11\) double jeopardy is not limited to protecting individual interests but serves important social functions as well.\(^12\)

A. The Importance of the Constitutional Protection Against Double Jeopardy

In *Green v. United States*, Justice Douglas wrote:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual

\(^8\) U.S. CONST. amend. V, § 1, cl. 2.
\(^12\) Rudstein, *supra* note 10, at 408.
for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\(^{13}\)

Justice Douglas’ statement encompasses virtually all of the policy values underlying the double jeopardy protection: minimizing the strain of trials on defendants; protecting defendants from harassment; reducing the risk of wrongful convictions; preserving the right of the jury to acquit against the evidence; encouraging efficient investigations and prosecutions; conserving legal resources; preserving the finality of judgments; and safeguarding the public’s respect and confidence in the legal system.\(^{14}\) These policies recognize that although any trial can be a financial and emotional burden, criminal defendants face distinct circumstances from civil defendants that warrant constitutional protection: the potential loss of liberty or in certain instances, life, and an adversary, the state, with unparalleled power and resources.

By disallowing multiple prosecutions, double jeopardy protects individuals from unchecked government power by making it impossible for a government actor who disagrees with a verdict to retry a defendant to achieve the desired verdict.\(^{15}\) This limits the possibility that the legal system will be used to harass individuals, while also helping to achieve accurate verdicts\(^{16}\): When a prosecutor tries his case more than once, he has the opportunity to rehearse his presentation of the evidence, improving his odds of conviction, despite the defendant’s guilt or innocence.\(^{17}\) In addition to ensuring more

\(^{13}\) 355 U.S. 184, 187–88 (1957).
\(^{14}\) Rudstein, supra note 10, at 404–05.
\(^{17}\) See Grady v. Corbin, 495 U.S. 508, 518 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993) (citing examples of this danger: “See, e.g., . . . Ashe v. Swenson, 397 U.S. 436, 447, 90 S.Ct. 1189, 1196, 25 L.Ed.2d 469 (1970) (the State conceded that, after the defendant was acquitted in one trial, the prosecutor did, at a
accurate verdicts, barring re-presentation of the evidence incentivizes police officers and prosecutors to investigate and prosecute more diligently and efficiently.\textsuperscript{18} When authorities know they have a single chance to convict an individual, they must have compelling evidence against an individual \textit{before} initiating a trial.\textsuperscript{19} Such diligence and efficiency translates into conservation of public resources, such as access to judges and courtrooms.\textsuperscript{20}

The limitation on repeated prosecutions for the same offense additionally benefits society by ensuring the continued vitality of the jury system and the jury’s power to acquit against the evidence.\textsuperscript{21} Jury nullification is an important, albeit controversial, power of our jury system that has been called the “conscience of the community.”\textsuperscript{22} Not disturbing a jury’s findings impacts two other important social interests: upholding the finality of judgments and the efficiency of the legal system. In recognizing the finality of an acquittal, the justice system provides a predictable means of determining the end of litigation, allowing individuals to plan their lives accordingly.\textsuperscript{23} Such certainty is so essential to the functioning of society that the corollary doctrines of \textit{res judicata}\textsuperscript{24} and collateral estoppel,\textsuperscript{25} more commonly

\textsuperscript{18} Rudstein, \textit{supra} note 10, at 415–16.  
\textsuperscript{19} Id.  
\textsuperscript{20} Id.  
\textsuperscript{23} Rudstein, \textit{supra} note 10, at 407.  
\textsuperscript{24} See 47 \textit{AM. JUR. 2D} Judgments § 463 (“Literally, res judicata means ‘a thing adjudged’ and has been more freely translated as ‘a matter decided,’ ‘a thing judicially acted upon or decided,’ or ‘a thing or matter settled by judgment.’ Broadly speaking, ‘res judicata’ is the generic term for a group of related concepts

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raised in civil cases, are firmly rooted common law principles. Lastly, avoiding relitigation conserves resources and such conservation, along with certainty in the finality of judgments, helps validate the integrity of the justice system in the eyes of the public.

B. The Evolution of Double Jeopardy Case Law

The prohibition against double jeopardy has been interpreted to provide three distinct constitutional protections: it bars subsequent prosecutions for the same offense after acquittal; it bars subsequent prosecutions for the same offense after conviction; and it bars multiple punishments for the same offense. Although the concept of double jeopardy may appear to be uncomplicated, courts have struggled to define the term “same offense.” This difficulty may stem from the

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25 See 47 AM. JUR. 2D Judgments § 487 (“Collateral estoppel or issue preclusion is a jurisprudential rule that arises in a subsequent proceeding when an issue of ultimate fact has been determined by a valid and final determination in a prior proceeding. The terms generally refer to the effect of a prior judgment in preventing, foreclosing, limiting, or precluding relitigation of issues that have been actually litigated in a previous action, regardless of whether it was based on the same cause of action as a second suit. Collateral estoppel recognizes that a determination of facts litigated between two parties in a proceeding is binding on those parties in all future proceedings and provides that once a party has fought out a matter in litigation with the other party, he or she cannot later renew that duel. In other words, collateral estoppel or issue preclusion prevents relitigation of an issue between the same parties or their privies in any future lawsuit based on a different claim. It operates whether the judgment in the first action is in favor of the plaintiff or the defendant.”). See also 21 AM. JUR. 2D Criminal Law § 385 (explaining that collateral estoppel is incorporated in, but not coextensive with, the doctrine of double jeopardy).


27 See Anne Bowen Poulin, Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model, 25 CONN. L. REV. 95, 97–98 (1992) (describing the difficulty courts have in defining “same offense” in the context of compound statutes such as RICO). See also Grady v. Corbin, 495 U.S. 508, 522 n.12 (1990), overruled by United States v. Dixon, 509 U.S. 688 (1993) (noting that the terminology used in defining double jeopardy has been “confused at
Supreme Court’s inconsistent stance on whether double jeopardy principles protect individuals only from overreaching by the executive branch, or whether it is a limit on how legislatures may proscribe criminal conduct. An early double jeopardy case, *Ex Parte Nielsen*, exemplifies this ambiguity.

In *Nielsen*, a Mormon man living with two women was charged with cohabitation and adultery. Although the defendant started cohabitating with the second woman on October 15, 1885, the prosecutor charged the cohabitation as occurring from October 15, 1885 to May 13, 1888, and the adulterous conduct as occurring from May 14, 1888 onward. The Supreme Court held that double jeopardy prevented the second prosecution, for adultery, for two reasons. First, the underlying conduct in both charges was the same because the...
sexual conduct charged in the adultery count was “incident” to the cohabitation. Second, the Court concluded that the prosecutors’ arbitrary division of dates resulted in multiple charges of discrete offenses for a single course of conduct intended by the legislature to be charged as a continuous offense. If prosecutors could fragment a crime that the legislature intended to punish as a continuous course of conduct into discrete charges, the Court reasoned, a prosecutor can create any number of offenses simply by charging based on a temporal subdivision of her choice. As a result, the prosecutor could charge the defendant with cohabitation for each year, month, or week of the cohabitation period individually, impermissibly punishing the defendant multiple times for the same conduct.

1. The Double Jeopardy Standard—the Blockburger Test

Nielsen was decided in 1889, decades before the Blockburger test was established in 1932. The Blockburger test soon became the double jeopardy standard. Unlike Nielsen, the Blockburger test focuses on a strict comparison of statutory elements, not on the underlying conduct. In Blockburger, the Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Because of its focus on statutory

33 Id. at 188–89.
34 Id. at 185–86.
35 Id.
37 United States v. Hatchett, 245 F.3d 625, 631 (7th Cir. 2001). See also United States v. Dixon, 509 U.S. 688, 704 (overruling the Grady same conduct test and reaffirming Blockburger’s same elements test as having “deep historical roots” and “accepted in numerous precedents of this Court.”)
39 284 U.S. at 304.
elements, *Blockburger* has been called a test of legislative intent, and a “rule of statutory construction.”

Under *Blockburger*, it would seem that lesser and greater offenses can be charged consecutively because the greater offense always requires proof of a fact the lesser offense does not. However, successive prosecutions of lesser and greater offenses is prohibited. A lesser offense is a crime, the elements of which are completely subsumed within a greater offense; the offenses are considered the same for double jeopardy purposes because in order to prove the greater offense, the state must necessarily prove every element of the lesser offense. The rule regarding lesser and greater offenses was already established by the time *Nielsen* was decided in 1889 and in 1977, the Court unequivocally affirmed that “the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense.”

While *Blockburger*’s application appears straightforward, the Court soon encountered its limits in cases of subsequent prosecutions. The first obstacle to the *Blockburger* test arises in the context of felony murder statutes. Under a felony murder statute, the state must prove

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40 See Linda Koenig Doris, *The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions*, 70 CAL. L. REV. 724, 732 (1982) (arguing that the Court, in recent years, has abandoned *Blockburger* as a constitutional test and has instead used it as “a gauge of legislative intent”).


42 *Brown*, 432 U.S. at 166.

43 See BLACK’S LAW DICTIONARY (9th ed. 2009) (defining a lesser included offense as “[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime . . . For double-jeopardy purposes, a lesser included offense is considered the ‘same offense’ as the greater offense, so that acquittal or conviction of either offense precludes a separate trial for the other.”)

44 See *Ex Parte Nielsen*, 131 U.S. 176, 189 (1889).

45 *Brown*, 432 U.S. at 169.

46 See *Harris v. Oklahoma*, 433 U.S. 682 (1977) (holding that “when, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.” *Id.* at 682.). See also *Klein &
that a killing occurred during the commission of a number of statutorily enumerated felonies. When a defendant is charged with felony murder based on armed robbery, for example, the Blockburger test would not bar a subsequent prosecution for armed robbery.\textsuperscript{47} This results because the Blockburger test looks only at the statutory elements of the statutes at issue; and felony murder statutes normally do not require proof of armed robbery \textit{per se}, but rather require proof only of some felony.\textsuperscript{48} Thus, a facial comparison of the statutes does not indicate that the offenses are lesser and greater included offenses. The Court, however, barred such successive prosecutions because they have the practical effect of forcing the defendant to defend against the charge of robbery a second time.\textsuperscript{49}

The second Blockburger obstacle is evident in cases in which the state attempts to relitigate an issue of fact that has already been resolved. In \textit{Ashe v. Swenson}, a defendant was charged with six separate robberies for entering the home of an individual during a poker game and robbing each of the game’s participants.\textsuperscript{50} The defendant was acquitted by the jury, which found that the prosecution did not sufficiently prove the defendant’s identity.\textsuperscript{51} Six weeks later, however, the defendant was brought to trial again, for the robbery of another participant in the poker game.\textsuperscript{52} The state, in presenting its evidence in the second trial, relied on substantially the same witnesses, but refined their presentation of the evidence, resulting in a 35-year prison term for the defendant.\textsuperscript{53} Under Blockburger, the second prosecution would not be barred because the state was required to prove that the defendant stole from the victim in the second trial: proof

\textsuperscript{48} Id.
\textsuperscript{49} See id.
\textsuperscript{50} 397 U.S. 436 (1970).
\textsuperscript{51} Id. at 439.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 439–440.
of a fact not required in the first prosecution. Relying on the principle of collateral estoppel, however, the Court held that the second trial violated double jeopardy.\(^{54}\)

The third Blockburger obstacle arises in situations similar to \textit{Nielsen}, in which a prosecutor attempts to fragment a single continuous course of conduct into multiple convictions. The Court addressed the issue of fragmentation in \textit{Brown v. Ohio}, stating: “The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”\(^{55}\) Like it did in \textit{Nielsen}, the Court in \textit{Brown} suggested that the answer to fragmentation lies not in the Blockburger test, but in how a statute defines the element of the crime.\(^{56}\)

Recognizing these limitations, the Court briefly instituted a “same conduct” test in the 1990 case, \textit{Grady v. Corbin}, but soon after overturned it in 1993.\(^{57}\) In \textit{Corbin}, the Court held that a prosecutor cannot bring a subsequent prosecution if, to establish an essential element of the subsequently charged offense, it “will prove conduct that constitutes an offense for which the defendant has already been prosecuted.”\(^{58}\) In \textit{Corbin}, Justice Scalia opposed the majority’s new “same conduct” test, and argued in part that the drafters’ conscious

\(^{54}\) \textit{Id.} at 446.
\(^{56}\) \textit{See supra}, Part I.B., for an explanation of the \textit{Nielsen} case. The Court, in determining whether the fragmentation was permissible, said it must determine if the offense is “inherently a continuous offense.” \textit{Ex parte} Nielsen, 131 U.S. 176, 186 (1889). In \textit{Brown}, the defendant was caught driving a car he had stolen. He was first charged with joyriding, and found guilty, and was later charged with auto theft. The defendant had the car in his possession for nine days before he was caught. The State argued that the prosecutions did not violate double jeopardy because they each focused on “different parts of his 9-day joyride.” Justice Brennan, writing for the majority, noted “we would have a different case if the Ohio Legislature had provided that joyriding is a separate offense for each day the motor vehicle is operated without the owner’s consent.” \textit{Brown}, 432 U.S. 161, 169, n.8 (1977).
\(^{58}\) \textit{Id.} at 521 (emphasis added).
choice to use the term “same offense” in the text of the Fifth Amendment, as opposed to “same conduct,” supports Blockburger’s focus on the statutory definition of the offense, not on the defendant’s underlying conduct.\textsuperscript{59} When the Supreme Court reversed Corbin in the 1993 case, United States v. Dixon, it relied on the reasoning of Justice Scalia’s Corbin dissent.\textsuperscript{60}

2. The Totality of Circumstances Test for Conspiracies

Even in light of Blockburger’s limitations, the Supreme Court continues to reject a constitutional test based on conduct.\textsuperscript{61} Yet the Supreme Court has held that prosecution of a single conspiracy as two separate conspiracies violates double jeopardy,\textsuperscript{62} and Blockburger’s comparison of elements fails to provide a system for gauging when the impermissible fragmentation of an element of the conspiracy has occurred. This failure, best illustrated in the Nielsen and Brown cases discussed supra, has led the lower federal courts to devise a conduct-based test applicable in instances of subsequent, overlapping conspiracies.\textsuperscript{63} As Nielsen and Brown demonstrated, the Blockburger test was incapable of guiding the Court in ascertaining whether prosecutors had impermissibly fragmented an element of the offense. Rather, the Court necessarily looked to the actual underlying conduct and evidence of legislative intent regarding the temporal element of the offense to determine whether prosecutors violated double jeopardy by arbitrarily fragmenting the offense.\textsuperscript{64}

\textsuperscript{59} Id. at 522 (Scalia, J., dissenting: “That rule best gives effect to the language of the Clause, which protects individuals from being twice put in jeopardy ‘for the same offence,’ not for the same conduct or actions. ‘Offence’ was commonly understood in 1791 to mean ‘transgression,’ that is, ‘the Violation or Breaking of a Law.’ . . . If the same conduct violates two (or more) laws, then each offense may be separately prosecuted.”).


\textsuperscript{61} Id.


\textsuperscript{63} Poulin, supra note 27, at 119.

\textsuperscript{64} See supra note 56.
In dealing with fragmentation, the lower courts have adopted the “totality of circumstances” test, a fact-sensitive, contextual approach for analyzing double jeopardy in instances of overlapping conspiracies. In determining the constitutionality of subsequent prosecutions of overlapping conspiracies, the lower courts have found that it is necessary to compare the underlying conduct constituting the conspiracies charged. Although each circuit differs in its articulation of the totality of circumstances test, most look at the extent of overlap of the following common elements: (1) time period; (2) participants; (3) location; (4) overt acts; and (5) defendant’s role in each conspiracy. In the Seventh Circuit, “the court must look to such factors as whether they involve the same overt acts, people, places, or time period; whether they share similar objectives or modus operandi; or whether the two conspiracies depend upon each other for success.”

One scholar describes the test as “protective and conduct-sensitive.” By focusing on the conduct that forms the conspiracy charge, the court is free to reject the prosecutor’s framing of the charges. The court’s independent analysis of the conduct, in turn, makes it less likely that a fragmented conspiracy will be overlooked, which results in adequate double jeopardy protection for defendants. The totality of circumstances test is useful in analyzing RICO conspiracies because two of the statute’s complex elements, enterprise and pattern of racketeering activity, are particularly susceptible to fragmentation.

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65 Poulin, supra note 27, at 119.
66 Id.
67 Id.
68 United States v. Sertich, 95 F.3d 520, 524 (7th Cir. 1996).
69 Poulin, supra note 27, at 119–120.
70 Id.
71 Id.
II. THE RICO ACT

The Racketeer Influence and Corrupt Organizations (RICO) Act, has been recognized as one of the nation’s broadest laws.\textsuperscript{72} RICO was a cog in the massive legislative machinery that Congress created to target the “sophisticated, diversified, and widespread activity” of organized crime leaders, the Organized Crime Control Act of 1970.\textsuperscript{73} RICO was enacted as title IX of the Act, which contains twelve distinct laws connected by the common purpose of combating organized crime.\textsuperscript{74} The Act’s stated purpose is “to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.”\textsuperscript{75} Despite this stated purpose, RICO’s broadly drafted statutory language has been interpreted to include a variety of contexts of “enterprise criminality” beyond the traditional understanding of organized crime.\textsuperscript{76} This expansion, particularly in the civil context, has drawn criticism even from the statute’s primary drafter.\textsuperscript{77}


\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} See generally Atkinson, supra note 72, at 9–10 (noting that RICO’s application in civil litigation has been criticized as beyond the scope of the law’s original intent and focus on organized crime).

A. A Brief Legislative History of RICO and its Policies

When the Organized Crime Control Act was passed in October 1970, it was the culmination of the federal government’s twenty-year long preoccupation with and study of organized crime.\(^{78}\) The mafia threat was first exposed during the 1950s through the investigative work of the Senate’s Special Committee to Investigate Organized Crime in Interstate Commerce.\(^{79}\) The Committee’s work, which included televised Senate hearings chaired by Senator Estes Kefauver, was one of the first endeavors to amass data on the Mafia’s activities and structure.\(^{80}\) The Committee uncovered evidence of organized crime’s infiltration into legitimate businesses and state and local governments.\(^{81}\) Soon, this infiltration became the focus of Congress’ fight against organized crime.\(^{82}\)

During the following decade, the President's Commission on Law Enforcement and Administration of Justice (popularly known as the Katzenbach Commission) continued to study the problem. The Commission struggled with defining organized crime because the danger of organized crime seemed to reside in two very different types of organizations: the “single Mafia,” the large, highly organized, hierarchical Italian crime families; and the “multifarious local syndicates,” groups of loosely associated criminals not necessarily unified under a single hierarchy.\(^{83}\) Eventually, the Commission rejected the idea (supported by some law enforcement officials at the time) that organized crime was nothing more than a group that


\(^{80}\) Id.


\(^{82}\) Id.

\(^{83}\) Lynch, supra note 72, at 669.
engaged in certain illicit activities such as gambling, narcotics dealing, or loansharking. The Commission recognized that this approach “focus[ed] exclusively on the crime instead of on the organization.” Rather, the Commission focused on the organization itself, recognizing that organized crime “involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments.”

Defining “organized crime” to encompass the Commission’s dual concept was a problem that cropped up again when Congress drafted and interpreted the RICO statute, contributing to the statute’s broadness.

Yet the initial version of the bill that would become the Organized Crime Control Act, Senate Bill 30 (S. 30), did not contain any of RICO’s provisions. The Organized Crime Control Act drew heavily from the Commission Report’s recommendations; significantly, the report did not contain any recommendations resembling RICO. Senator Roman Hruska introduced two bills in the Senate that included the provisions that inspired title IX, the RICO portion of the Act. The first bill, S. 2048, proposed amending the Sherman Antitrust Act to prohibit parties from investing or using, in a particular business, unreported income from an unrelated line of business. The second

84 Id. at 668.
85 Id. (quoting the Commission’s Report, President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime (1967)).
86 Lynch, supra note 72, at 667–668 (quoting the Commission’s Report, President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967)).
89 Lynch, supra note 72, at 672.
90 Id. at 673.
91 Id. at 673; S. 2048, 90th Cong., 1st Sess. (1967).
bill, S. 2049, created new civil and criminal penalties for anyone who invested income derived from certain criminal activities in a business affecting interstate commerce. Although Senator Hruska’s two successive bills both died in the Senate, his efforts at combating the “racketeer infiltration of legitimate businesses” did not. He proposed a new bill, detaching the proposals from the antitrust laws and combining the provisions. His new proposal would have criminalized the investment of any income derived from any of several enumerated federal offenses, or any intentionally unreported income, in any business enterprise affecting interstate commerce.

Hruska eventually joined forces with Senator McClellan, who had originally proposed the Organized Crime Control Act in January of 1969. They worked together to revise Hruska’s new bill, and Hruska’s proposals were once again before the Senate, this time as S. 1861. This new bill was later amended and incorporated into S. 30, as title IX, the RICO Act. Senate Bill 30 took 22 months to travel through Congress. It eventually garnered strong support, passing in the Senate by a vote of 73 to 1, and in the House by a record vote of 341 to 26. Upon signing the popular new law, President Richard Nixon remarked that law enforcement would now have the “necessary tools” to “launch a total war against organized crime.”

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93 Lynch, supra note 72, at 676.
94 Id.
95 Id.
96 Blakey, supra note 81.
B. The Structure of the RICO Statute

The RICO statute is codified in §§ 1961 through 1968 of title 18 of the United States Code. The statute is structured in a complex, multi-layered way. The “core” of the statute, §1962, creates four distinct substantive offenses: (1) § 1962(a) prohibits the establishment, acquisition, or control of legitimate or illegitimate enterprises funded by illegally obtained resources; (2) Section 1962(b) prohibits an individual from illegally maintaining or acquiring an interest in, or controlling any enterprise that affects interstate commerce; (3) § 1962(c) prohibits an individual associated with an enterprise to participate in its activities through a pattern of racketeering activities or collection of unlawful debts; and


103 Lynch, supra note 72, at 680.

104 18 U.S.C.A. § 1962(a) provides: It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

105 18 U.S.C.A. § 1962(b) provides: It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

106 18 U.S.C.A. § 1962(c) provides: It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.
(4) § 1962(d), the conspiracy component of the statute, prohibits an individual from entering into a conspiracy to violate § 1962(a), (b), or (c).

It is impossible to understand RICO without reference to §1961’s definitions. Section 1962(c), for example, criminalizes “enterprises” that engage in “a pattern of racketeering activities.” Section 1961 defines the terms used in §1962, including “racketeering activity,” “enterprise” and “pattern of racketeering activity.” Under § 1961, “racketeering activity” is defined broadly as committing two or more offenses from a laundry list of over fifty enumerated state and federal offenses loosely grouped into seven categories and ranging from murder and kidnapping, to fraud and witness tampering. A “pattern

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107 18 U.S.C.A. § 1962(d) provides: It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.
111 18 U.S.C.A. § 1961(1) provides: “racketeering activity” means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene
matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the
of racketeering activity” requires at least two racketeering activities to have been committed within the statutory period. An enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” Additionally, the Supreme Court has held that “enterprise” and “pattern of racketeering activity” are distinct elements a prosecutor must prove:

In order to secure a conviction under RICO, the Government must prove both the existence of an “enterprise” and the connected “pattern of racketeering activity.” The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute.

However, because there is often so much overlap between these elements, both of which are defined broadly, prosecutors sometimes use the same evidence to prove the existence of an enterprise and a pattern of racketeering activity.

act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).

112 18 U.S.C.A. § 1961(5): “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.


C. RICO Sanctions

In line with the law’s expansive nature, the statute provides for both criminal and civil liability.\textsuperscript{116} RICO’s criminal penalties are found in § 1963, while civil remedies are articulated in § 1964. RICO’s criminal sanctions can include imprisonment, fine, and forfeiture.\textsuperscript{117} The statute expressly permits life imprisonment\textsuperscript{118} “if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment.”\textsuperscript{119} Convictions based on other underlying offenses can be punished by a sentence of up to 20 years imprisonment.\textsuperscript{120} Section 1963’s forfeiture provisions\textsuperscript{121} allow the government to seize a defendant’s “interest in the enterprise connected to the offense, and his interests acquired through or proceeds derived from racketeering activity or unlawful debt collection. Section 1963 also permits the government to seek pre-trial and, in some cases, pre-indictment restraining orders to prevent the dissipation of assets subject to forfeiture.”\textsuperscript{122}

D. Exceptions to Double Jeopardy in the RICO Context

Courts have failed to find violations of double jeopardy in several scenarios that have a direct impact on RICO prosecutions. These “exceptions” to double jeopardy give prosecutors freedom to obtain numerous indictments based on a single course of conduct. The dual

\textsuperscript{118} United States v. Flores, 572 F.3d 1254, 1268 (11th Cir. 2009).
\textsuperscript{119} 18 U.S.C.A. § 1963(a).
\textsuperscript{120} Id.
\textsuperscript{121} 18 U.S.C.A § 1963(a)(1)–(3).
sovereignty exception to double jeopardy is such an example.\textsuperscript{123} Under the dual sovereignty principle, a defendant can be prosecuted for identical conspiracy violations, based on the same conduct, if both the state and the federal government each have a statute criminalizing the behavior.\textsuperscript{124}

The dual sovereignty principle was explained in \textit{Abbate v. United States}. In \textit{Abbate}, the defendants pled guilty and were convicted in Illinois for conspiring to destroy the property of another, based on an agreement to dynamite telephone company facilities located in Mississippi, Tennessee, and Louisiana.\textsuperscript{125} Subsequently, the defendants were also indicted in the United States District Court for the Southern District of Mississippi for conspiracy to destroy “property and material known as coaxial repeater stations and micro-wave towers,” based on the same agreement.\textsuperscript{126} The Court dismissed the double jeopardy claim, asserting that the state and federal government each derive their power from a different source.\textsuperscript{127} Thus, when each proscribes certain behavior, it is “exercising its own sovereignty, not that of the other. ‘It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.’”\textsuperscript{128} Although \textit{Benton v. Maryland}, which extended Fifth Amendment double jeopardy protections to the states through the Fourteenth Amendment,\textsuperscript{129} had not yet been decided, \textit{Abbate} has never been overruled and the dual sovereignty principle has been repeatedly reaffirmed.\textsuperscript{130} Thus, despite being convicted or acquitted in a state prosecution, a defendant can face a nearly identical

\begin{footnotes}
\item\textsuperscript{124} \textit{Abbate v. United States}, 359 U.S. 187, 196 (1959).
\item\textsuperscript{125} \textit{Id.}
\item\textsuperscript{126} \textit{Id.} at 189.
\item\textsuperscript{127} \textit{Id} at194, 196.
\item\textsuperscript{128} \textit{Id.} at 194 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).
\item\textsuperscript{129} 395 U.S. 784 (1969).
\item\textsuperscript{130} See Poulin, supra note 27, at 150.
\end{footnotes}
subsequent federal prosecution, arguably eradicating the protections of double jeopardy.\textsuperscript{131}

Likewise, prosecutors can achieve multiple convictions without violating double jeopardy by charging a defendant for both a conspiracy and the underlying substantive charges. Courts have held that punishment for both a RICO conspiracy and substantive offenses implements Congress’ desire to enhance the sanctions that are imposed on “racketeers.”\textsuperscript{132} Thus, prosecutors have considerable leeway in achieving multiple prosecutions of RICO defendants. In states with statutes similar to RICO,\textsuperscript{133} the Abbot principle allows federal prosecutors to coordinate efforts with state prosecutors to achieve consecutive convictions. Additionally, federal prosecutors may prosecute defendants for both conspiracy and substantive RICO offenses. Lastly, many of the predicate “racketeering” offenses can also be punished separately under state law, including, for example, acts or threats involving murder, kidnapping, gambling, arson, robbery, bribery, and extortion.\textsuperscript{134} These exceptions demonstrate that the double jeopardy protection for subsequent prosecutions based on the same course of conduct is not absolute and that prosecutors have substantial discretion in choosing to cumulatively punish a single course of conduct.

\textsuperscript{131} See generally Doris, supra note 40, at 732 (discussing the Justice Department’s recognition of the perils of the sovereignty principle as embodied in the Petite Policy. According to the Justice Department’s Petite Policy, no federal prosecution should follow a state prosecution for substantially the same act. Duplicate prosecutions should only occur with prior approval of an Assistant Attorney General if the AAG determines that the federal prosecution will serve “compelling interests of federal law enforcement.” The Department asserted that the Petite Policy will be observed in RICO cases.).

\textsuperscript{132} Brenner, supra note 107, at 933.

\textsuperscript{133} See Tracy Doherty et al., Racketeer Influenced and Corrupt Organizations, 31 AM. CRIM. L. REV. 769, 826 n. 1 (1994) (noting that “[t]hirty one American jurisdictions have enacted ‘little RICO’ or RICO-like statutes that more or less track the federal RICO statute. Twenty-nine of these statutes are directed at activity similar to that which is the target of the federal RICO statute.”).

\textsuperscript{134} 18 U.S.C.A. § 1961(1).
III. THE SCHIRO DECISION

A. Background Facts and Procedural Posture

The defendants in Schiro, Frank J. Calabrese, Sr., and James Marcello, had been members of the “Chicago Outfit,” or “the Syndicate” since the 1960s. The Outfit is a Chicago organized crime gang with roots that can be traced to Al Capone. The Outfit operated its illicit activities through an assortment of “street crews,” operating in different parts of the city. In 1993, Marcello was tried and convicted under § 1962(d) of the RICO Act, for conspiring to conduct the affairs of the “Carlisi street crew,” which was also known as the “Melrose Park crew,” through a host of illegal activities. The conspiracy conviction was based on conduct occurring between 1979 and 1990, and included activities such as extortion, intimidation, and conspiracy to commit murder and arson, among other charges. Calabrese was indicted in 1995 for his participation in a similar conspiracy, occurring between 1978 and 1992, and involving the “Calabrese street crew,” which was also known as the “South side” or “26th street crew.” Calabrese pled guilty in 1997 and was sentenced to 118 months in prison. Marcello appealed his conviction to the Seventh Circuit, which affirmed his conviction and 150-month sentence.

In 2005, Calabrese (who remained in federal custody) and Marcello were indicted with new RICO conspiracies, based on information from the FBI’s decades-long “Operation Family Secrets”

135 United States v. Calabrese, 490 F.3d 575 (7th Cir. 2007).
136 Id. at 577.
138 Calabrese, 490 F.3d at 577.
139 Id.
140 Id.
141 Id.
142 United States v. Zizzo 120 F.3d 1338, 1363 (7th Cir. 1997).
investigation. The indictment alleged that the two men (along with nine other defendants) engaged in racketeering activities for the Outfit, whose “criminal activities were carried-out by sub-groups or ‘crews.'” Because one of the protections of double jeopardy is against a second trial for an offense of which the defendant has already been convicted or acquitted, a defendant can move to dismiss new charges at the indictment level. Thus, prior to the beginning of the “Family Secrets” trial in 2007, Marcello and Calabrese moved to dismiss the indictment based on double jeopardy.

The district court held that the new indictment did not violate double jeopardy and the Seventh Circuit reviewed the decision in United States v. Calabrese. Judge Posner, writing for the majority, affirmed the dismissal of Marcello’s and Calabrese’s double jeopardy claims. The Seventh Circuit held that the defendants failed to show a sufficient overlap between the current indictment and the previous indictment to establish that the new prosecution was placing them in double jeopardy. However, Judge Posner noted that, depending on the approach taken at trial by the prosecutors, the double jeopardy claim could be vindicated if prosecutors relied on essentially the same evidence as in the prior conviction.

After the Seventh Circuit affirmed the district court’s decision, the defendants proceeded to trial in June of 2007. At the end of the trial, a jury convicted both Marcello and Calabrese, and both were sentenced

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144 Id.
147 United States v. Calabrese, 490 F.3d 575 (7th Cir. 2007).
148 Id. at 581.
149 Id.
150 Id.
to life in prison.\textsuperscript{151} The \textit{Schiro} decision addresses Marcello and Calabrese’s appeal of these convictions.\textsuperscript{152} The Seventh Circuit rejected the defendants’ argument that their agreement to facilitate racketeering activities for the street crews and the Outfit is the same conspiracy because the street crews are part of the Outfit, which together form a single enterprise.\textsuperscript{153} The court affirmed the trial court’s convictions\textsuperscript{154} and the defendants filed a writ of certiorari with the United States Supreme Court, which was denied on October 1, 2012.\textsuperscript{155}

\textbf{B. Judge Posner’s Majority Opinion}

In \textit{Schiro}, the majority held that “[t]he Outfit and its subsidiary street crews are different though overlapping enterprises pursuing different though overlapping patterns of racketeering. And so they can be prosecuted separately without encountering the bar of double jeopardy.”\textsuperscript{156} In reaching this conclusion, the court identified the difficulty of assessing double jeopardy claims in conspiracy prosecutions: a conspiracy statute criminalizes the actual agreement as opposed to the acts committed pursuant to the agreement.\textsuperscript{157} Thus, “the terms of the agreement rather than the details of implementation” determine the conspiracy’s boundaries.\textsuperscript{158} Since a RICO conspiracy is an agreement to knowingly facilitate the activities of operators or managers of an enterprise that commits racketeering activity, agreements with two distinct “enterprises” are separate conspiracies.\textsuperscript{159}

\textsuperscript{151} \textit{Schiro}, 679 F.3d at 524-25.
\textsuperscript{152} \textit{Id.} at 525.
\textsuperscript{153} \textit{Id.} at 526, 528.
\textsuperscript{154} \textit{Id.} at 535.
\textsuperscript{156} \textit{Schiro}, 679 F.3d at 526.
\textsuperscript{157} \textit{See id.} at 526.
\textsuperscript{158} \textit{Id.}
\textsuperscript{159} \textit{See id.}
Consequently, the majority cautioned, the *Blockburger* test, which requires a determination of whether two statutes have the same elements, did not guide the court’s determination in *Schiro*. 160

The majority, however, failed to enunciate any test that controls the determination of the enterprise issue; instead, the crux of its decision is Judge Posner’s Ford analogy. 161 In his analogy, the defendants are likened to employees working at Ford Motor Company’s River Rouge plant, conspiring to make illegal firearms, instead of cars. 162 At this point in the analogy, the majority explained, an employee cannot be charged with successive conspiracies based on his work for Ford and the River Rouge plant separately because “the members and the objectives and the activities of the two conspiracies (conspiracy with employees of Ford, conspiracy with employees at River Rouge) would be identical.” 163 Once the employee is promoted to Ford’s corporate headquarters, however, where he engages in preparing financial reports to conceal Ford’s illegal profits, “he has joined a separate though overlapping conspiracy.” 164 This promotion scenario, the majority contends, is analogous to the defendants’ work with the street crews and the Outfit, illustrating that “depending on what the employee does, there can be two different enterprises that he is assisting rather than one even though they are affiliated.” 165 Thus, because an enterprise member’s activities and objectives determine the boundaries of the enterprise, the defendants conspired with two enterprises by performing certain distinct activities (namely, murder) that were directly linked to the objectives of the Outfit but not to the objectives of the street crews.

Yet, by predicating the enterprise’s boundaries on “what the employee does,” 166 the majority’s analysis conflated two elements,

160 See id.
161 See id. at 526-27.
162 Id. at 526.
163 Id.
164 Id.
165 Id.
166 Id.
enterprise and pattern of racketeering activity, and measured the scope of the enterprise by the scope of the conspiracy. The majority accepted that the street crews are branches, or “operating divisions” of the Outfit.\footnote{Id. at 527.} It also conceded that there was some overlap between the activities charged in the previous trial and the current indictments.\footnote{Id.} It concluded, however, that the Outfit is distinct from the street crews because it has authority over activities (i.e. murders) that accrue benefits unique to the Outfit, whereas the street crews’ operation of street-level vice accrues benefits to the entire organization.\footnote{Id.} The majority stated:

All this would be obvious if the Chicago Outfit were a corporation and the street crews were subsidiaries. But it would be beyond paradoxical if by virtue of being forbidden by law to form subsidiaries, employees of criminal enterprises obtained broader rights under the double jeopardy clause than the employees of legal ones.\footnote{Id.}

In concluding its double jeopardy analysis this way, it is evident that the majority’s comparison of the Mafia to a corporation was not merely illustrative, but policy-driven.

\textbf{C. Judge Wood’s Dissent}

In her dissent, Judge Wood concluded that “the double jeopardy violation that [she] feared would occur from this retrial has unequivocally occurred. Calabrese and Marcello had each already been convicted and imprisoned for their part in the street crews that lie at the heart of the Outfit’s operation.”\footnote{Id. at 535 (Wood, J., dissenting).} To reach this conclusion, Judge Wood analyzed the underlying conduct in each indictment using

\begin{footnotes}
\item[167] Id. at 527.
\item[168] Id.
\item[169] Id.
\item[170] Id.
\item[171] Id. at 535 (Wood, J., dissenting).
\end{footnotes}
a version of the totality of circumstances test, examining the overlap in: (1) the timeframe of the various activities charged; (2) the persons involved in the activities charged; (3) which statutes the racketeering activities in each charge violated; (4) the nature and scope of the activity the government seeks to punish in each charge; and (5) the location where the activities charged occurred. According to Judge Wood, when the test’s five factors all point in the same direction, courts must find that the pattern of racketeering activity was the same and that the conspiracies had the same object. In her dissent’s carefully conducted analysis, this is exactly what she concluded.

In comparing the indictments, Judge Wood’s analysis showed that the government’s new charges against the defendants covered the same period of time and the same pattern of racketeering activity as the prior charges. The only difference she discerned between the current and prior cases was the wider scope of the recent prosecution, which focused on evidence of the Outfit’s commission of murder and violence; however, this evidence was also a component of the first prosecution and while it is not entirely subsumed in the pattern of activities, it is not different enough to change the pattern.

Judge Wood recognized the difficulties of comparing conspiracies because conspiracies have no clearly discernible boundaries with regard to time, place, persons, and objectives. Additionally, she recognized that under the RICO statute, the definition of enterprise is broad: “a group of persons associated together for a common purpose of engaging in a course of conduct.” However, Judge Wood, unlike the majority, did not conflate enterprise and pattern of racketeering. Conspiring with one enterprise to commit a different pattern of racketeering, she stated, creates a separate conspiracy, but not a

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172 Id. at 539.
173 Id.
174 Id. at 539–41.
175 Id. at 540.
176 Id. at 535.
177 Id.
178 See supra Part III.B.
Because the defendants agreed to the same pattern of racketeering activity, and the Outfit and street crews are the same enterprise, there is only one conspiracy. She perceived the double jeopardy issue as essentially one of fragmentation. Unlike the majority, she concluded that the issue in Schiro required an answer to the question: “[U]nder what circumstances [is it] permissible to carve multiple ‘enterprises’ out of one group?”

Judge Wood’s finding that a single enterprise exists is bolstered by the weaknesses of the majority’s analogy between the mafia and Ford, a legitimate corporate enterprise. First, she addressed the majority’s contention that “what the employee does” (or an employee’s objectives and activities) determines the boundaries of the enterprise: In Judge Wood’s view, each of Ford’s various plants, like the River Rouge plant, would not be transformed into separate enterprises by virtue of independently manufacturing a different product. Each plant would still be part of Ford; however, Ford would now be a single enterprise that makes money through different lines of commerce. Thus, although each street crew independently conducted its activities, each remained a part of the Outfit, providing it with different streams of income.

Second, Judge Wood’s dissent rejected the majority’s claim that the Outfit’s unique authority to authorize murders distinguished the Outfit from the street crews. The dissent noted that the fact that an employee of a subsidiary can exercise discretion in performing certain tasks but must receive approval from the parent company for others, does not create a separate enterprise; whether the employee must follow the orders of his superiors or not, he is still acting for the

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179 See id. at 538.
180 See id. at 535.
181 Id.
182 Id at 536.
183 Id.
184 See id. at 538.
185 Id. at 536–37.
benefit of the parent company. Judge Wood illustrated this point using the Ford analogy:

Should the janitorial staff at the River Rouge Complex be considered to be conspiring with a different “enterprise” than a notional enterprise made up of the assembly line workers? What if the sanitation workers required approval from HR before they hired a new janitor to join their ranks? Would the action of hiring a janitor somehow become associated with the “HR-enterprise,” but all other janitorial actions remain confined to the “janitor-enterprise”? Nothing in either the Double Jeopardy Clause or RICO calls for such inconsequential distinctions.

According to the dissent, the overarching problem with the majority’s approach was a matter of application, not theory: an examination of the facts in the case, the dissent stated, reveals that the work of the street crew and the Outfit was “a single coordinated operation.” The majority erred by concluding that the work of the street crews was a different pattern of racketeering activity distinct from the work of the Outfit and using this fact to establish distinct enterprises. In Judge Wood’s view, the evidence at trial demonstrated that the street crews were not “self-sufficient” enterprises that functioned without oversight, like independent contractors. Rather, they were an indispensable and inextricable part of the Outfit: “The Street Crews were the mob’s hands, the Outfit its head. There is no way to divide the two.”

Judge Wood further noted that two other circuits have recognized that lower levels within the hierarchy of a single crime family are

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186 Id.
187 Id. at 537.
188 Id. at 539.
189 See id. at 538.
190 Id.
191 Id.
components of the same family. Lastly, she reminded the court that double jeopardy ensures that the state will play by the rules, including facing the consequences of its choice to prosecute: “One of those consequences is refraining from prosecuting the defendant again, for the same conspiracy, when it obtains broader evidence of criminal culpability.”

CONCLUSION

The Seventh Circuit’s decision in Schiro constrains the protections of double jeopardy. Judge Wood, in analyzing the case through a framework that focuses on the prosecution’s charges to determine if fragmentation has occurred, gave effect to the double jeopardy clause. She understood that judges must examine how prosecutors have defined the contours of an element because double jeopardy prohibits arbitrary and artificial fragmentation of elements. In critiquing the majority’s overly drawn corporate analogy, she stated:

Nothing in either the Double Jeopardy Clause or RICO calls for such inconsequential distinctions. Indeed, if the majority's view were correct, we would eviscerate any protection the Double Jeopardy Clause provides against repeat prosecutions for conspiracy; single organizations could be carved into any number of different “enterprises” to avoid the Clause's protection.

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192 *Id.* Notably, both the majority and dissent cite *United States v. Langella*, a case from the Second Circuit, as authority for their conclusions. *See* *United States v. Langella*, 804 F.2d 185, 189 (2d Cir.1986) (holding that there was no double jeopardy because the indictments involved different enterprises: “The Commission and the Colombo Family . . . are two separate and independent criminal enterprises. Significantly, the Colombo Family is not merely a lower level of authority within the hierarchy of organized crime . . . [it] is a self-sufficient enterprise that functions without oversight by the Commission.”).

193 *Id.* at 541.

194 *Id.* at 537.
When our nation’s founding fathers drafted the Constitution, they probably could not have imagined a statute as broad and complex as RICO. But Schiro, is not, as the majority suggests, a case about “employees of criminal enterprises obtain[ing] broader rights under the double jeopardy clause than the employees of legal ones.”195 Simply stated, Schiro is a case about a concept that would have been familiar to the drafters: the fragmentation of a single course of conduct into multiple convictions by government actors eager for convictions. The courts have dealt with this type of prosecutorial zeal since at least 1889, when the Nielsen case was decided. Nielsen upheld the fundamental principle at the heart of the double jeopardy doctrine: “[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.”196 Parsing the enterprise element arbitrarily, as the majority did in Schiro, sacrifices the clause’s protections against prosecutorial overreaching in favor of RICO’s remedial purpose. A RICO conspiracy charge is a mighty sword, a “broad and powerful tool,”197 and so there must be adequate protection against its abuse.

195 Schiro, 679 F.3d at 527.
196 Ex Parte Nielsen, 131 U.S. 176, 188 (1889).
197 Schiro, 679 F.3d at 537 (Wood, J., dissenting).