Justice is not its aim: RICO creates a police state

by Leo F. Scanlon

The mechanisms used to expand the jurisdiction of the federal law enforcement apparatus in the United States has always contained the seeds of a revolt against the American constitutional system. This is by no means an academic question, given the fact that today we are seeing the emergence of police state justice in the United States. The culmination of this process of erosion is the federal Racketeering Influenced and Corrupt Organizations Act—the so-called RICO statutes. Designed by Robert Blakey—who now claims that his offspring has been "abused"—and adopted in 1970, RICO was in fact purposefully designed to overturn American jurisprudence—the Constitutional protection of the rights of U.S. citizens (and even non-citizen residents), and mount an assault on freedom of association.

Like the Soviet concept of "justice," RICO is based on the principle of guilt by association. Mere membership in an organization can render an individual open to criminal or civil penalties. In effect, organizations, rather than individuals, are judged to be criminals . While there are two forms of RICO proceedings—civil and criminal—in practice civil RICO has been shaped to allow the civil courts to impose punitive action upon defendants, such that civil RICO proceedings are now usurping the proper role of criminal proceedings. Worse, defendants indicted under civil RICO do not have the protection accorded to them in normal criminal cases. True, they do not face jail in civil RICO cases, but the confiscatory property seizures are such, that the difference may appear moot. Furthermore, private individuals may, under civil RICO, gain powers similar to those enjoyed by prosecutors in criminal proceedings.

Most important, and most overlooked, is the fact that a law so wide-ranging inevitably shapes the investigative as well as prosecutorial powers of the government. It has created what is known as the "enterprise theory of investigation," through which the FBI is granted the power, and the obligation, to bring the harassing impact of intrusive investigations to bear on any organization, political or religious, that is independent of state-controlled financing mechanisms.

Robert Blakey, who can fairly be called the father of RICO, reviewed its origins during a seminar he delivered in November 1985 at a seminar at Notre Dame University, where he is currently a professor. RICO, he said, "can be seen as the culmination of a series of statutes in late 19th and early 20th century jurisprudence. We did it in antitrust at a national level. We did it with the food and drug statutes. We did it with the labor statutes. We did it in the securities statues."

"It" refers to particular features of laws, especially the Sherman Anti-Trust Act passed in 1890, which were increasingly used to target entrepreneurial capitalists such as the sugar, tobacco, and oil monopolies for conspiring to restrict competition. Financial trusts remained untouched.

In 1933 and 1934, President Franklin Roosevelt introduced the Securities Acts, which aimed at accelerating such targeting operations by "federalizing" the common-law crime of "fraud." From then on, securities fraud could be tried in a civil as opposed to a criminal proceeding, meaning that looser standards of evidence would apply, and that guilt could be determined by a mere "preponderance of the evidence" rather than requiring "proof beyond a reasonable doubt." In securities fraud cases, triple damages could be awarded to the victorious plaintiff, and any citizen could initiate a prosecution—a major step in the eradication of the distinction between civil and criminal law as embodied in the RICO statute.

Blakey himself began his career in government law enforcement as one of the "whiz kids" in Robert Kennedy's Justice Department. The unit was staffed by a group of veterans from the "anti-corruption" units of New York prosecutor, governor, and eventual presidential candidate Thomas Dewey, which had distinguished itself in the use of investigations and indictments to "pre-empt" crime.

A reasonable hypothesis is that prosecutions against the mafia were intended to be a "test bed" for a law which would have far greater applicability, and could be turned to political purposes. This emerges from an examination of the sociolog-

ical "models" of the mafia, done on behalf of the 1967 Crime Commission report by Donald Cressey. Far from being profiles in crime, these "models" are equally applicable to any constituency-based political machine, or to any large religious institution. It should therefore be no surprise that the weapons created to battle "organizational crime" would so easily be turned against non-criminal organizations.

While working as a consultant to this commission, Blakey concentrated on the task of expanding the evidence-gathering powers of the federal prosecutor's office. He championed the idea that the grand jury should be viewed primarily as a prosecutor's weapon, rather than an independent evaluative body. He proposed that constitutional limitations on the scope of what constitutes contempt of court, be scrapped in order to force testimony from witnesses caught up in the investigatory web. He was eventually asked to draft the 1968 Surveillance Act, which vastly broadened the wiretap practices. In all of this, Blakey argued that constitutional protections of the individual's freedoms are ultimately constrained by the necessity to restrict the power of social organizations.

According to Blakey's own account, he made a conceptual breakthrough while working as the staff director for the Senate subcommittee which oversaw the infamous re-writing of the U.S. Criminal Code by the Brown Commission. Blakey explains that he realized that a new theory of conspiracy would be required to adequately use the expanded prosecutorial tools he had been developing. He wrote: "There is . . . tension in the law between conspiracy as 'agreement,' i.e., mental assent, and conspiracy as 'combination,' i.e., concerted activity. . . . The solution of this tension in the law seems evident: Break it. . . . Conspiracy thus must be defined in terms which emphasize not only mental assent, but also concerted activity. This is met by joining the notions of agreement and relationship." Or, as he describes it elsewhere, "I realized that the concept of conspiracy had to be shifted from the agreement to the association."

The S. 1 bill (as the Brown Commission report came to be called) was rejected by Congress, which refused to vote for pre-trial detention, fixed sentencing, and other devices which have since been enacted, but which at the time were considered police-state measures. However, a compromise was worked out and in 1970 Congress accepted an anti-crime bill, the Racketeering Influenced and Corrupt Organizations Act.

How RICO works

Blakey is self-admittedly a big fan of the Hollywood-generated image of "organized crime," and claims that he invented the acronym RICO in honor of the gangster character of the same name played by film actor Edward G. Robinson. But the statute's text goes way beyond "organized crime." It states:

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt . . . or 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 engages in, or the activities of which affect, interstate or foreign commerce. . . .

"(b) It shall be unlawful for any person through a pattern of racketeering . . . to maintain . . . any interest in . . . any enterprise. . . .

"(c) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

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

There is a list of specific "predicate crimes" which sometimes varies on the state level, but always includes murder, extortion, etc. as acts which constitute "racketeering activi-

Federal justice: then and now

If you are indicted by a federal grand jury today, your probability of being convicted is greater than 80%.

Of 48,529 federal indictments in 1988, 7,824 (or about 16%) were dismissed by the prosecutors or the court. Of the remainder, there were 39,065 convictions and only 1,640 acquittals ("not guilty" verdicts). Almost 34,000 of the 39,000 convictions were the result of "guilty" pleas. Of those who refused to plead guilty and went to a trial in front of a judge or jury, there were 4,815 convictions and only 1,640 acquittals. So if you stick it out and decide to plead not guilty, your chances of conviction after trial are about 75%.

In contrast to the 50,000 federal indictments per year today, during the period of 1801 to 1828 there were only 2,718 federal indictments—an average of less than 100 a year. Of those 2,718 federal indictments, 1,075 went to trial, and juries found 596 guilty—or about 55%. The overall conviction rate was thus about 18%, as compared with 80% today. And of those convicted, about one-fourth were eventually pardoned by the President.

Does the federal criminal justice system function more efficiently today? Without a doubt, if the rate of convictions is a guide. But if justice, and not police-state efficiency, is the standard, history may have some lessons to teach us.

ty." The list also includes "fraud" and its variants "mail fraud" and "wire fraud," and borrows the Securities Act provisions for triple damages and citizen prosecutors.

In the Kafka-like world of RICO, the word "enterprise" can be any person or association in fact. A "pattern" is defined as any two acts, such as telephone calls or mailing letters, in furtherance of a "fraud." Conspiracy can be charged with all the implications described above. Blakey told the Notre Dame audience: "RICO is not different from either the antitrust or securities statutes. It takes the messages of both and generalizes them across our society." And, by endowing the word "enterprise" with an unlimited meaning, it successfully moves the focus of conspiracy from agreement to association.

Criminal RICO cases are supposed to be centered on the provisions of sections (a) and (b), which supposedly are directed at mob money that is being used to buy up "legitimate" businesses or extort tribute from the same. But since the abstract behavior this section regulates-which is drawn from a sociological model-seldom occurs in a clear fashion, most RICO prosecutions—even of alleged mobsters—occur under section (c), the so-called "civil" component of RICO.

In 1987, William Weld, a leading figure in the "Get LaRouche" task force and then an Assistant Attorney General, testified before a congressional committee considering RICO reform proposals, defended the current civil RICO statute with the following explanation:

"The civil RICO statute is potentially of use to the federal government because, as the Chair is well aware, the standard of proof is a *preponderance of the evidence,* as against a *reasonable doubt* standard in criminal cases. A party who refuses to take the stand becomes the subject of an adverse inference as to his or her testimony, which is not the case in criminal matters, because the liberal discovery rules are available in civil cases, and because the relief which the court is permitted to award in civil RICO actions is considerably more flexible and indeed more radical" (emphasis added).

Weapon of private intrigue

RICO encourages private citizens to utilize its fraud provisions to shape every social dispute into a RICO action. The effect is that all social activity is viewed as pecuniary—personal relations, religious activities, political activities, and all are equally subject to RICO actions. Do the abortion mills want to stop a protest? They can accuse the protesters of disrupting business, allege conspiracy, add everyone from the sidewalk picketers to the movement's newsletter writer to the complaint, and file a RICO action. Does an airline want to stop a strike? It can accuse the union of deliberately disrupting an impending takeover bid, charge conspiracy, and bring a RICO action. The costs of responding to such suits are enormous, and can potentially cripple a business or organization.

There is no such thing as "innocent until proven guilty" in Blakey's world: "How do you know the business is legitimate until the person has had his day in court to test the question?" he asks. "If we are going to go down the lists of legitimate businesses, let's take the General Electric company, for example, who's cheating us on the Minuteman missile; or Rockwell International; or General Dynamics. I do not think any business is legitimate simply because it develops a favorable image for itself through advertising. The time to find out whether they are legitimate is in the case, and the place to find that out is in a full and fair trial."

So it's no surprise when Blakey states flatly, "This bill is systemic reform, not limited to organized crime. . . . The mafia was just a test case." The effect of RICO is not determined by the number of cases tried in the courts.

'Enterprise theory of investigation'

By 1980, these prosecutorial innovations were being incorporated into the investigatory side as well. The FBI's new guidelines were supposedly designed to prevent the FBI from conducting indiscriminate investigations against domestic organizations; but the guidelines utilized RICO's open-ended language, with its loose definitions of "crime" and "probable cause," which had precisely the opposite effect, significantly expanding the FBI's power to interfere in any organization deemed "likely to commit a crime." Under the new guidelines, investigations designed to preempt criminal activity in a targeted organization have in fact become more common than they were during the days of FBI "Cointelpro" operations against political groups.

RICO also has the blockbuster power to authorize pretrial seizure of assets of targeted organizations, including funds necessary to retain counsel, a practice certified by the Supreme Court last year. In the "Three-penny Opera" of Blakey's courtroom, "White-collar criminals get the same justice as no-collar criminals." The remark is not a joke. Blakey and the Supreme Court are saying that *in all cases*—rather than only in those where there is no other remedy—the right to counsel should be determined by the prosecution and the court. Once indicted, no defendant has a right to counsel except the public defender. The sophistry that this will not happen in all cases is irrelevant—it will happen in the most important cases. The threat is exacerbated by the Sentencing Reform Act, which allows the prosecutor, not the judge, to modify the sentence of a defendant—if he "cooperates." A free society does not need such tyrannical practices to defend itself from any enemy in war or peace.

But for all its talk about "white-collar crime," the civil fraud provisions of RICO have no more power to stop the coming financial crash than the Securities Act of 1933 was able to stop the Great Depression. And as we quickly slide into the current depression, the deliberate targeting and suppression of political organizations, which is now a standard practice of law enforcement agencies, will weaken the ability of our sick nation to deliberate on and correct its errors.