# FROM THE SOPHISTICATED UNDERTAKINGS OF THE GENOVESE CRIME FAMILY TO THE EVERYDAY CRIMINAL: THE LOSS OF CONGRESSIONAL INTENT IN MODERN CRIMINAL RICO APPLICATION

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**Abstract**: Due to the unmanageable development of organized crime in America, principally the growth of La Cosa Nostra, Congress enacted the Organized Crime Control Act of 1970. Through this Act, Congress intended to eliminate organized crime, by criminalizing not only the syndicate but also the activities in which it was engaged. Congress then passed the Racketeer Influenced and Corrupt Organizations Act (RICO), which was to preclude organized crime from infiltrating legitimate American businesses.

Although Congress intended courts to construe the RICO statute liberally to combat organized crime, in some cases, American courts have taken this liberal construction too far. The RICO statute was to be employed in pursuit of formalistic corrupt groups of criminals that were engaged in crimes such as robbery, extortion, and fraud. Today, this is simply not the way in which RICO is applied.

In an appalling modern-day application of the RICO statute, Planned Parenthood filed a RICO lawsuit alleging that anti-abortion demonstrators comprised a RICO enterprise engaged in demonizing, harassing, and intimidating Planned Parenthood facilities.[1] The racketeering lawsuit was filed after Planned Parenthood was the target of viral surreptitious videos, depicting Planned Parenthood doctors marketing fetal tissue. The departure from the original congressional intent of the RICO statute is precisely what this Article is about.

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1. *See* Complaint for Damages and for Declaratory and Injunctive Relief; Demand for Jury Trial at 2, Planned Parenthood Federation of America, Inc. v. Center for Medical Progress, No. 3:16-cv-00236 (N.D. Cal. Jan. 14, 2016), 2016 WL 159573.

RICO is no longer a statute exclusively used to fight organized crime; instead, RICO is a statute that has been judicially expanded to encompass loosely affiliated groups who are not engaged in traditional organized crime activities. From Planned Parenthood activists to law firms, and even marriages, RICO is a statute used to prosecute groups of individuals rather than organized crime units that are engaged in crimes such as robbery or extortion.

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## I. INTRODUCTION

Growing out of an Italian-American neighborhood-level bootlegging-gang,[2] the Mafia became an American sensation. Beginning in the early 1950's, Americans grew fixated on the idea of a secretive yet overwhelmingly influential organized crime family, La Cosa Nostra. It naturally followed from the emergence of a national attention-grabbing criminal organization that the federal government would start to implement procedures to reduce its power. The techniques used in the war against organized crime in America are both intriguing and perplexing, and far more intricate than the common citizen can imagine.

Introduced as a way to limit the influence of high-ranking members of the Mafia, the application of the criminal RICO statute has expanded far beyond its original congressional intent. Courts throughout the United States, including the Supreme Court, have expanded the reach of RICO by continuing to allow the government to prosecute more cases involving loosely affiliated enterprises. Criminal RICO now seems to be a medium by which the government may prosecute nearly any group of criminal defendants, so long as prosecutors are able to string together a series of unrelated crimes that are on the list of substantive RICO violations.[3] This is a problem that remains underacknowledged and that this Article addresses by reevaluating the appropriate scope of RICO application.

Scholars have often written about RICO, but when they do so, they take one of three approaches. First, scholars advocate for RICO's application to criminal street gangs[4] and those engaged in human trafficking.[5] Second, scholars simply explain RICO.[6] Third, scholars

2. *See Origins of the Mafia*, HISTORY, http://www.history.com/topics/origins-of-the-mafia (last visited May 23, 2016) (outlining the history of the American Mafia).

3. *See* United States v. Elliot, 571 F.2d 880, 902–03 (5th Cir. 1978) (explaining that the RICO statute has created "a substantive offense which ties together. . .diverse parties and crimes") (citing Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 590 (2007)); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerald A. Lynch*, 88 COLUM. L. REV. 774, 797–99 (1988). RICO allows the government to piece together numerous distinct offenses committed by distinct defendants, without even having to prove the existence of a conspiratorial agreement as required by traditional conspiracy law. *See Elliot*, 571 F.2d at 902. The "enterprise" element of RICO allows this government "piecing" of evidence to punish even the mere agreement to participate in an enterprise that engages in a pattern of criminal acts. *See* Goldsmith, *supra*.

4. *See generally* Jan Fox, Note, *Into Hell: Gang-Prostitution of Minors*, 20 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 591, 611–16 (2014) (arguing RICO may be a useful tool to prevent youth gangs from engaging in the promotion of prostitution).

5. *See generally* Kendal N. Smith, Comment, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 784–91

discuss the application of RICO in the civil litigation context.[7] This Article takes a different approach. First, this Article reviews the historical background of organized crime in America. The first section includes: the initial efforts to combat organized crime; the Organized Crime Control Act of 1970; the Racketeer Influenced and Corrupt Organizations (RICO) Act; the Original RICO enterprise, i.e., the Genovese Crime family; and a brief description of the various criminal RICO statutory provisions.

This Article next explores the concept of the RICO enterprise through three major cases, which have altered the scope of RICO's application. Finally, this Article surveys three types of statutory interpretation, explains the expansion of the RICO statute, and discusses the most rational method of statutory interpretation to apply to the RICO statute.

## II. THE HISTORICAL BACKGROUND OF ORGANIZED CRIME

### A. ORIGINAL INTENT TO COMBAT ORGANIZED CRIME

While many Americans were unaware of the growing problem of organized crime, municipalities across America urged the federal government to support local efforts to combat organized crime.[8] In response, Senate Resolution 202 was passed in 1950, which established the Special Committee on Organized Crime in Interstate Commerce, "the Kefauver committee," to determine whether organized crime was infiltrating into or operating in interstate commerce. If it was, the

(2011) (explaining the advantages of RICO in the prosecution of human trafficking cases).

6. *See generally* Ross Bagley, Dorian Hurley & Peter Mancuso, *Racketeer Influenced and Corrupt Organizations*, 44 AM. CRIM. L. REV. 901, 902–04 (2007) (discussing RICO prosecutions for white collar crimes, the elements of a RICO offense, potential defenses to RICO prosecutions, criminal penalties for RICO violations, civil RICO, and several recent developments in this area of the law); Amy Franklin, Lauren Schorr & David Shapiro, *Racketeer Influenced and Corrupt Organizations*, 45 AM. CRIM. L. REV. 871 (2008) (discussing RICO prosecutions for white collar crimes, the elements of a RICO offense, potential defenses to RICO prosecutions, criminal penalties for RICO violations, civil RICO, and several recent developments in this area of the law).

7. *See generally* Benjamin M. Daniels, Note, *Proximately Anza: Corporate Looting, Unfair Competition, and the New Limits of Civil RICO*, 85 WASH. U. L. REV. 611, 611–15 (2007) (discussing new caselaw threatening civil RICO); Daniel Hoppe, Comment, *Racketeering After Morrison: Extraterritorial Application of Civil RICO*, 107 NW. U.L. REV. 1375, 1378–83 (2013) (providing an overview of civil RICO), Jacob Poorman, Comment, *Exercising the Passive Virtues in Interpreting Civil RICO "Business or Property"*, 75 U. CHI. L. REV. 1773, 1773–75 (2008) (criticizing the effort to define "business and property" under civil RICO).

8. SPECIAL COMMITTEE ON ORGANIZED CRIME IN INTERSTATE COMMERCE, 81ST CONG., A HISTORY OF NOTABLE SENATE INVESTIGATIONS 1 (1951) (citing Harold Hinton, *Senate Fight Seen over Crime Hunt*, N.Y. TIMES, April 13, 1950, at 21).

committee was to identify those engaged in such activities.[9]

During his tenure as an Assistant United States Attorney, Samuel Alito stated that the "[e]nactment of RICO legislation culminated four decades of congressional efforts to combat organized crime."[10] During the first ten years of the enactment of the RICO statute, the entire federal government prosecuted fewer than twenty RICO cases per year, which then jumped to over 100 per year since 1982.[11] The two goals of the RICO statute were to criminally prohibit the membership of individuals in organized crime and "to stop organized crime's infiltration of legitimate businesses."[12] RICO was derived from decades of presidential crime commissions that followed the attacks on organized crime during the Prohibition-era.[13] After the federal government outlawed prohibition, organized crime moved into the realm of extortion, labor racketeering, and gambling.[14] Facing the threat of communism, Congress wanted to prohibit powerful organized crime families from harming the United States.[15]

Prior to the 1960's, J. Edgar Hoover denied the existence of the Mafia. Although the organized crime problem in America was rising, Hoover believed it was mainly "gangs of 'hoodlums' and 'gangsters[.]'"[16] This was the belief until New York state troopers uncovered the national Mafia-leader conference, called the Apalachin conclave, in 1957.[17] Hoover and Attorney General Robert F. Kennedy set out to combat organized crime.[18]

Subsequently in 1963, Joe Vilachi[19] opened Americans' eyes when he

9. S. Res. 202, 81st Cong., at 1–2 (1950) (enacted).

10. SAMUEL ALITO, JR. ET AL., THE RICO RACKET 1 (Gary L. McDowell ed. 1989).

11. *Id.* at 11.

12. *Id.* at 3.

13. *See Mafia in the United States*, HISTORY, http://www.history.com/topics/mafia-in-the-united-states (last visited May 23, 2016) (stating RICO was created in order to convict those involved in organized crime).

14. ALITO, *supra* note 10, at 1.

15. *See* Hobbs Anti-Racketeering Act, Pub. L. 79–486, 60 Stat. 420 (1946) (explaining that the Hobbs Act was enacted to insulate intrastate commerce in America from the harmful effects of organized crime's racketeering, such as extortion to further political corruption).

16. THE FBI: A COMPREHENSIVE REFERENCE GUIDE 67, 120 (Athan G. Theoharis et al. eds., 1999) (highlighting Hoover's embarrassment for publicly denying the existence of the Mafia).

17. *See id.* at 119–20 (explaining how New York State Police Sergeant Edgar Croswell discovered an abundance of organized crime figures as a result of a suspicious sighting he observed of black limousines approaching the village of Appalachian).

18. *See id.* at 67 (discussing Hoover's efforts to combat organized crime, which, in turn, caused Kennedy to intensify his efforts against organized crime).

19. *See id.* at 68 (detailing how Joseph Vilachi, a Mafia soldier in the Genovese crime

publicly testified before the Senate Permanent Subcommittee on Investigations hearing on organized crime and narcotics regarding the Mafia.[20] For six days, Vilachi set out the Mafia's structure[21] and explained the organization's national reach, including its twelve-man leadership commission.[22] Though Vilachi's week-long testimony only led to one prosecution, it brought awareness to the growing threat of organized crime in America.[23] Although there were no immediate criminal prosecutions, the FBI created the Top Hoodlum program, which was implemented to identify the top ten Mafia leaders in each region.[24] The FBI officials independently decided to unlawfully bug locations in which the Mafia held their meetings; therefore, none of the evidence gathered could be used at trial.[25]

The President's Commission on Law Enforcement and Administration of Justice, also called the Katzenbach Commission,[26] was established by President Lyndon B. Johnson in 1965, through an Executive Order to analyze crime sources and the adequacy of law enforcement systems to combat such crime.[27] In 1967, the Katzenbach Commission reported that there was an enormous need for federal assistance to combat all types of crime at the state level.[28]

In April of 1969, President Johnson addressed the House of

family turned FBI informant, gave daily accounts to FBI Agent James Flynn). Vilachi introduced the government to the phrase "La Cosa Nostra" that was used by insiders to describe the Mafia. *Id.*

20. *See id.* at 67 (highlighting how Valachi's testimony made the public at large realize the national character that organized crime possessed and, as such, encouraged the FBI's initiative to combat organized crime).

21. *See id.* at 68 (explaining the "capos" were the top ranking bosses, and listed them by name).

22. *See* THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 16, at 68; *see also* Robert F. Kennedy, Att'y Gen., Dep't of Justice, Statement to the Permanent Subcommittee on Investigations of the Senate Government Operations Committee 3 (1963) (outlining the FBI's findings based on the testimony provided by Valachi), https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/09-25-1963.pdf.

23. *See* THE FBI: A COMPREHENSIVE REFERENCE GUIDE, *supra* note 16, at 68 (mentioning that the FBI's ability to prosecute more than one criminal case was limited due to the FBI's use of wiretaps).

24. *See id.* (mentioning that the program not only identified the top ten Mafia leaders in each region, but also monitored these Mafia leaders).

25. *See id.* (noting that these unlawful wiretap procedures were conducted without informing Attorney General Rogers or even seeking his approval to pursue such procedures).

26. *See* NAOMI MURAKAWA, THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA 82 (2014).

27. Exec. Order No. 11,236, 30 Fed. Reg. 9349 (July 23, 1965) (establishing the President's Commission on Law Enforcement and Administration of Justice), http://www.presidency.ucsb.edu/ws/?pid=105658.

28. *See* MURAKAWA, *supra* note 26, at 82.

Representatives in a message regarding the epidemic of organized crime in America.[29] He explained that these "criminal cartels" supported themselves through economic monopolies created by their engagement in illicit gambling, narcotics trafficking, and loan sharking.[30] Further, these criminal organizations promoted street level crime and penetrated and corrupted labor unions through intimidation, torture, bribery, and retaliation.[31] These criminals undermined the democratic principles of decency in regard to other members of society, as they targeted anyone and anything that could make them a penny.[32] President Johnson set out to combat organized crime by gathering together the federal, state, and local governments to a prepare and implement a long-term plan of action.[33]

The Katzenbach Commission reasoned that organized crime continued to flourish mainly due to problems in the procedure of "evidence-gathering."[34] For example, members of the public were unwilling to report criminal acts committed by organized crime, either because they did not want to incapacitate their supplier, or because they were afraid of the consequences of cooperating with law enforcement.[35] Additionally, any informants the government exploited were tortured and then murdered to dissuade others from informing.[36] Those who slipped through the cracks and actually provided the government with information remained anonymous and refused to testify.[37] If the cases made it to trial, the organized crime groups would bribe or terrorize the judge and members of the jury.[38]

Beyond the witness problem came the problem of actually obtaining physical evidence. Street-level bookies did not maintain written records, and main gambling offices moved around to prevent law enforcement from gathering sufficient probable cause to obtain a search warrant.[39] Further, these criminal organizations would use devices to circumvent the normal

29. *See* S. REP. NO. 91-617, at 35 (1969) (citing H.R. DOC. No. 91-105, 91st Cong., 1st sess. at 1–2 (1969)).

30. *See id.*

31. *See id.*

32. *See id.* at 35–36.

33. *See id.* at 43.

34. *See id.* at 44. Also contributing to the growth of organized crime was a "lack of resources, lack of coordination, lack of public and political commitment, and failure to use available criminal sanctions." *Id.*

35. *See* S. REP. NO. 91-617, at 44 (1969).

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

recording method of telephone systems.[40] Additionally, the lack of technological advances in the 1960s meant that members of organized crime groups could simply destroy all incriminating documents as soon as officers knocked and announced but before the officers could legally enter the premises.[41] Organized crime won the fight; not a single member of the notorious Mafia Family had been touched by law enforcement.[42]

President Johnson authorized a budget increase to combat organized crime through wiretapping, a "Racket Squad" based in New York and nationwide anti-racketeering offices to facilitate cooperation with the Department of Justice organized crime investigations, and extensive training for state and federal law enforcement.[43] To further these efforts, state and local law enforcement were encouraged to exchange information, accept training seminars from the Department of Justice, create statewide organized crime task forces, and promote awareness in communities affected by organized crime.[44]

After implementing the Organized Crime Control Act of 1970 and the Racketeer Influenced and Corrupt Organizations (RICO) Act, Congress further extended RICO by implementing the Comprehensive Crime Control Act of 1984,[45] the Anti-Terrorism and Effective Death Penalty Act of 1996,[46] and the Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety (SAFE DOSES) Act of 2012.[47]

## B. THE ORGANIZED CRIME CONTROL ACT OF 1970

The Organized Crime Control Act of 1970 ("the Organized Crime Control Act") was enacted to combat organized crime which entailed loan

40. *See id.*
41. S. REP. NO. 91-617, at 44–45 (1969).
42. *See id.* at 45.
43. *See id.*
44. *See id.* at 46.
45. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 201, 98 Stat. 1976, 2136, 2143 (1984) (expanding RICO "racketeering activities" to include distributing obscene material and non-reporting of foreign currency and transactions).
46. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 433, 110 Stat. 1214, 1274 (1996) (amending 18 U.S.C. § 1961(1)); *see S.735 – Antiterorism and Effective Death Penalty Act of 1996*, CONGRESS.GOV,https://www.congress.gov/bill/104th-congress/senate-bill/735/titles (last visited May 24, 2016) (noting that the Antiterrorism and Effective Death Penalty Act of 1996 was enacted, in part, from the Criminal Alien Deportation Improvements Act of 1995).
47. Strengthening and Focusing Enforcement to Deter Organized Stealing and Enhance Safety Act of 2012, Pub. L. No. 112-186, § 4, 126 Stat. 1427, 1428–29 (2012).

sharking, syndicate gambling, and drug trafficking.[48] The revenue generated from these illegal activities was being used by organized crime not only to infiltrate, but also to corrupt lawful businesses, labor unions, and local politics.[49] Congress believed that these groups would destabilize the economy, injure investors, prevent free trade and competition, hinder interstate and foreign commerce, endanger national security, and simply compromise the general welfare of America.[50] It was intended to be utilized as a governmental tool to fight organized criminality, as Congress believed organized crime was becoming more dangerous.[51]

The congressional intent behind the Organized Crime Control Act was to render both the criminal organizations and the criminal acts illegal, as they drained billions of dollars from the American economy each year.[52] Congress believed there was a need to implement a prosecutorial tool to bring down organized crime because the available tools were unreasonably limited in both bearing and scope.[53] Congress *explicitly* noted that the purpose of the Organized Crime Control Act was to eradicate organized crime in America through the implementation of stronger prosecutorial tools in the "evidence-gathering process."[54] Specifically, Congress intended to combat organized crime by creating "penal prohibitions," implementing enhanced criminal sanctions, and providing tools to the government to combat groups participating in organized crime.[55]

### C. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT (RICO)

Under Title IX of the Organized Crime Control Act of 1970, Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO")[56] to eliminate the infiltration of racketeering[57] and organized crime into legitimate businesses[58] that operated in interstate commerce.[59] RICO broadened the scope and impact of the Organized Crime Control Act

48. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).
49. *See id.*
50. *See id.*
51. *See id.*
52. *See id.* at 922–23.
53. *See id.*
54. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).
55. *See id.* at 923
56. *Id.* § 901(a), 84 Stat. at 941.
57. *See* United States v. Irizarry, 341 F.3d 273, 312 n.7 (3d Cir. 2003).
58. *See* Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 990 (8th Cir. 1989).
59. S. REP. NO. 91-617, at 76 (1969).

and allowed prosecutors to charge individuals who used an enterprise to conduct patterns of racketeering activity.[60] In implementing RICO, Congress intended the courts to liberally construe the statute in order to effectuate the intention of combating organized crime.[61] Specifically, the Court held that when examining RICO's legislative history, it was evident that Congress intended to provide government prosecutors with a new weapon of "unprecedented scope" to combat organized crime and its economic sources.[62]

The criminal RICO statute allows prosecutors to seek elevated sentences and seize proceeds of illegal activity.[63] The RICO statute was shaped from anti-trust statutes[64] because racketeering activity and enterprises were somewhat unknown to the common law system.[65] Congress drafted RICO in a broad form in order to encompass many types of criminal acts because many types of criminal perpetrators were to be targeted.[66] Congress perceived a need to attack organized crime; therefore, it adopted a broader statute that focused on, but was not limited to, organized crime.[67] Some argue that Congress wanted the courts to liberally interpret the RICO statute.[68] While the RICO statute was drafted in a broad manner, the intention behind RICO was to target a variety of activities conducted by the families of organized crime not to expand RICO to punish individuals who associate with an organization that had a criminal purpose.[69]

60. *See* G. Robert Blakey, *Time-Bars: RICO—Criminal and Civil—Federal and State*, 88 NOTRE DAME L. REV. 1581, 1594–95 (2013).

61. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

62. Russello v. United States, 464 U.S. 16, 26 (1983).

63. 18 U.S.C. § 1963 (2009). A person who violates this statute is subject to fines and imprisonment up to life if the violation is based on a racketeering activity that allows for the maximum penalty of life imprisonment. *Id.* § 1963(a). A person who violates this statute is also subject to the forfeiture of his or her real and personal property that was derived from violation of the statute. *Id.* § 1963(a)–(b).

64. *See* Blakey, *supra* note 60, at 1604 ("antitrust statutes protect [Americans] against collusion; RICO protects [Americans] against violence and fraud in the market."); *see also* Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359–60 (1933) (stating that the purpose of antitrust statutes, such as the Sherman Anti-Trust Act, is to protect the public and detect and prevent all efforts to unduly restrain the free path of interstate commerce).

65. Agency Holding Corp. v. Malley-Duff & Assocs., Inc., 483 U.S. 143, 150 (1987).

66. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 248, 248–49 (1989).

67. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 260 (1994).

68. Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947 (1970).

69. *See* Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 526 (1985) (Powell, J., dissenting).

## D. THE ORIGINAL RICO ENTERPRISE

The original enterprise that the criminal RICO statute targeted was the mafia—"La Cosa Nostra"—mainly comprised of the Genovese crime family.[70] The Genovese Family was the most influential and profitable of the five organized crime families that made up "the mafia."[71] This "family," as it called itself, was not only located in New York, but also in Massachusetts, Florida, Connecticut, and New Jersey.[72]

As expected in an organized crime family, the structure of the Genovese Family was formalistic.[73] This is the type of group RICO intended to combat. Normally, the Genovese Family consisted of around two hundred official members, also known as "good fellas" or "soldiers."[74] In order to become an official member, one had to be of Italian descent and possess the ability to engage in violent acts and earn money from criminal activity.[75] Next in the hierarchy came the "Captains," followed by the most powerful "Bosses" who controlled the organization.[76] In addition to these official members, the Genovese Family had hundreds of what were known as "associates," or non-official members that committed criminal acts to benefit the Family.[77]

Other than New York, each major city housed only one Family to maximize the group's profits and safeguard the leaders from law enforcement action.[78] Unlike criminal street gangs, these Families continued to operate even if their membership pool transformed because they maintained a structured hierarchy with set positions.[79] For instance, criminal street gangs lack leadership and resemble a loose network of friends.[80] However, the leadership structure of La Cosa Nostra in Boston,

70. *See* S. REP. NO. 91-617, at 39 tbl.1 (1969); *see also* Brief for the United States of America at 6, United States v. Arillotta, 529 F. App'x 81 (2d Cir. 2013) (Nos. 11-3821(L), 11-3822(con), 11-4049(con)), 2013 WL 210410, at *6.

71. Brief for the United States of America, *supra* note 70, at 6.

72. *Id.*

73. *See id.* at 6–7; *see also* S. REP. NO. 91-617, at 36 (1969) (noting that the structure of the organized crime families in New York City closely resembled the Sicilian Mafia).

74. *See* Brief for the United States of America, *supra* note 70, at 6; *see also* S. REP. NO. 91-617, at 36 (noting that then FBI Director J. Edgar Hoover estimated that at one point the Mafia had 3,000 to 5,000 members, with 2,000 members located in New York).

75. Brief for the United States of America, *supra* note 70, at 6.

76. *See id*. at 6–7.

77. *See id.* at 7.

78. *See* S. REP. NO. 91-617, at 36 (1969).

79. *See id.*

80. *See* Deborah Lamm Weisel, *The Evolution of Street Gangs: An Examination of Form and Variation*, *in* RESPONDING TO GANGS: EVALUATION AND RES. 33, (2002) (reporting that

Massachusetts consisted of a Boss, Underboss, Consigliere, and Capodecina.[81] Under these leaders came the "soldati" who actually operated the "illicit enterprise, using their employees [as] the street level personnel of organized crime."[82]

The President's Commission on Law Enforcement and Administration of Justice ("the Crime Commission")[83] explicitly differentiated organized crime from youth gangs and even professional criminals.[84] The Crime Commission categorized organized crime as "a unique form of criminal activity," meaning the nature of organized crime was beyond that of any other type of crime.[85] It noted that distinguishing characteristics existed in organized crime, but did not exist in other criminal groups. Specifically, organized crime employed "enforcers" and "corruptors."[86] The "enforcer" acted as the silencer, killing disobedient members, police cooperators, and enemies.[87] He acted in a deliberate, calculated, and sophisticated manner.[88] His position was necessary to maintain discipline within the organization and ensure orderliness in business dealings.[89] The "corruptor" established working relationships

from the participating police officers, thirty percent stated that typical gangs had no formal form of leadership while thirty-seven percent said typical gangs did have a form of leadership).

81. *See* S. REP. NO. 91-617, at 36–37.

82. *See id.* at 40.

83. Exec. Order No. 11,236, 30 Fed. Reg. 9349 (July 23, 1965) (describing the establishment and functions of the President's Commission on Law Enforcement and Administration of Justice). The Crime Commission was established by President Lyndon B. Johnson for the purpose of conducting an investigation regarding the cause of crime in America and providing a report on the adequacy of the criminal justice system, including recommendations for actions to be taken by all levels of government and private persons and organizations to prevent, reduce, and control crime and increase respect for the law. *Id.*

84. *See* PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 191–92 (1967) [hereinafter PRESIDENT'S COMMISSION REPORT] (reporting on the findings of the Crime Commission's examination of the various facets of crime and law enforcement in the United States); *see also* S. REP. NO. 91-617, at 41.

85. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; *see also* S. REP. NO. 91–617, at 41.

86. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193 (explaining that the two unique characteristics of organized crime are enforcement and corruption); *see also* S. REP. NO. 91–617, at 41 (describing the enforcement and corruption characteristics of organized crime).

87. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; *see also* CHICAGO CRIME COMM'N, ANNUAL REPORT 131–33 (1969) (reporting that between 1919 and 1969, over 1,000 killings occurred and almost all remained unsolved); S. REP. NO. 91–617, at 41 (citing CHICAGO CRIME COMM'N, ANNUAL REPORT, *supra*, at 131–33).

88. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 17; *see also* S. REP. NO. 91–617, at 41.

89. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; *see also* S. REP. NO. 91–617, at 41.

with influential individuals,[90] such as politicians, to protect the Family.[91] In organized crime, these two positions fell within the hierarchy of the Family; however, in other types of crime, no such positions existed.[92]

Through its incorporation of these various positions, the Family essentially became a form of government.[93] In addition to the enforcer and the corruptor positions, the Family had a "Commission," which was the ruling body for the criminal organization.[94] It was a group of nine to twelve men from the most influential families that made up La Cosa Nostra,[95] and had the ability to influence all twenty-four crime families.[96] The Commission was based on hierarchical standards in which the wealthier and more powerful members had more respect.[97] The five families in New York held the most power; thus, New York became the headquarters of the entire Mafia organization.[98]

## E. THE CRIMINAL RICO STATUTE

The Racketeer Influenced and Corrupt Organizations (RICO) Act was implemented to combat the racketeering activities of organized crime groups. The main objective of the RICO Act is to punish racketeering activity, specifically a pattern of racketeering activity.[99] Racketeering is defined as the obstruction, delay, or affect of commerce through actual, attempted, or conspired extortion, robbery, or physical violence.[100]

Under the criminal RICO Act, it is unlawful to: (1) receive or invest

90. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; *see also* S. REP. NO. 91–617, at 41. Members of La Cosa Nostra successfully had their cases dismissed or obtained acquittals over twice as often as other members of society. S. REP. NO. 91–617, at 42. In addition, 17.6% of La Cosa Nostra members had charges against them dismissed over five times each. *Id.* at 43.

91. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; S. REP. NO. 91-617, at 41.

92. PRESIDENT'S COMMISSION REPORT, *supra* note 84, at 193; S. REP. NO. 91-617, at 41 (distinguishing organized crime families from a criminal street gang where positions may or may not be assigned to members). It is also unlikely that gangs recruit or train members to be enforcers or corruptors. PRESIDENT'S COMMISSION REPORT, *supra* note 85, at 193.

93. *See* PRESIDENT'S COMMISSION REPORT, *supra* note 85, at 193.

94. *See id.*

95. S. REP. NO. 91-617, at 41. In 1960 Vito Genovese, Carlo Gambino, Joseph Profaci, Joseph Bonnano, Thomas Luchese, Stefano Magaddino, Angelo Bruno, Joseph Zerilli, and Salvatore Giancana made up the La Cosa Nostra Commission. *Id.* at 42.

96. PRESIDENT'S COMMISSION REPORT, *supra* note 85, at 195.

97. *See id.*

98. *Id.*

99. 18 U.S.C. § 1961 (2013).

100. *Id.* § 1951.

income derived from a pattern of racketeering activity;[101] (2) acquire or maintain an enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity;[102] (3) employ or associate with an enterprise engaged in interstate or foreign commerce through a pattern of racketeering activity;[103] or (4) conspire to violate any of the previously mentioned statutory RICO provisions.[104]

Racketeering statutes are drafted as general intent, rather than specific intent statutes,[105] meaning the government would only be required to prove that a defendant intended to obtain property, rather than be required to prove that a defendant intended to affect commerce.[106] Similarly, RICO does not require the government to substantiate a *mens rea* of anything more than the *mens rea* of the predicate acts.[107] Therefore, the *mens rea* element would be satisfied so long as the prosecution proves that the defendant was aware the predicate act was illegal.

"Racketeering activity" is defined by a list of federal and state statutory crimes such as robbery, extortion, fraud, and murder.[108]

The term "enterprise" is one of the more problematic RICO terms, because it 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."[109]

A "pattern of racketeering activity" requires the government to demonstrate a minimum of two acts of racketeering activity—one occurring within the last ten years following the commission of a prior act of racketeering activity, but excluding periods of incarceration.[110] The government must prove that the two predicate acts were continuous and interrelated,[111] rather than two isolated acts of racketeering activity.

It is important to note that a predicate act is not necessarily unlawful or tortious; instead, over the years it has become seemingly unlawful

101. *Id.* § 1962(a).
102. *Id.* § 1962(b).
103. *Id.* § 1962(c).
104. *Id.* § 1962(d).
105. *See* United States v. Furey, 491 F. Supp. 1048, 1061 (E.D. Pa. 1980).
106. *See, e.g.*, *id.* at 1062.
107. Bruner Corp. v. R.A. Bruner Co., 133 F.3d 491, 495 (7th Cir. 1998); *see also* United States v. Baker, 63 F.3d 1478, 1493 (9th Cir. 1995).
108. 18 U.S.C. § 1961(1).
109. *Id.* § 1961(4).
110. *Id.* § 1961(5).
111. Sedima, S.P.R.L. v. IMREX Co., 473 U.S. 479, 496 n.14 (1985).

because it is included as a criminal offense under Title 18.[112] Further, although RICO requires a defendant to commit two predicate racketeering acts, the defendant need not be convicted of each offense before RICO may be charged.[113] As such, the government is free to use against the defendant offenses for which he was acquitted.[114]

Criminal RICO convictions allow the government to utilize criminal forfeiture proceedings that require a defendant convicted of RICO to forfeit "any interest the person has acquired or maintained in violation of [18 U.S.C. §] 1962," any interest in an enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, or in violation of section 1962; and any "proceeds" from racketeering activity.[115] The purpose of this provision is to remove the resources and assets of the criminal enterprise to further combat organized crime.

Under 18 U.S.C. § 1963, Congress set out criminal sanctions for a violation of the RICO statute indicating that a violator "shall be fined . . . or imprisoned not more than 20 years," or for life if the violation includes a predicate act with a life imprisonment maximum.[116] During sentencing, a judge may consider conduct for which the defendant has been acquitted, so long as that conduct was proven by a preponderance of the evidence.[117] Essentially, this suggests that even if a jury finds that the government did not prove that the predicate acts constituted a pattern of racketeering activity beyond a reasonable doubt, a judge may find that the predicate acts were related by a preponderance of the evidence, and sentence the defendant based on her finding.

## III. THE EVOLUTION OF THE RICO ENTERPRISE

The RICO Act was passed to prevent the infiltration of organized crime families into legitimate businesses in America by means of extortion, bribery, and robbery. How then, did this statute become a prosecutorial tool to punish criminal street gangs and illegitimate businesses?

When Congress drafted the RICO statute, it intended to target the Mafia by implementing prohibitions on the receipt or investment of income obtained through a pattern of racketeering activity.[118] Courts today,

112. *See* Beck v. Prupis, 529 U.S. 494, 505–06 (2000).
113. BancOklahoma Mortg. Corp. v. Capital Title Co., 194 F.3d 1089, 1102 (10th Cir. 1999).
114. United States v. Farmer, 924 F.2d 647, 649 (7th Cir. 1991).
115. 18 U.S.C. § 1963(a) (2009).
116. *Id.*
117. *See* United States v. Watts, 519 U.S. 148, 157 (1997).
118. *See* DAVID B. SMITH & TERRANCE G. REED, CIVIL RICO § 5.02[1] n.4 (1987 & Supp.

however, read the statute broadly, finding no need to prove that the defendant used income that was directly derived from such an illegal act.[119]

Under the RICO statute, one of the most important elements to be substantiated by the government is the existence of an enterprise.[120] According to the Supreme Court, an enterprise is either "something acquired through the use of illegal activities or by money obtained from illegal activities,"[121] or a "vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity."[122] Yet, § 1961(4) defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[123] Therefore, labor unions,[124] business entities,[125] and associations-in-fact[126] all fall into the categorization of an enterprise.

How far should courts extend the meaning of the language in the RICO statute that an enterprise includes a "group of individuals associated in fact although not a legal entity"?[127] The evolution of the RICO enterprise is punctuated by three important Supreme Court cases. First, in *United States v. Turkette*, the Supreme Court held that RICO should extend beyond legitimate businesses to include enterprises engaged entirely in illegitimate activity.[128] Prior to *Turkette*,[129] federal courts were not in agreement regarding whether an enterprise could include both legitimate and illegitimate enterprises. Second, in *Boyle v. United States*, the Supreme Court held that a RICO enterprise must have a structure to engage in racketeering activity, but nothing more.[130] Finally, in *Reves v. Ernst & Young*, the Supreme Court held that RICO defendants must have engaged

1997).

119. *See* United States v. Vogt, 910 F.2d 1184, 1194 (4th Cir. 1990).

120. *See* United States v. Pelullo, 964 F.2d 193, 211 (3d Cir. 1992).

121. Nat'l Org. of Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994) (referencing an enterprise under 18 U.S.C. § 1961(a) or (b) because the enterprise is the victim of racketeering activity).

122. *Id.* at 259 (referencing an enterprise under 18 U.S.C. § 1962(c)).

123. 18 U.S.C. § 1961(4) (2013).

124. *See* United States v. Dist. Council of N.Y. City & Vicinity of United Broth. of Carpenters & Joiners of America, 778 F. Supp. 738, 758 (S.D.N.Y. 1991).

125. *See* United States v. Blinder, 10 F.3d 1468, 1473 (9th Cir. 1993).

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

127. 18 U.S.C. § 1961(4) (2013).

128. *See* United States v. Turkette, 452 U.S. 576, 580–81 (1981).

129. *See id.*

130. Boyle v. United States, 556 U.S. 941, 945 (2009).

in the operation or management of an enterprise.[131] These three cases demonstrate the transformation from a criminal statute aimed at combatting organized crime families to a criminal statute aimed at prosecuting a greater number of crimes.

## A. UNITED STATES V. TURKETTE

RICO's main purpose was to protect existing American markets[132] by tackling the "infiltration of legitimate businesses by organized crime," which included both legitimate and illegitimate criminal organizations.[133] In *United States v. Turkette*, the Supreme Court considered RICO's application to an entirely criminal enterprise.[134] The defendant, Turkette, argued that by definition, a "group of individuals associated in fact" should be read to include only legitimate enterprises because the preceding terms specifically referred to a legitimate legal entity.[135] Refusing to follow this argument, the Court noted that this reasoning did not apply. It was clear to the Court that the statute was intended to include criminal enterprises[136] because Congress placed no limitations in the statute regarding the scope of the enterprise.[137]

The Court, therefore, held that two types of enterprises fall within the RICO statute: (1) legitimate enterprises, and (2) associations only engaged in criminal endeavors.[138] As to the first, the Court held that a legal entity, such as a corporation or partnership, constituted a RICO enterprise.[139] As to the second, the Court held that a "group of persons associated together for a common purpose of engaging in a course of conduct" was an enterprise for RICO purposes.[140]

Furthermore, RICO enterprises could be proven by simply adducing evidence that demonstrates a formal or informal association that is ongoing, along with evidence that those participating in the organization operate as a

131. Reves v. Ernst & Young, 507 U.S. 170, 185 (1993).
132. *See Turkette*, 452 U.S. at 590.
133. *See id*. at 591.
134. *See generally id.* at 576.
135. *Id.* at 580–81.
136. *See id.* at 580–81.
137. *Id.* at 581.
138. *See generally Turkette*, 452 U.S. at 576; United States v. Church, 955 F. 2d 688, 697 (11th Cir. 1992).
139. *See Church*, 955 F. 2d at 697.
140. *Id.* at 698 (quoting *Turkette*, 452 U.S. at 581–83).

"continuing unit."[141] Yet, there is no enterprise under RICO if the so-called "enterprise" is merely a name for the crimes that the defendants committed, or for the defendant's agreement to commit these crimes that was separately charged from the conspiracy count.[142]

To demonstrate *Turkette's* impact, consider the Eleventh Circuit's expansive reading of RICO. The Eleventh Circuit has held that "a group of persons who had committed a variety of unrelated offenses with no agreement as to any particular crime could be convicted of a RICO offense, because they were associated for the purpose of making money from repeated criminal activity."[143] In this Circuit, therefore, the government can prove the existence of a RICO enterprise by providing evidence that the organization was devoted to making money from repeated criminal activity because this evidence serves as proof that the "enterprise" has a "common purpose of engaging in a course of conduct."[144] The Eleventh Circuit also refused to require the members of enterprise to participate "throughout the life of the enterprise" in order to satisfy the "continuing unit" element under *Turkette*.[145] Its only requirement for a RICO enterprise was that there be a group of people who formally or informally associated to purposefully conduct illegal activity.[146]

Consider, also, the Fifth Circuit's observation that the RICO statute supersedes many of the legal policies traditionally imposed to combat concerted criminal undertakings by allowing the government to bypass multi-conspiracy doctrine restrictions and jointly prosecute defendants.[147] This judicial decision has led many to believe that RICO has become a "super-conspiracy" statute.[148] This is so because unlike traditional concepts of evidence law that exclude from trial the criminal conduct of someone other than the defendant,[149] racketeering charges allow the jury to rely on

141. *Turkette*, 452 U.S. at 583.

142. *See id*.; United States v. Neapolitan, 791 F.2d 489, 499–500 (7th Cir. 1986) *abrogated by* United States v. Tello, 687 F. 3d 785 (7th Cir. 2012). *But see* United States v. Mazzei, 700 F.2d 85, 89 (2nd Cir. 1983) (depicting the Second Circuit's holding that a RICO charge was upheld where the so-called "enterprise" was, in essence, "no more than the sum of the predicate racketeering acts").

143. United States v. Cagnina, 697 F.2d 915, 920–21 (11th Cir. 1983).

144. United States v. Church, 955 F.2d 688, 698 (11th Cir. 1992).

145. United States v. Hewes, 729 F.2d 1302, 1317 (11th Cir. 1984).

146. *See id*. at 1311.

147. *See* United States v. Elliot, 571 F.2d 880, 900 (5th Cir. 1978).

148. Gerard E. Lynch, *The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 949 (1987).

149. *See id.* at 944 (explaining that this evidence is excluded to ensure the jury decides whether a defendant is responsible based on what the evidence depicts regarding a specific

evidence of the defendant's criminal conduct as well as "evidence of the crimes of those with whom he is alleged to have thrown in his lot," because a finding of a RICO violation depends on the presentment of evidence that the defendant was engaged in a pattern of criminal activity "as part of [defendant's] association with a subculture of crime."[150]

## B. POST-TURKETTE

Following *Turkette*, federal circuit courts were split regarding whether an enterprise under the RICO statute required proof of an "ascertainable structure" that was "separate and distinct from that inherent in the pattern of racketeering activity."[151] While the government was supposedly required to prove the existence of an enterprise and a connection between that enterprise and a pattern of racketeering activity,[152] it has been widely recognized that evidence of a pattern of racketeering activity alone may be used to prove the existence of the enterprise.[153]

The majority of federal circuit courts have held that an association-in-fact enterprise must have "some sort of structure [to make] decisions, whether it be hierarchical or consensual," and that "[t]here must be some mechanism for controlling and directing the affairs of the group on an on going rather than ad hoc basis."[154] In *United States v. Riccobene*, the Third

criminal act).

150. *Id.*

151. Brief for Petitioner at 26, United States v. Myrick, (nos. 14-2766-cr), 2015 WL 4910729, at *26.

152. *Turkette*, 452 U.S. at 583.

153. A MANUAL FOR FEDERAL PROSECUTORS CRIMINAL RICO 18 U.S.C §§ 1961–1968, U.S. DEP'T OF JUSTICE (5th ed. 2009) at 67, 68.

154. *See* United States v. Riccobene, 709 F.2d 214, 222–24 (3d Cir. 1983); *see also* United States v. Tillette, 763 F.2d 628, 632 (4th Cir. 1985) (explaining that an enterprise must exist beyond what is necessary to only accomplish predicate crimes); Clark v. Douglas, 2008 WL 58774 at *4 (5th Cir. Jan. 4) (explaining that the RICO statute requires associates of an enterprise to operate as a "continuing unit" that exists with a "coherent decision-making structure"); United States v. Tocco, 200 F.3d 401, 425 (6th Cir. 2000) (explaining that the government provided sufficient evidence to establish a distinct and ascertainable structure through demonstrating the defendant's involvement in La Cosa Nostra); United States v. Neapolitan, 791 F.2d 489, 500 (7th Cir. 1986) (explaining that the Seventh Circuit believed Congress intended RICO to include only enterprises with an ascertainable structure that existed beyond just the pattern of racketeering activity); United States v. Bledsoe, 674 F.2d 647, 665 (8th Cir. 1982) (explaining that the government may prove an enterprise has an ascertainable structure by showing that the group has "an organizational pattern or system of authority" outside of what is required to commit the racketeering acts); Chang v. Chen, 80 F.3d 1293, 1298–99 (9th Cir. 1996); United States v. Sanders, 928 F.2d 940, 944 (10th Cir. 1991) (explaining that the government may demonstrate an ascertainable structure through proof that the enterprise "coordinated the commission of different

Circuit determined that it was unnecessary for the government to demonstrate that the enterprise had a role "wholly unrelated" to the acts of racketeering.[155]

## C. BOYLE V. UNITED STATES

Not all circuits agree that the enterprise must be distinct from the pattern of racketeering activity. Instead, a minority of courts have held that the government may prove an enterprise by presenting evidence that the formal or informal association is ongoing and those associated with it operate as a "continuing unit."[156] For example, the Second Circuit has upheld the application of RICO to an enterprise that "was, in effect, no more than the sum of the predicate racketeering acts."[157] In addition, the D.C. Circuit has held that while the same group of people engaged in repeated racketeering activity does not necessarily form an enterprise if there is no organization, the government can substantiate the organizational element through inferences from the pattern of racketeering activity.[158] Following the uncertainty of the federal circuit courts, the Supreme Court in *Boyle v. United States*,[159] settled the dispute as to whether a RICO association-in-fact enterprise requires proof of an "ascertainable structure" that is both "separate and distinct from that inherent in the pattern of racketeering activity"[160] by adopting the minority view that an enterprise

[racketeering activities] on an ongoing basis").

155. *See Riccobene*, 709 F. 2d at 223–24.

156. *Turkette*, 452 U.S. at 583; *see also* United States v. Patrick 248 F.3d 11, 18–19 (1st Cir. 2001) (explaining that the First Circuit would not give jury instructions that had the ascertainable structure requirement); United States v. Mazzei, 700 F.2d 85, 89 (2d Cir. 1983) (explaining that the Second Circuit did not interpret *Turkette* as requiring proof that the enterprise and the pattern of racketeering activity were independent of each other, so long as the government presented proof that satisfied both prongs); United States v. Bagaric, 706 F.2d 42, 55 (2d Cir. 1983) *abrogated by* National Organization For Women, Inc. v. Scheidler, 510 U.S. 249 (1994) (explaining that the Second Circuit does not need to examine an enterprise's structure, but rather look to the acts in which the group was engaged). United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1982) (explaining that the Eleventh Circuit did not believe the Supreme Court in Turkette required an enterprise to have a formalized and/or distinct structure); United States v. Hewes, 729 F.2d 1302, 1310 (11th Cir. 1984); United States v. Perholtz, 842 F.2d 343, 363 (D.C. Cir. 1988).

157. *Bagaric*, 706 F.2d at 55 (citing United States v. Mazzei, 700 F.2d 85, 88–89 (2d Cir. 1983)).

158. *Perholtz*, 842 F.2d at 367. The *Perholtz* court relied on the holding in *Turkette* that "recognized that the proof of the enterprise may 'coalesce' with the proof of the pattern, i.e., that the different conclusions may be inferred from proof of the same predicate act." *Id.* at 363.

159. Boyle v. United States, 556 U.S. 938 (2009).

160. Brief for Petitioner at 26, U.S. v. Myrick, (nos. 14-2766-cr), 2015 WL 4910729, at *26; *Boyle*, 556 U.S. at 940–41.

need not be distinct from the pattern of racketeering activity.[161]

In *Boyle*, the United States indicted Boyle and a group of "loosely affiliated" parties on RICO charges for their role in a string of bank thefts, involving preparation and planning for the criminal act, assembling the essential tools, and allotting responsibilities to each participant.[162] Boyle argued the government should be required to show that the "enterprise" in which he was associated had a structural hierarchy that committed a variety of crimes.[163] His view was rejected, however, because the Court believed the text of the RICO statute had no such requirement.[164] The Court held that although a RICO enterprise must have a structure, it need not be "an ongoing organization [with] a core membership that functions as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts."[165] Instead, the Court ruled that the structure required of an enterprise must include "a purpose, relationship among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[166]

Because Congress included no structural requirements in the RICO statute, the Court specifically noted that an enterprise need not have a hierarchy, chain of command, fixed roles, or appear as a business-like entity.[167] The Court stated that an enterprise exists even if the group simply engages in sporadic phases of activity followed by intervals of acquiescence, so long as it serves as a "continuing unit" and lasts long enough to engage in a "course of conduct."[168] The crimes committed during the course of conduct are not required to be "sophisticated, diverse, complex, or unique."[169]

The Court noted, however, that this does not mean that proof of a conspiracy provides proof of an enterprise because a RICO conspiracy requires both an enterprise and the commission of racketeering activity.[170] Although the Supreme Court settled the debate as to what constituted an enterprise, another dispute was still unsettled amongst the federal circuits courts regarding whether the government was required to demonstrate that

161. *Boyle*, 556 U.S. at 942.
162. *Id.* at 941.
163. *See id*. at 943.
164. *Id*. at 943–51.
165. *Id.* at 958.
166. *Id*. at 946.
167. *Boyle*, 556 U.S. at 939.
168. *Id.* at 948.
169. *Id.*
170. *Id*. at 950.

the defendant was engaged in the operation or management of the enterprise to be liable for the acts of that enterprise.[171]

## D. REVES V. ERNST & YOUNG

The Supreme Court in *Reves v. Ernst & Young*,[172] ruled that while RICO liability was not limited to those participants with a formal position within the enterprise, a defendant was not liable for a RICO violation unless he participated in directing the affairs of the enterprise itself.[173] The Court determined liability by examining whether the defendant took part in the operation or management of the enterprise.[174]

However, the Court also essentially eliminated the operational-managerial requirement by expanding RICO's reach to include those involved in an enterprise at a lower level.[175] The Court declined to specify the level of direction a defendant must provide to others in order to fulfill the operational-managerial requirement.[176] Though, the Court did specifically reject the proposition that the defendant was required to have *significant control* over the enterprise.[177]

Following the *Reves* decision, the majority of federal circuit courts have held that in order for a defendant to be liable for a RICO violation, he need not participate as a member of the controlling group, so long as he

171. *See* Bennett v. Berg, 710 F.2d 1361, 1364 (8th Cir. 1983); Yellow Bus Lines, Inc. v. Drivers, Chauffers & Helpers Local Union 639, 913 F.2d 948, 954, 956 (D.C. Cir. 1990). *But see* Bank of America National Trust & Savings Ass'n v. Touche Ross & Co., 782 F.2d 966, 970 (11th Cir. 1986) *abrogated by* Reves v. Ernst & Young, 507 U.S. 170 (1993). Before *Reves*, the Eighth Circuit and the D.C. Circuit adopted the "operation or management test." *Bennett*, 710 F. 2d 1361; *Yellow Bus Lines, Inc.*, 913 F. 2d 956. But the Eleventh Circuit unequivocally disregarded the requirement that the alleged defendant be in a position of operation or management within an enterprise. *Bank of America National Trust & Savings Ass'n*, 782 F. 2d 970.

172. Reves v. Ernst & Young, 507 U.S. 170, 184 (1993). *See generally* Napoli v. United States, 45 F.3d 680, 683 (2d Cir. 1995); United States v. Oreto, 36 F.3d 739, 750 (1st Cir. 1994); United States v. Starrett, 55 F.3d 1525, 1542 (11th Cir. 1995). While *Reves* was a civil RICO case, the operation or management test has been applied to criminal RICO cases by a majority of the circuits. *E.g.*, *Starret*, F. 3d at 1542.

173. *Reves*, 507 U.S. at 185.

174. *See id.* at 179 (referring to this inquiry as the "Operation or Management Test").

175. *Id.* at 184; *see also* United States v. Parise, 159 F.3d 790, 796 (3d Cir. 1998).

> We agree that liability under § 1962(c) is not limited to upper management . . . [because] [a]n enterprise is "operated" not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management. [It] might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

*Reves*, 507 U.S. at 184.

176. *See Reves*, 507 U.S. at 184.

177. *See id*. at 179.

intentionally undertakes activities that are associated with and promote the enterprise's operation or management.[178] The Sixth Circuit has held that a subordinate who knowingly fulfills the requests of his superiors is in a position of operation or management.[179] Similarly, the Fifth Circuit has held that a drug dealer who determines the resale quantities and prices of cocaine was an operational participant.[180] The Second Circuit even held that a defendant was liable for a RICO violation because "plainly he was not at the bottom of the management chain."[181] And, the Ninth Circuit has held that a defendant was a participant in the operation and management of an enterprise, the Mexican Mafia, when he acted as a messenger between gang members in prison and those on the street, and when he assisted in organizing criminal activities on behalf of the gang.[182]

Furthermore, in a 2012 Seventh Circuit ruling regarding a RICO conspiracy[183] which originated from a 1992 RICO conspiracy indictment,[184] the government alleged that members of the Chicago Outfit, a progeny of Al Capone's gang, committed nearly fifty years worth of racketeering offenses.[185] Upon affirmation of the co-conspirator's conviction, the ruling essentially permitted the government to convict enterprise subordinates for their roles in a RICO conspiracy.[186]

178. United States v. Urban, 404 F.3d 754, 769–70 (3d Cir. 2005); United States v. Grubb, 11 F.3d 426, 439 n.24 (4th Cir. 1993); United States v. Delgado, 401 F.3d 290, 297–98 (5th Cir. 2005); United States v. Maloney, 71 F.3d 645, 660–61 (7th Cir. 1995); United States v. Darden, 70 F.3d 1507, 1542–43 (8th Cir. 1995); United States v. Hurley, 63 F.3d 1, 8–9 (1st Cir. 1995) (explaining that defendants were liable because they were employees of an enterprise and helped conduct its illegal activities); United States v. Wong, 40 F.3d 1347, 1371–74 (2d Cir. 1994) (explaining that non-leader defendant gang members were liable for RICO violations); Baisch v. Gallina, 346 F.3d 366, 376 (2d Cir. 2003) (explaining that a defendant is liable if he has "discretionary authority" to follow orders from upper-level associates); United States v. Posada-Rios, 158 F.3d 832, 856 (5th Cir. 1998) (explaining that the defendant is not required to have decision-making authority to be liable for a RICO violation as long as he takes part in the operations of the enterprise); United States v. To, 144 F.3d 737, 747 (11th Cir. 1998) (explaining a defendant is liable for a RICO violation when he planned and committed a robbery).

179. United States v. Fowler, 535 F.3d 408, 418 (6th Cir. 2008).

180. United States v. Thompson, No. 99-41007, 2001 WL 498430, at *8 (5th Cir. Apr. 9, 2001).

181. United States v. Thai, 29 F.3d 785, 816 (2d Cir. 1994).

182. United States v. Shyrick, 342 F.3d 948, 986 (9th Cir. 2003).

183. United States v. Schiro, 679 F.3d 521, 524 (7th Cir. 2012).

184. United States v. Calabrese, 490 F.3d 575, 577 (7th Cir. 2007).

185. *Schiro*, 679 U.S. at 524.

186. *Id.* at 526.

## IV. THE MOVEMENT AWAY FROM CONGRESSIONAL INTENT

### A. THE MODERN RICO PROSECUTION

When RICO was enacted, organized crime was considered to encompass a group of individuals engaged in criminal activity, such as extortion, robbery, and bribery, which began to infiltrate the legitimate businesses of America. These groups had a national presence, established hierarchy, and substantial effect on law-abiding citizens. Today, the headline of the FBI's Organized Crime Page[187] exclaims, "It's not just the Mafia anymore."[188] The FBI has set out to "cripple these national and transnational syndicates with every capability and tool [they've] got."[189]

Originally, RICO was aimed at preventing the infiltration of legitimate interstate businesses by organized crime. However, courts have relied on the "liberally construed" language in the RICO statute to expand the enterprises targeted under the modern RICO net.[190] In *Sedima, S.P.R.L. v. IMREX Co.*, for example, the Supreme Court noted that RICO was not merely limited to typical "mobsters" or those engaged in organized crime, because legitimate enterprises also engaged in criminal activity.[191] Following this theory, the Court extended RICO to reach enterprises without a financial motive, such as anti-abortion groups.[192] Courts have held that RICO charges were not improper just because a gang lacked an "economic motive" or "financial purpose" when they committed crimes.[193]

A new wave of RICO prosecutions has begun to take shape because the Supreme Court held that a criminal enterprise consists of multiple categories of organized criminal behavior, including political corruption, complex white-collar crime schemes, and traditional "mafia-type" undertakings.[194] Courts have held that a defendant need not have an actual stake in the enterprise, so long as he or she assists the enterprise in

187. *Organized Crime*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/about-us/investigate/organizedcrime/overview (last visited Apr. 18, 2016)

188. *Id.*

189. *Id.*

190. *See* United States v. Turkette, 452 U.S. 576, 580 (1981) (explaining that the RICO statute has no defined restriction on what constitutes an enterprise).

191. Sedima, S.P.R.L. v. IMREX Co., 473 U.S. 479, 499 (1985).

192. Nat'l Org. for Women v. Scheidler, 510 U.S. 249, 261 (1994).

193. United States v. Nascimento, 491 F.3d 25, 42 (1st Cir. 2007); United States v. Muyet, 994 F. Supp. 501, 511 (S.D.N.Y. 1998).

194. United States v. Cauble, 706 F.2d 1322, 1330 (5th Cir. 1983).

accomplishing its unlawful goals.[195]

The characterization of an enterprise under the RICO statute has been expanded to include governmental entities,[196] motorcycle clubs,[197] labor unions,[198] marriages,[199] law firms,[200] and criminal street gangs.[201] According to the D.C. Circuit, the reach of the RICO statute is far greater than "the specific motivation of its authors."[202] The RICO statute is now used to prosecute Wall Street executives for securities fraud,[203] labor union leaders for personal pecuniary benefits,[204] a defendant who unlawfully sold motorcycle parts,[205] individuals who imported contraband cigarettes,[206] and even law enforcement officers who took part in wagering, drug dealing, and alcohol distribution schemes.[207]

To illustrate the expansive characterization of the "enterprise" under the RICO statute, consider the following four cases. In *United States v. Frumento*, the Third Circuit considered a RICO conviction arising from an agreement to import untaxed cigarettes into Pennsylvania using counterfeit tax stamps, where employees guaranteed a wholesale cigarette distributor "protection" through the use of their positions within the Pennsylvania Department of Revenue's Bureau of Cigarette and Beverage Taxes ("the

195. *See* United States v. Mokol, 957 F.2d 1410, 1417 (7th Cir. 1992) (explaining that a defendant can be associated with an enterprise by taking part in the completion of enterprise-related predicate acts).

196. United States v. Urban, 404 F.3d 754, 770 (3d Cir. 2005).

197. United States v. Starrett, 55 F.3d 1525, 1545 (11th Cir. 1995).

198. United States v. Cervone, 907 F.2d 332, 336 (2d Cir. 1990).

199. Am. Mfrs. Mut. Ins. Co. v. Townson, 912 F. Supp. 291, 295 (E.D. Tenn. 1995).

200. Handeen v. Lemaire, 112 F.3d 1339, 1349–50 (8th Cir. 1997); United States v. Console, 13 F.3d 641, 652 (3d Cir. 1993); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991).

201. *See* United States v. Rogers, 89 F.3d 1326, 1337 (7th Cir. 1996); United States v. Fernandez, 388 F.3d 1199, 1214–15 (9th Cir. 2004). In regard to criminal street gangs under RICO, twenty-four members of the Mexican Mafia, the largest international criminal street gang operating in Los Angeles, faced RICO charges for conspiring to aid and abet the distribution of drugs within the Los Angeles County Jail. *Fernandez*, 388 F.3d at 1214. During their imprisonment, the Mexican Mafia began to spread throughout the California prison system by threatening and intimidating members of less influential gangs. *Id.* at 1215–16. Because of their influence, the imprisonment of Mexican Mafia members actually allowed them to expand their operations, both inside of the prison and outside of the prison through intimidating practices. *Id.* at 1216.

202. In re Madison Guar. S&L, 346 F.3d 1111, 1117 (D.C. Cir. 2003).

203. United States v. Regan, 726 F.Supp. 447, 449 (S.D.N.Y. 1989).

204. United States v. Browne, 505 F.3d 1229, 1241 (11th Cir. 2007); United States v. Reifler, 446 F.3d 65, 70 (2d Cir. 2006); United States v. DeFries, 129 F.3d 1293, 1296 (D.C. Cir. 1997).

205. United States v. Fabel, 312 Fed.Appx. 932–34 (9th Cir. 2009).

206. United States v. Baker, 63 F.3d 1478, 1484–85 (9th Cir. 1995).

207. United States v. Stephens, 46 F.3d 587, 589 (7th Cir. 1995).

Bureau").[208] Although there was no mention of any relation to organized crime, the Third Circuit held that the Bureau was a division of government that was charged with enforcing taxes, and in enforcing taxes, this entity had an effect on the American economy.[209] Therefore, this state-level governmental entity was an enterprise under RICO.[210]

Similarly, in *United States v. Bacheler*, while employed with the Philadelphia Traffic Court, two employees were engaged in bribery and tax violations.[211] The Third Circuit held that the Philadelphia Traffic Court was an "enterprise" for the purpose of prosecution under RICO.[212] Both employees were convicted of substantive RICO violations and engaging in a RICO conspiracy.[213]

In *United States v. Starrett*, the Eleventh Circuit held that a motorcycle club constituted an enterprise because its members associated for the common purpose of promoting a "1%er" lifestyle by living independently of, and causing trouble in, society.[214] The members took part in murders,[215] extortion,[216] prostitution, and narcotics sales.[217] The court extended the enterprise classification to include patch-wearing "1%ers," as well as anyone associated with the chapter, and anyone who engaged in racketeering activity[218] even if that conduct did not "affect the everyday operations of the enterprise. . . ."[219]

Finally, in *Am. Mfrs. Mut. Ins. Co. v. Townson*, two defendants, a husband and wife, were liable under RICO for filing a fraudulent insurance claim alleging a burglary and damage to their home.[220] The defendants argued that a marriage did not constitute an enterprise under the RICO statute, but the court disagreed.[221] In holding that a marriage represented a RICO enterprise, the court noted that because the defendants were married, the two operated as a unit, each with certain responsibilities who "associated together for the common purpose of engaging in a course of

208. United States v. Frumento, 563 F.2d 1083, 1085 (3d Cir. 1977).
209. *Id.* at 1091.
210. *Id.* at 1092.
211. United States v. Bacheler, 611 F.2d 443, 444–45 (3d Cir. 1979).
212. *Id.* at 450.
213. *Id.* at 444–45.
214. United States v. Starrett, 55 F.3d 1525, 1533 (11th Cir. 1995).
215. *Id.* at 1535.
216. *Id.* at 1535–38.
217. *See id.* at 1538.
218. *Id.* at 1545.
219. *Id.* at 1542.
220. *See* Am. Mfrs. Mut. Ins. Co. v. Townson, 912 F. Supp. 291, 294 (E.D. Tenn. 1995).
221. *Id.* at 295.

conduct necessary to preserve their welfare as a marital unit."[222]

## B. DIFFERENTIATING BETWEEN RICO ENTERPRISES

Few similarities exist between the originally intended RICO enterprise, and the enterprises indicted today under the criminal RICO statute. Similarities are most apparent with criminal street gangs because both target victims, distribute drugs, and impose fear. Even the Supreme Court acknowledged a lack in similarity, but embraced RICO's expansion by noting that although RICO is being applied to situations beyond the original congressional intent, it sufficiently demonstrates the statute's breadth.[223] The Court noted that, in general, the RICO statute has turned into "a tool for everyday fraud cases," rather than a tool aimed at attacking "mobsters and organized criminals."[224]

The enterprise Congress intended to prosecute was one of structure and hierarchy.[225] It had local and national assemblies encompassing the ever-powerful "commission," enforcers, corruptors, bosses, and soldiers.[226] Today's RICO enterprises tend to be loosely affiliated groups of petty criminals who crossed paths in order to make money, such as criminal street gangs.[227] Though law enforcement categorizes these groups based on this system of classification,[228] there is an absence of true hierarchy.[229] There is not one shot caller, there are no corruptors, and enforcers—"the muscle"—are common, but not found in every gang. Even more distinguishable are situations in which the government prosecutes law firms or labor unions, because they are inherently law-abiding groups who may have associated with others engaging in criminal activity.[230]

222. *Id.*

223. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 499 (1985) (citing Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chicago, 747 F.2d 384, 398 (7th Cir. 1984)).

224. *Id.* at 499 (quoting *Sedima, S.P.R.L.*, 741 F.2d at 487).

225. *See supra* Section II.D (focusing on the mafia as the original "family" and the different structures that make up the mafia).

226. *Id.*

227. SAMUEL WALKER & CASSIA SPOHN, MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 459 (5th ed. 2012) (focusing on a Texas statute to determine how to classify gang members).

228. *Id.* (evaluating statistics from different states reflecting the composition of criminal street gangs).

229. *See* Malcolm W. Klein & Cheryl L. Maxson, *Gang Structures, Crime Patterns, and Police Responses: A Summary Report* at 4–6 (Apr. 1996) (describing different types of gangs and the various structures within each gang).

230. *See supra* Part II.

## V. STATUTORY INTERPRETATION AND THE RICO STATUTE

As examined in the prior sections of this Article, because RICO is such a complex statute, courts tend to interpret and to apply the statute in varying ways.[231] The following sections will discuss in detail the various canons of statutory interpretation, including the rule of lenity,[232] textualism,[233] and originalism.[234] This Article will then discuss the most rational method of statutory interpretation that should be applied, as it appears that courts have yet to produce a consistent result in their decisions regarding the RICO statute.[235]

### A. THE RULE OF LENITY

The rule of lenity is a canon of statutory interpretation, which proposes that criminal laws be interpreted in a narrow manner that favors defendants.[236] Specifically, the rule of lenity holds that if conduct is not explicitly prohibited by a statute, an individual cannot be punished for engaging in such conduct.[237] Congressional supremacy in the application of criminal law is enforced through the rule of lenity because it precludes courts from surreptitiously undermining congressional decisions, and it forces Congress to handle the entire task of lawmaking, including properly defining terms contained within the criminal statute, although it may be easier to convey a portion of that undertaking to the court system.[238]

In *United States v. Wiltberger*,[239] Justice Marshall rationalized that the rule of lenity was established on the basis that the legislature, and not the courts, had the power to punish and define crimes.[240] Marshall's application of the rule of lenity was grounded in a due process of law argument.[241] In terms of due process, the rule of lenity ensures fair notice of what the law prescribes by ensuring that no defendant is punished unless

231. *See supra* Part III.
232. *See infra* Part V.A.
233. *See infra* Part V.B.
234. *See infra* Part V.C.
235. *See infra* Part V.D.
236. *See* Phillip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 511–12 (2002).
237. *See* John L. Diamond, *Reviving Lenity and Honest Belief at the Boundaries of Criminal Law*, 44 U. MICH. J.L. REFORM 1, 32 (2010).
238. *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 349–50 (1994).
239. *See* United States v. Wiltberger, 18 U.S. 76 (1820).
240. *See id* at 95.
241. *See id.*

Congress clearly and definitely implicated the crime, and its punishment, in a statute.[242] Similarly in *United States v. Hudson & Goodwin*,[243] the Supreme Court held that three steps are to be taken before an individual may be charged with a federal crime: (1) Congress must declare an act to be a crime; (2) Congress must attach punishment to the act; and (3) Congress must give courts the jurisdiction over the offense.[244]

More recently in *United States v. Thompson*,[245] the Seventh Circuit reversed a woman's conviction for embezzlement as a state agent when she attempted to save the government money by navigating the selection of a government contractor to the cheapest bidder.[246] The court noted that "misapplies"—a term contained in the statute—was ambiguous and lead the trial court to broadly interpret the word, when it could have been interpreted in a more narrow way, which would have prevented a conviction.[247] In its ruling, the Seventh Circuit stated that "the Rule of Lenity counsels us not to read criminal statutes for everything they can be worth."[248]

While some may believe the rule of lenity applies to the RICO statute, it is apparent that courts do not agree. For this claim, there are three reasons. First, courts have broadly construed the RICO statute in favor of government interpretation; not in favor of the criminal defendant.[249] Second, Congress failed to define all terms contained within the RICO statute.[250] Third, courts have interpreted and expanded the definition of terms contained within the RICO statute.[251] For these reasons, the rule of lenity does not apply to the criminal RICO statute.

## B. THE TEXTUALIST METHOD OF INTERPRETATION

Textualism is a method of statutory interpretation in which courts are required to follow a statute's plain meaning, without considering the

242. *See* United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221–22 (1952).
243. United States v. Hudson, 11 U.S. 32 (1812).
244. *Id.* at 34.
245. *Thompson*, 484 F.3d at 877.
246. *Id.* at 878.
247. *Id.* at 881.
248. *Id.* at 884.
249. *See supra* Part III.
250. *See* David Kurzweil, *Criminal and Civil Rico: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 Colum. J.L. & SOC. PROBS. 41, 61 (1996).
251. *See supra* Part III.A.

legislative purpose, history, or spirit.[252] The textualist approach focuses not on the drafter's intent, but on what the words of a statute mean.[253]

The textualist approach to statutory interpretation contains seven prongs. First, a judge examines the statute and finds the "ordinary meaning" of the words.[254] Second, in determining the ordinary meaning of a word, a judge may refer to a grammar book or dictionary if the meaning of a word is not immediately apparent.[255] Third, if the use of a grammar book or dictionary does not aid in finding the meaning of a term, a judge may use the language and structure of the entire statute to read the words in a holistic manner.[256] Fourth, if the ordinary meaning of a word is still unclear, the judge may examine an alternate source of governing law[257] or construe the words in a manner that is consistent with comparable terms in a separate statute.[258] Fifth, it is also permissible for the judge to use a textualist canon to determine the ordinary meaning of an unclear word.[259] Sixth, according to textualists, however, this does not mean that legislative history may be used to interpret the meaning of a word within the statute.[260] Lastly, the judge is not to construct rules or make policy choices.[261]

Some scholars believe that textualism advances fair notice because statutes are generally written to inform citizens of the way in which their conduct must conform to social norms;[262] however, it cannot be argued that the textualist approach has been, or should be, applied to the RICO statute. When solely looking at the text of the RICO statute, one would have no

252. Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1886 (2008).

253. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988).

254. Chisom v. Roemer, 501 U.S. 380, 404 (1991).

255. *See e.g.*, MCI Telecommunications Corp. v. American Tele. & Tel. Co., 512 U.S. 218, 242 (1994) (using Webster's Collegiate Dictionary to define a term).

256. United Savings Association v. Timbers of Innwood Forest, 484 U.S. 365, 371 (1988) (explaining that "[s]tatutory construction . . . is a holistic endeavor.").

257. *See generally* Easterbrook, *supra* note 252, at 65.

258. *See generally* Pierce v. Underwood, 487 U.S. 552, 565–68 (1988) (explaining the process of turning to other statutes to determine the meaning of the word "substantial").

259. *See* Chisom v. Roemer, 501 U.S 380, 404 (1991) (Justice Scalia, in dissent, explaining that if the meaning of a word is unclear, the Court then turns to whether there is evidence that a meaning, other than the ordinary meaning, applies to the particular word).

260. *See* INS v. Cardoza-Fonseca, 480 U.S. 421, 452–53 (1987) (Justice Scalia in concurrence explaining that the legislative history must not be considered); *see also* William N. Eskridge, Jr., No Frills Textualism, 119 HARV. L. REV. ASS., 2041, 2043 (2006) (reviewing Adrian Vermeule, Judging Under Uncertainty (2006)).

261. Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 276 (1997).

262. *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 542 (2009).

way of being on notice that Planned Parenthood protestors[263] could be sued under an organized crime statute. Furthermore, it cannot be said that courts believed that Congress properly defined the crimes that are contained within the RICO statute because various phrases continue to be redefined and reinterpreted by the judiciary. For example, a "pattern of racketeering activity" was left undefined by Congress in the RICO statute.[264] The Supreme Court specifically noted that the statute failed to provide direction on how to determine what constituted a pattern of racketeering activity.[265]

In addition, the legislative history of RICO is one of the more extensive and possibly important sources of information available to properly interpret the statute. Because Congress's reason for enacting RICO was to control organized crime in American neighborhoods, courts should instead look to the originalist method of interpretation.[266]

## C. THE ORIGINALIST METHOD OF INTERPRETATION

Originalism is a method of statutory interpretation in which courts are to "give effect to the will of the Legislature."[267] When a conflict arises between the intent of the legislature and the spirit of the judiciary, courts must resolve the tension in favor of congressional intent.[268]

The originalist method of statutory interpretation is a six-prong approach. First, a judge will inspect the language of the statute, as the text is the best indication of the intent of the legislature.[269] Second, if the statutory language is clear and in accord with other indications of legislative intent, then the judge shall respect the text of the statute—the plain meaning rule.[270] Third, however, if the judge determines that the statutory language is ambiguous, then the judge shall elect a reasonable interpretation of the statute based on the statute's legislative history and the structure.[271] Fourth, a judge should only interpret a statute, independent of

263. *See* Complaint for Damages and for Declaratory and Injunctive Relief, *supra* note 1 (explaining that Planned Parenthood protestors harass and intimidate Planned Parenthood staff members and interfere with the organization's operations).

264. 18 U.S.C. § 1961(5) (2016).

265. *H.J. Inc.*, 492 U.S. at 238.

266. 116 Cong. Rec. 591 (1970).

267. Osburn v. Bank of the United States, 22 U.S. 738, 866 (1824).

268. Gebbia-Pinetti, *supra* note 260 at 280–81, n. 133.

269. United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940) (explaining that, frequently, the text of a statute is sufficient to establish its purpose).

270. United States v. Hartwell, 73 U.S. 385, 396 (1867) (explaining that if the language of a statute is clear then there is nothing in it to be construed).

271. Green v. Bock Laundry Machine Company, 490 U.S. 504, 508–09 (1989) (Justice

congressional intent, when the statute possesses a gap that needs to be sealed; not *sua sponte*.[272] Fifth, in making these interpretations, a judge should further consider the context of the enactment to examine the policy and purpose behind the statute.[273] Finally, to ensure that the judiciary does not engage in unrestrained policymaking, the judge should only consider the text of the statute and credible historical sources related to legislative intent.[274] Therefore, legislative history is useful to prove the plain meaning of a clearly written statute[275] and establish the legislative intent and purpose behind an ambiguous statute.[276]

Under the originalist method of statutory interpretation, courts shall act as Congress's faithful agents. Courts are required to look into the congressional intent behind a statute in order to protect Congress against an imperfectly drafted law. A problem, however, occurs when the courts incorrectly interpret the congressional intent and begin to use their own views. When this occurs, the method no longer resembles originalism; rather it is *sua sponte* judicial policymaking.

### D. THE EXPANSION OF THE RICO STATUTE

In the abstract, I might favor textualism because, ideally, Congress should be required to write statutes that are clear, concise, and give citizens proper notice. In most situations, a statute should be applied through the text chosen by Congress. In practice, I would take the textualist approach, unless there is expansive documentation regarding the congressional intent of the statute.

The RICO statute has been expanded far beyond what was intended by Congress. Courts throughout America have clearly ignored

Stevens writing that if the text of a statute is ambiguous a judge should then "seek guidance from the legislative history and from the [statute's] overall structure.").

272. James Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 893 (1930) (referring to judicial legislation as involving interstitial workings).

273. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535–44 (1947).

274. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (explaining that policy considerations, background norms, and "all 'outside sources,' are immaterial" in determining the proper interpretation).

275. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 289 (1990).

276. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 170–71 (1993) (Justice Stevens explaining that the Court would first use the text and structure of the statute and then go to the legislative history).

congressional intent when applying the RICO statute. However, it is also important to note that courts typically do abide by congressional intent in their application of law. Although some scholars and practitioners may argue this is not problematic, I disagree. It is important to abide by congressional intent for two reasons.

First, when courts do not abide by congressional intent, they engage in rogue policymaking. With the RICO statute, courts have engaged in a regime of impermissible judicial lawmaking in the way in which they ignore congressional intent by implementing their own views. An example of this rulemaking occurred when the Supreme Court implemented the two-prong "pattern of racketeering" test that required relatedness and continuity.[277] Neither of these requirements can be located within the RICO statute. Courts must remember that criminal lawmaking authority is reserved for Congress.

Second, when courts do not abide by congressional intent, they expand the scope of a statute. For example, in *National Organization for Women v. Schiedler*,[278] the Supreme Court relied solely on the plain meaning rule. The Court refused to require an economic motive for the "pattern of racketeering activity" and refused to require a legitimate "enterprise" because Congress had the ability to further incorporate detail into the statute.[279] This judicial decision prevented the RICO statute from being limited to the use intended by Congress. But, interestingly enough, most people would think that the plain meaning of the word "enterprise" connotes an entity with some sort of legal business relationship; not just a group of people.

If courts were to use the originalist method of interpretation, the application of RICO would again be aimed at fighting organized crime in America, rather than prosecuting groups of criminals. Furthermore, if the originalist approach were taken, the courts would have more consistent outcome in RICO cases.

## VI. CONCLUSION

This Article began by examining the historical background of organized crime.[280] From the establishment of the Special Committee on Organized Crime in Interstate Commerce to the implementation of the

277. *H.J. Inc.*, 492 U.S. at 240.
278. Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249 (1994).
279. *Id.* at 260.
280. *See* Part II (examining the historical background of organized crime).

Crime Control Act of 1970, Congress specifically sought to prevent the expansion of organized crime into the lives of American citizens.[281] Congress noted that these individuals were not ordinary criminals—members of organized crime units operated through extortion, torture, corruption, and retaliation.[282] The Organized Crime Control Act of 1970 targeted organized crime, by criminalizing its associates and the acts they committed, in large part because their acts deprived the United States economy of billions of dollars per year.[283]

Congress subsequently enacted the Racketeer Influenced and Corrupt Organizations Act with an aim at eliminating racketeering that infiltrated legitimate business ventures.[284] The main focus of the RICO statute was the mafia[285]—an entity entirely more sophisticated and dangerous than professional criminals and street gangs.[286] The criminal RICO statute would be used by prosecutors to punish groups of individuals who were engaged in a pattern of racketeering activity.[287]

This Article next examined the way in which the RICO statute—a statute aimed at organized crime—became a tool for federal prosecutors to incarcerate criminal street gangs and punish illegitimate business ventures in America.[288] Three cases illustrate this evolution. The first case, *United States v. Turkette*, extended the RICO statute to encompass both legitimate and illegitimate businesses.[289] Adding to this expansion, *Boyle v. United States*, required a RICO enterprise to have, at minimum, a structure able to engage in racketeering activity, but nothing more.[290] In the final step of expansion, the Court in *Reves v. Ernst & Young*, held that, to prosecute an individual for a RICO violation, he or she must have engaged in the operation or management of an enterprise.[291]

Next, this Article examined the way in which prosecutors applied the RICO statute in a manner that was inconsistent with the original congressional intent—to combat groups of organized crime, such as the

281. *See* Part II.A (examining the original intent to combat organized crime).
282. *See* S. Rep. No. 91-617, *infra* note 31.
283. *See* Pub. L. No. 91-452, 84 Stat. 922, *infra* note 52.
284. *See* Part II.C (examining the Racketeer Influenced and Corrupt Organizations Act).
285. *See* Part II.D (examining the original RICO enterprise).
286. *See* S. Rep. No. 91-617, *infra* note 85.
287. *See* Part II.E (examining the criminal RICO statute).
288. *See* Part III (examining the evolution of the RICO enterprise).
289. *See Turkette*, *infra* note 127; *see also* Part III.A (examining United States v. Turkette).
290. *See Boyle*, *infra* note 129; *see also* Part III.C (examining Boyle v. United States).
291. *See Reves*, *infra* note 130; *see also* Part III.D (examining Reves v. Ernst & Young).

Mafia.[292] From the prosecution of legitimate business enterprises to the prosecution of law firms and married couples, federal prosecutors have used the RICO statute to penalize more than just Mafia-style groups.[293] There are very few similarities between the modern criminal RICO enterprise and the enterprise initially contemplated by Congress, especially in terms of the lack of a hierarchy possessed by today's enterprises.[294]

This Article finally addresses the various methods of statutory interpretation in relation to the RICO statute.[295] First, the rule of lenity is infrequently applied by courts and certainly should not be applied to the criminal RICO statute.[296] Similarly, the textualist approach is rarely applied by courts and is not an appropriate method of statutory interpretation for the criminal RICO statute.[297] Unlike the other methods of statutory interpretation, this Article emphasizes the need for courts to apply the originalist method of interpretation by giving authority to the intent of the legislature.[298] Because there is extensive evidence regarding the congressional intent of the RICO statute and organized crime in general, it is improper for the courts to expand the RICO statute beyond the desires of Congress.[299]

Since the enactment of RICO, courts have continually expanded the scope of the statute beyond the original congressional intent of combatting the organized crime families that infiltrated legitimate businesses. Prosecutors no longer focus on the original type of organized crime; instead, the government utilizes RICO to punish those associated with criminal organizations. While RICO was enacted to imprison the "untouchables" like the Genovese Crime Family, other groups of criminals can be combatted with state and federal conspiracy statutes. Because RICO no longer corresponds to the original congressional intent, courts and legislatures alike should reconsider whether justice is served when the government prosecutes members of a criminal enterprise in the absence of sufficient proof that the individual defendant was engaged in organized crime.

292. *See* Part IV (examining the movement away from congressional intent).
293. *See* Part IV.A (examining the modern RICO prosecution).
294. *See* Part IV.B (examining the difference between the original and the modern RICO enterprise).
295. *See* Part V (examining statutory interpretation and the RICO statute).
296. *See* Part V.A (examining the rule of lenity).
297. *See* Part V.B (examining the textualist method of interpretation).
298. *See* Part V.C (examining the originalist method of interpretation).
299. *See* Part V.D (examining the expansion of the RICO statute).

Congress should intervene to reduce the level of discretion left to the courts. In this context, intervention would require Congress to develop the statute pertaining to the term "enterprise" to ensure that the definition encompasses only RICO's original intent rather than the interpretation of the courts. It is essential to note that RICO was enacted because Congress was terrified that organized crime would destabilize the American economy and possibly even undermine the justice system through the use of bribery and intimidation. If the courts took the originalist approach and Congress was to encompass its original intent behind enacting the RICO statute, the expansion of this law could be minimized. Today courts are so heavily focused on the structure of an enterprise that there is no longer an emphasis on the organization's effect on the country. This not only affects defendants who are associated with non-organized-crime-type criminal organizations, but in having such a strong focus on the structure of the enterprise, courts are likely taking away the government's ability to prosecute dangerous groups that actively engage in racketeering activity, but do not have this mafia-style structure.

Therefore, it is imperative that Congress step up to the plate and strengthen the RICO statute so that courts are not free to run with it as they please. This will ensure fairness throughout criminal prosecutions, a more confident application by prosecutors, and better guidance for the judiciary. In addition, requiring courts to apply the originalist method of statutory interpretation will assist in ensuring that the original intent of combatting organized crime is the main focus of the criminal RICO statute.