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## The Line Between Justice and Abuse: A Critical Review of State RICO Statutes in Drug Prosecution

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# THE LINE BETWEEN JUSTICE AND ABUSE: A CRITICAL REVIEW OF STATE RICO STATUTES IN DRUG PROSECUTIONS

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## I. INTRODUCTION

On May 9, 2022, platinum recording artists Jefferey Lamar Williams and Sergio Giavanni Kitchens, better known by their stage names Young Thug and Gunna, were indicted and arrested along with twenty-six other individuals linked to their record label and alleged criminal enterprise, YSL, for violating Georgia's Racketeer Influenced and Corrupt Organizations ("RICO") statute.<sup>1</sup>

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\* Jaylen Kaine Minefield, Juris Doctor Candidate at the University of Illinois Chicago School of Law. I would be remiss if I did not first take the time to thank my mother, Kelly, who has been my biggest and proudest supporter in every endeavor. Simply put, the admiration, appreciation, and love I have for you exceeds the limits of language. I want to also thank my family and loved ones who have supported me, encouraged me, and provided a shoulder to lean on in times of need. Without them, I can confidently say none of this would be possible. Last, but certainly not least, thank you to my younger siblings, Kingston and Aubree. Being your big brother means more to me than any achievement or accomplishment available in this world.

1. Charles Trepany et al., *Young Thug, Gunna in Police Custody After Being Named in Sweeping Rico Violation Indictment*, USA TODAY (May 12, 2022, 7:58 AM), [www.usatoday.com/story/entertainment/celebrities/2022/05/10/young-thug-gunna-rico-charges-georgia-indictment/9712831002/](http://www.usatoday.com/story/entertainment/celebrities/2022/05/10/young-thug-gunna-rico-charges-georgia-indictment/9712831002/) [perma.cc/H5JM-

News of this indictment rattled the entertainment industry and illustrated the statute's ability to package a crowd of individuals into an alleged criminal enterprise by using disjointed song lyrics, communications, and associations to past crimes, some of which had already been prosecuted and resolved.<sup>2</sup> Unknown to the rest of the world, this, however, was merely the foreword to Georgia's RICO novel, and the remaining chapters were unveiled on August 25, 2023 when Donald J. Trump and eighteen others were indicted under the same statute for participating in a scheme to overturn the 2020 election.<sup>3</sup> While the two artists and the former president are the latest, high-profile defendants, the acronym "RICO" has long been associated with the nation's most notorious criminal prosecutions.<sup>4</sup> The federal RICO Act is responsible for facilitating the infamous prosecutions of the Cosa Nostra, international drug cartels, and a gang of former Key West Police Department officers, and these are just a few examples.<sup>5</sup>

Utilization of the RICO Act in high profile prosecutions dominate media headlines and capture the attention of the country.<sup>6</sup> RICO's use extends far beyond mob bosses, cartel heads, and powerful criminal syndicates.<sup>7</sup> And its scope has been liberally expanded to apply to loosely associated individuals and small groups lacking a hierarchy, organized structure, or even an agreed

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RXYR].

2. Marc Hogan, *What Young Thug and Gunna's Indictment Means for Rap Music on Trial*, PITCHFORK (May 11, 2022), [www.pitchfork.com/news/what-young-thug-and-gunna-indictment-means-for-rap-music-on-trial/](http://www.pitchfork.com/news/what-young-thug-and-gunna-indictment-means-for-rap-music-on-trial/) [perma.cc/23CT-9ZVH]; see also Debrea Cassens Weiss, *Georgia Indictment Bolstered by Broad State Law on Racketeering*, ABA JOURNAL (Aug 15, 2023, 12:32 PM), [www.abajournal.com/news/article/georgia-indictment-bolstered-by-broad-state-laws-on-racketeering-false-statements](http://www.abajournal.com/news/article/georgia-indictment-bolstered-by-broad-state-laws-on-racketeering-false-statements) [perma.cc/NU9L-MFHB] ("The RICO law in Georgia is one of the broadest in the nation . . . [a] defendant doesn't have to 'set foot in Georgia' to be charged."). Moreover, not only is Georgia's version of the RICO statute broader than those of other states, but it "is broader than the federal RICO statute because of the types of crimes that are considered racketeering activity." *Id.*

3. Kate Brumback, *Trump and All 18 Others Charged in Georgia Election Case Meet the Deadline to Surrender at Jail*, AP NEWS (Aug. 25, 2023, 3:36 PM), [apnews.com/article/trump-georgia-election-indictment-fulton-county-jail-95b25c42d96c3ed8353a42ab795daca0](https://apnews.com/article/trump-georgia-election-indictment-fulton-county-jail-95b25c42d96c3ed8353a42ab795daca0) [perma.cc/UD42-QVFE].

4. Arnold H. Lubasch, *Judge Sentences 8 Mafia Leaders to Prison Terms*, N.Y. TIMES (Jan. 14, 1987), [www.nytimes.com/1987/01/14/nyregion/judge-sentences-8-mafia-leaders-to-prison-terms.html](http://www.nytimes.com/1987/01/14/nyregion/judge-sentences-8-mafia-leaders-to-prison-terms.html) [perma.cc/E4U5-CG72]; *United States v. Gotti*, 171 F.R.D. 19 (E.D.N.Y. 1997), *aff'd*, 166 F.3d 1202 (2d Cir. 1998); *United States v. Casamayor*, 837 F.2d 1509 (11th Cir. 1988).

5. Lubasch, *supra* note 4; Carlos A. Briano, *Mexican Cartel Member Sentenced to Life in Prison for Violating Rico Statute*, DEA (Mar. 3, 2022), [www.dea.gov/press-releases/2022/03/03/mexican-cartel-member-sentenced-life-prison-violating-rico-statute](https://www.dea.gov/press-releases/2022/03/03/mexican-cartel-member-sentenced-life-prison-violating-rico-statute) [perma.cc/48Y8-SJVN]; Trepany, *supra* note 1.

6. Trepany, *supra* note 1.

7. Jordan Blair Woods, *Systemic Racial Bias and Rico's Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 304 (2012).

upon name identifying the alleged gang.<sup>8</sup> The breadth of the statute, especially at the state level, allows for prosecutors to exercise seemingly limitless discretion in determining whether an individual's conduct makes them a co-conspirator and participant.<sup>9</sup> The statute may even apply when the individual exercises no management or control over the alleged enterprise and does not receive a share of the enterprise's profits.<sup>10</sup> Prosecutors often take advantage of the statute's low bar and vagueness, by including vulnerable individuals, like drug-addicted individuals, as co-conspirators in criminal RICO indictments.<sup>11</sup> At times, the co-conspirators' association with the alleged criminal enterprise stems only from purchasing drugs for personal use or performing various services for members of the organization in exchange for drugs.<sup>12</sup>

In light of RICO's increased use in federal and state prosecutions, this comment explores whether the statute's broad construction and interpretation requires narrowing or a stringent review system to determine when an individual should be included in RICO indictments. Part II discusses the history of the RICO statute, its original purpose, significance, evolution over time, and criticism. Part III analyzes the past constitutional challenges to RICO and the courts' disposition. Additionally, it examines the benefits and negative consequences of the statute's broad construction and interpretation since the expansion of its application. This section also explores the implications of judicial resistance to narrowing the statute's application combined with a prosecutor's discretion. Part IV asserts that the breadth of state and federal RICO statutes extends application of the statute well past its original purpose and legislative intent. This is particularly true given the lack procedural safeguards and supervisory measures in the application of state RICO statutes. RICO statutes no longer require broad and liberal interpretation to achieve their goals, and as such, use of RICO statutes should be narrowed by imposing a system of review and accountability on prosecutors to avoid circumnavigating individual liberties, coercing defendants into admissions of guilt, and perpetuating patterns of mass incarceration to bolster high conviction rates.<sup>13</sup> In the alternative,

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8. *Id.* at 304, 309.

9. *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), [www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#\\_ftn6](http://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead#_ftn6) [perma.cc/8773-EQFM].

10. *United States v. Miller*, 116 F.3d 641, 671 (2d Cir. 1997).

11. *Id.* at 682; *United States v. Millan-Machuca*, 991 F.3d 7, 32 (1st Cir. 2021); *United States v. Wilson*, 605 F.3d 985, 1023-24 (D.C. Cir. 2010).

12. *Id.*

13. Nkechi Taifi, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), [www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs](http://www.brennancenter.org/our-work/analysis-opinion/race-mass-incarceration-and-disastrous-war-drugs)

RICO should be subjected to the strict legislative limitations imposed by some states with adopted RICO statutes.<sup>14</sup> These approaches best comport with the Fourteenth Amendment and serves the public interest by safeguarding the public's rights from prosecutorial and government overreach.<sup>15</sup>

## II. BACKGROUND

This section provides a comprehensive examination of the extensive history of organized crime in the United States, the obstacles the government encountered in combatting it, and the creation of RICO and its subsequent effectiveness in bringing justice to criminal organizations. Next, this section transitions to review the expanded use and availability of RICO statutes at the state and federal level. This section concludes by discussing RICO's impact on drug investigations and prosecutions.

### A. *History of Organized Crime in the United States*

Discussing the RICO Act thoroughly requires understanding the well-established and complex history of organized crime and its impact on the country. At the turn of the twentieth century, the idea of criminal enterprises remained foreign to most Americans since most street-level criminal actions were not coordinated under an organization.<sup>16</sup> The prohibition on alcohol in the 1920s provided the perfect opportunity for criminal groups to profit by bootlegging.<sup>17</sup> The profits and success from bootlegging enabled groups to consolidate their power and form structured and organized enterprises that better fit the current mold of organized crime.<sup>18</sup> No crime syndicate was more successful, powerful, or important in revolutionizing organized crime in the United States than Cosa Nostra, a group of crime families formed from direct descendants of Italian and Sicilian immigrants.<sup>19</sup>

Since the emergence of organized crime, criminal enterprises

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[perma.cc/TU2X-Q3HS].

14. See Derek Keenan, *The Game of RICO: A Powerful Prosecutorial Tool Versus Strict Legislative Limitations*, 69 DEPAUL L. REV. 827, 839-850 (2020) (discussing the RICO statutes of Illinois and New York and the legislature's focus on a narrow construction and use of the provision through procedural guardrails, mandatory oversight, and analysis of the reasonableness).

15. U.S. CONST. amend. XIV, § 2.

16. *Prohibition Profits Transformed the Mob*, THE MOB MUSEUM, prohibition.themobmuseum.org/the-history/the-rise-of-organized-crime/the-mob-during-prohibition/ [perma.cc/EP6T-4D9S] (last visited Oct 5, 2022).

17. *Id.*

18. *Id.*

19. James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 Crime & Just. 17, 18 (2020).

blurred the lines of their revenue streams and conduct by establishing footholds in legitimate markets.<sup>20</sup> The enterprises then used the footholds in legitimate industries to maintain or expand their businesses in illegal black markets.<sup>21</sup> In the 1910s and 1920s, Cosa Nostra's ability to operate outside the law proved to be a valuable asset as business owners seeking to stop labor movements, and unions supporting the labor movements both vied for the families' help in their fight against one another.<sup>22</sup> Organized crime families seized this window of opportunity and replaced the union officers with members or sympathizers of their business through force or election fraud.<sup>23</sup> The move into labor unions quickly transitioned the enterprises into racketeering machines controlling labor, employment, and ownership of businesses in a wide range of industries including construction, waste removal, trucking, garment manufacturing, and hospitality in major cities across the country.<sup>24</sup>

In addition to labor racketeering and extortion, the criminal enterprises created extensive business networks across the country to further their own illegitimate interests in America's criminal underworld.<sup>25</sup> These interests included gambling, drug trafficking, loansharking, prostitution, pornography, theft and fraud, and murder for hire.<sup>26</sup> Following the rampant success of criminal enterprises in the United States in the 1920s, organized crime families set their sights on international revenue and solidified their business interests in Cuba's importation industry.<sup>27</sup> In addition to stabilizing its foothold in Cuba, Cosa Nostra expanded its businesses by making legitimate investments in ownership of at least nineteen casinos.<sup>28</sup> By the mid-1900s Cosa Nostra boasted over twenty criminal families across the country in its enterprise, and it had yet to reach its peak.<sup>29</sup>

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20. *Id.* at 25.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 25-31.

25. *Italian Organized Crime*, FBI, [http://web.archive.org/web/20110116163335/http://www.fbi.gov/about-us/investigate/organizedcrime/italian\\_mafia](http://web.archive.org/web/20110116163335/http://www.fbi.gov/about-us/investigate/organizedcrime/italian_mafia) (last visited Mar 11, 2024) [perma.cc/54UE-YSBT].

26. Jacobs, *supra* note 19 at 31-38.

27. LAWRENCE M. SALINGER, *ENCYCLOPEDIA OF WHITE-COLLAR AND CORPORATE CRIME* 234 (2013); *see also* Simon Worrall, *When. The Mob Owned Cuba*, *SMITHSONIAN MAGAZINE* (Oct. 28, 2016) [www.smithsonianmag.com/travel/mob-havana-cuba-culture-music-book-tj-english-cultural-travel-180960610/](http://www.smithsonianmag.com/travel/mob-havana-cuba-culture-music-book-tj-english-cultural-travel-180960610/) [perma.cc/5FWP-BQ7N] (discussing Lucky Luciano and Meyer Lansky's businesses in Cuba as well as their aspirations to expand their enterprises in other Caribbean and South American countries).

28. SALINGER, *supra* note 27.

29. Editors of Encyclopaedia Britannica, *Mafia*, *BRITANNICA* (Feb. 27, 2024),

### B. Change on the Horizon

During the early and mid-twentieth century, Cosa Nostra operated on the peripheries of society and law enforcement agencies in the United States.<sup>30</sup> The FBI, led by J. Edgar Hoover, expressly denied the existence of an organized criminal underworld well into the 1950s.<sup>31</sup> Commentators contribute this express denial to distractions by the threat of the Cold War and potential blackmail from criminal enterprises.<sup>32</sup> Nevertheless, Cosa Nostra's infiltration of legitimate markets and domination of the criminal underworld left the enterprise vulnerable due the attention of its success.<sup>33</sup> In 1957, in Apalachin, New York, Cosa Nostra hosted a national meeting with over sixty-five mob bosses in attendance.<sup>34</sup> Shortly after commencing, New York State Troopers raided the meeting after growing suspicious of the surplus of cars lacking state registrations.<sup>35</sup> After over sixty members of organized crime were arrested under a single roof, the FBI no longer had the choice of denying the existence of a massive organized criminal enterprise in the United States.<sup>36</sup>

Despite making over sixty arrests after the raid and successfully convicting several of those arrested, the government's win against organized crime was short lived.<sup>37</sup> Ultimately, the convictions were overturned on appeal.<sup>38</sup> The trend of organized crime remaining largely outside of the justice system's reach continued for over a decade with very few organized crime bosses facing criminal prosecution, and even fewer sustaining convictions

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[www.britannica.com/topic/Mafia](http://www.britannica.com/topic/Mafia) [perma.cc/NS3N-S2Z6].

30. Jacobs, *supra* note 19, at 17.

31. *J. Edgar Hoover was Homosexual, Blackmailed by Mob, Book Says*, L.A. TIMES (Feb. 6, 1993, 12:00 AM), [www.latimes.com/archives/la-xpm-1993-02-06-mn-1078-story.html](http://www.latimes.com/archives/la-xpm-1993-02-06-mn-1078-story.html) [perma.cc/A4L3-NGU4].

32. *Id.*

33. Lorraine Boissoneault, *A 1957 Meeting Forced the FBI to Recognize the Mafia and Changed the Justice System Forever*, SMITHSONIAN MAG. (Nov. 14, 2017), [www.smithsonianmag.com/history/1957-meeting-forced-fbi-recognize-mafia-and-changed-justice-system-forever-180967204/](http://www.smithsonianmag.com/history/1957-meeting-forced-fbi-recognize-mafia-and-changed-justice-system-forever-180967204/) [perma.cc/6KAY-9YPG].

34. *Id.*

35. Howard Wantuch & Sidney Kline, *Sixty-Two Top Mafia Leaders Were Seized in the Apalachin Meeting in 1957*, N.Y. DAILY NEWS (Apr. 9, 2018, 5:57 AM), [www.nydailynews.com/news/crime/62-mafia-members-seized-upstate-ny-1957-article-1.2428519](http://www.nydailynews.com/news/crime/62-mafia-members-seized-upstate-ny-1957-article-1.2428519) [perma.cc/9LAJ-J49C].

36. *Id.*

37. Allen Pusey, *Nov. 14, 1957: Mob Bosses Raided at Apalachin*, ABA J., (Nov. 1, 2014), [www.abajournal.com/magazine/article/nov\\_14\\_1957\\_mob\\_bosses\\_raided\\_at\\_apalachin#google\\_vignette](http://www.abajournal.com/magazine/article/nov_14_1957_mob_bosses_raided_at_apalachin#google_vignette) [perma.cc/D72M-T2A8].

38. *Id.* (noting that, despite twenty of the meeting's participants sustaining conspiracy convictions, the appellate court overturned the convictions because the "cases were based almost entirely on suspicion").

and custodial sentences.<sup>39</sup>

While the government directed resources, called congressional committees, and conducted investigations into organized crime, its efforts were ineffective in curbing organized crime, much less convicting the bosses at the top.<sup>40</sup> Due to years of denial and neglect, the country's leading law enforcement agency for domestic crime, the FBI, woefully lacked the knowledge, network, and ability to understand the sophistication of the criminal organizations.<sup>41</sup> The bosses enjoyed insulation at the top of the strict and rigid hierarchy of families of Cosa Nostra.<sup>42</sup> Arrests of low-level operatives in the families for petty street crimes had little to no blowback on the bosses.<sup>43</sup> Without evidence connecting the bosses to the few specific crimes prosecuted, the government had no avenue of legal redress unless a criminal defendant testified.<sup>44</sup> However, Cosa Nostra's code of silence, emphasis on loyalty, and willingness to bring violence or death to anyone infringing on those values proved a strong deterrent to cooperating with the government.<sup>45</sup> Additionally, after Cosa Nostra's immense profitability throughout most of the century, the enterprise utilized its financial success to create political capital.<sup>46</sup> Organized crime's influence in both legitimate businesses and the black market enabled a complex and embedded system of informants in all aspects of the criminal justice system.<sup>47</sup>

By the end of the 1960s, the Senate Report on Organized Crime Control Act of 1969, concluded that organized crime's reach had expanded across the country.<sup>48</sup> Gambling, loansharking, economic fraud, drug trafficking, and other illegal activities of criminal enterprises had spread from major cities into suburban America.<sup>49</sup> Cosa Nostra and other criminal organizations infiltrated, corrupted,

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39. Jacobs, *supra* note 19, at 40.

40. See S. Rep. No. 1784, (1962) (discussing the rampant and widespread corruption of the New York Teamster Local 239 under infamous mobster James "Jimmy" Hoffa, who also served as the president of the International Brotherhood of Teamsters); S. Rep. No. 621, (1960) (reporting on investigations and information obtained regarding improper activities in labor and management, specifically focusing on allegations racketeering in labor unions).

41. G. Robert Blakey, *RICO: The Genesis of an Idea*, 9 TRENDS IN ORGANIZED CRIME 8, 8, 11-12 (June 2006).

42. Herbert Edelhurst, *Major Issues in Organized Crime Control*, OFF. OF JUST. PROGRAMS (1986), [www.ojp.gov/pdffiles1/Digitization/106775NCJRS.pdf](http://www.ojp.gov/pdffiles1/Digitization/106775NCJRS.pdf) [perma.cc/55ZW-XCVB] (last visited Apr. 20, 2022).

43. *Id.*

44. Jacobs, *supra* note 19, at 40.

45. S. Rep. No. 91-617, at 44 (1969).

46. James O. Finckenauer, *La Cosa Nostra in the United States*, OFF. OF JUST. PROGRAMS, [www.ojp.gov/pdffiles1/nij/218555.pdf](http://www.ojp.gov/pdffiles1/nij/218555.pdf) [perma.cc/DN6C-Q8QT] (last visited Oct 9, 2022).

47. Edelhurst, *supra* note 42.

48. Blakey, *supra* note 41, at 35.

49. *Id.*



and controlled law enforcement agencies, government officials, labor unions, legitimate businesses, and branches of the government through the use of violence, threat of economic retaliation, psychological intimidation, and bribery.<sup>50</sup> Without a novel approach to combatting the epidemic of organized crime, the United States government failed to stay ahead of the organizations' money, connections, and brute force.<sup>51</sup>

### C. Creation of RICO

In an effort to combat the rampant adverse effects of organized crime and solve the government's ineffectiveness in prosecuting organized crime, the legislature shifted its focus to creating legislation to use as a vehicle to successfully prosecute organized crime.<sup>52</sup> The Senate Judiciary Committee and Professor G. Robert Blakey authored the Organized Crime Control act of 1970.<sup>53</sup> Despite hesitancy from members of congress and Congressman Emanuel Cellert, the Chair of the Senate Judiciary Committee, the legislature adopted this bill without thorough review.<sup>54</sup> The Act was passed and later signed into law by President Richard Nixon on October 15, 1970.<sup>55</sup> The Act contained provisions ranging from procedural rules governing witnesses conduct and protections to enhanced criminal punishments for organized crime.<sup>56</sup> While the Act included several components, the most consequential component of the legislation, RICO provisions, were found in Title IX of the Organized Crime Control Act.<sup>57</sup>

The legislature drafted and passed the RICO statute in the Act to specifically control and successfully prosecute, destabilize, and deter organized crime and its influence in the United States.<sup>58</sup> The

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50. *Id.*

51. Edelhurst, *supra* note 42.

52. See 116 Cong.Rec. 18,913–14; 35,204; 35,343–46 (1970), reprinted in 1970 U.S. Code Cong. & Ad. News 4007.

53. *Crime Control Act of 1970*, U.S. HOUSE OF REPRESENTATIVES: HISTORY, ART & ARCHIVES (Oct. 15, 1970), [www.history.house.gov/HistoricalHighlight/Detail/37049?current\\_search\[perma.cc/JY5E-AUH6\]](http://www.history.house.gov/HistoricalHighlight/Detail/37049?current_search[perma.cc/JY5E-AUH6]).

54. *Id.*

55. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970).

56. See *Crime Control Act of 1970*, *supra* note 53 (“The law standardized procedural rules for witnesses that included: perjury, witness protection; recalcitrant witnesses; and witness self incrimination. It also contained a House amendment that stiffened punishments[.]”).

57. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-47 (1970) (outlining the RICO statutory scheme, in full, including its definitions, prohibited racketeering activities, criminal penalties, civil remedies, jurisdictional requirements, timing, and evidence).

58. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922,

legislatures struggled in crafting a statute sufficiently broad to curtail the challenges of prosecuting the leadership of criminal enterprises without being unconstitutionally broad and ambiguous.<sup>59</sup> The legislature attempted to solve this problem by tailoring the scope of RICO to target criminal enterprises and patterns of white collar crime that promote violence, production and distribution of contraband, government corruption, labor union corruption, and commercial fraud.<sup>60</sup> It is important to understand that RICO alone did not create new crimes.<sup>61</sup> Instead, RICO created a pathway enabling the government to prosecute individuals, entities, or criminal organizations in a single indictment for independent violations of existing state and federal conduct prohibited as criminal.<sup>62</sup> The statute enables the government to prosecute these crimes as long as they form a pattern of racketeering activity that furthers the interests of the enterprise.<sup>63</sup> RICO labels the violations of preexisting state and federal laws as predicate acts,<sup>64</sup> and predicate acts are not required to be related to one another in a RICO case if they are related to the operation of the enterprise.<sup>65</sup>

The RICO statute categorizes four kinds of prohibited predicate acts in organized crime that relate to a criminal enterprise's interests.<sup>66</sup> Section (a) of 18 U.S.C. § 1962 prohibits an individual or organization to receive any direct or indirect income obtained through a pattern of racketeering activity related to a

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923 (1970) (stating the purpose of the act is “seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime”).

59. See generally *Crime Control Act of 1970*, *supra* note 53 (highlighting the hesitancy of certain legislators to approve the sweeping legislation and the political pressure surrounding its adoption).

60. Alina Veneziano, *Investigating the Attendant Circumstances of RICO from its Early History and Drafting to Transnational Organized Crime and Extraterritorial Applications: A Perspective on U.S. Prosecutions, Ideology, and Globalization*, HARV. J. ON LEGIS. ONLINE (May 20, 2020), [journals.law.harvard.edu/jol/2020/05/20/attendant-circumstances-of-rico/](https://journals.law.harvard.edu/jol/2020/05/20/attendant-circumstances-of-rico/) [perma.cc/A5DA-BK28].

61. G. Robert Blakey, *Foreword: Debunking RICO's Myriad Myths*, 64 ST. JOHN'S L. REV. 701, 705 (1990) [hereinafter Blakey, *Debunking RICO*].

62. See *id.* at 705-07 (explaining RICO's use of predicate acts already found in state and federal as a basis for subjecting the entire organization to criminal liability and civil punishments); 18 U.S.C. § 1962(a)-(d).

63. Blakey, *Debunking RICO*, *supra* note 61, at 705.

64. 18 U.S.C. § 1961(1).

65. See *United States v. Elliott*, 571 F.2d 880, 899 n.23 (5th Cir. 1978) (holding that predicate offenses are only required to be related to the organization or enterprise not each other).

66. 18 U.S.C. § 1962(a)-(d).

criminal enterprise.<sup>67</sup> Section (b) makes it unlawful for any person to “acquire or maintain, directly or indirectly, any interest or control of any enterprise engaged in, or the activities of which affect, interstate or foreign commerce” through a pattern of racketeering activity or unlawful debt.<sup>68</sup> Section (c) prohibits “any person employed or associated with an enterprise engaged in” interstate or foreign commerce, or activities impacting interstate or foreign interstate commerce, to directly or indirectly participate or instruct the conduct of an enterprise’s affairs through a pattern of racketeering or unlawful debt.<sup>69</sup> Section (d) of the statute prohibits any person “to conspire to violate any” of the previous three provisions.<sup>70</sup>

Further, the text of the statute expands the existing breadth by adding “[t]he provisions of this title shall be liberally construed to effectuate its remedial purposes.”<sup>71</sup> The remedial purpose of the statute is to stifle and suppress the growth of criminal enterprises, prosecute criminal organizations that control legitimate businesses, and prevent patterns of racketeering in white collar crimes from negatively impacting interstate commerce.<sup>72</sup>

#### D. RICO Implemented

Although the legislature approached RICO as necessary to address the imminent threat of organized crime in the United States, the first RICO indictment did not occur until 1979.<sup>73</sup> This was nine years after President Nixon signed the Organized Crime Control Act into law.<sup>74</sup> In 1979, the federal government indicted thirty-two members of Oakland’s Hell’s Angels Motorcycle Club with upwards of sixty RICO charges for murder, attempted murder, methamphetamine production and distribution, and other crimes.<sup>75</sup>

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67. 18 U.S.C. § 1962(a).

68. 18 U.S.C. § 1962(b).

69. 18 U.S.C. § 1962(c).

70. 18 U.S.C. § 1962(d).

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

72. William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 INDEP. REV.: J. OF POL. ECON. 85–97 (Summer 2004).

73. Cynthia Gorney, *The Case Against Harley's Angels*, WASH. POST (Oct. 25, 1979, 8:00 PM), [www.washingtonpost.com/archive/lifestyle/1979/10/26/the-case-against-harleys-angels/c58e8ea6-8fcf-49c1-b6b8-b3ee5f62ccf3/](http://www.washingtonpost.com/archive/lifestyle/1979/10/26/the-case-against-harleys-angels/c58e8ea6-8fcf-49c1-b6b8-b3ee5f62ccf3/) [perma.cc/R5G2-HAXC].

74. *Id.*

75. Wallace Turner, *U.S. Drug Investigation Brings a Round of Arrests for Hell's Angels*, N.Y. TIMES (June 18, 1979), [www.nytimes.com/1979/06/18/archives/us-drug-investigation-brings-a-round-of-arrests-for-hells-angels.html](http://www.nytimes.com/1979/06/18/archives/us-drug-investigation-brings-a-round-of-arrests-for-hells-angels.html) [perma.cc/YTJ5-RSRZ]; Wallace Turner, *Criminal Trial of Hell's Angels Starting 4<sup>th</sup> Month*, N.Y. TIMES (Jan. 20, 1980),

The defendants were made to stand trial, after unsuccessfully asserting double jeopardy protection in an interlocutory appeal.<sup>76</sup> As such, RICO's first substantial test was in view, as the government was positioned to take the remaining eighteen defendants to trial.<sup>77</sup>

The legislature intentionally drafted RICO to be broad and encompassing.<sup>78</sup> The goal of RICO was to serve as an adequate prosecutorial tool to counteract organized crime's permeation of the United States' labor, politics, economy, and industries.<sup>79</sup> The provision's complexity combined with its vagueness, presented a new challenge for prosecutors who were inexperienced in applying RICO and convincing a jury to follow the confusing language and implementation required by the statute.<sup>80</sup> In the end, these challenges proved to be fatal for the prosecution.<sup>81</sup> After two attempts at convicting the Hell's Angels, the verdict resulted in a mistrial on both occasions, and the government declined to pursue prosecution for a third time.<sup>82</sup> The government's initial endeavor to

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[www.nytimes.com/1980/01/20/archives/criminal-trial-of-hells-angels-starting-4th-month.html](http://www.nytimes.com/1980/01/20/archives/criminal-trial-of-hells-angels-starting-4th-month.html) [perma.cc/Y23R-X6BP].

76. See *United States v. Solano*, 605 F.2d 1141 (9th Cir. 1979) (holding subsequent criminal charges brought under RICO involving drug offenses for which a defendant had previously been tried do not violate double jeopardy because RICO charges did not possess the same requisite elements as the previous charges).

77. Wallace Turner, *Security is Tight as Hell's Angels Face Trial in Drugs-Murder Case*, N.Y. TIMES (Oct. 5, 1979), [www.nytimes.com/1979/10/05/archives/security-is-tight-as-hells-angels-face-trial-in-drugsmurder-case.html](http://www.nytimes.com/1979/10/05/archives/security-is-tight-as-hells-angels-face-trial-in-drugsmurder-case.html) [perma.cc/JF95-A7KS].

78. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) (reiterating the legislative intent for RICO to be construed liberally and broadly to reach the legislation's goal).

79. See *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) (recognizing that criminal organizations obtain money and power through illicit endeavors and that the "money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic process").

80. David Kurlander, *'They are Not Club Activities': The Hell's Angels and the Early Struggles of the Rico Statute*, CAFE (Nov. 12, 2021), [www.cafe.com/article/they-are-not-club-activities-the-hells-angels-and-the-early-struggles-of-the-rico-statute/](http://www.cafe.com/article/they-are-not-club-activities-the-hells-angels-and-the-early-struggles-of-the-rico-statute/) [perma.cc/9YYW-64K9].

81. Wallace Turner, *Prosecution of Hells Angels is Dropped After 2D Mistrial*, THE NEW YORK TIMES (Feb. 26, 1981), [www.nytimes.com/1981/02/26/us/prosecution-of-hells-angels-is-dropped-after-2d-mistrial.html](http://www.nytimes.com/1981/02/26/us/prosecution-of-hells-angels-is-dropped-after-2d-mistrial.html) [perma.cc/4K5S-PQ9B].

82. *Id.* (explaining that the mistrial arose out of the jury's continued deadlock and identifying the jury's hesitancy to accept testimony from key witnesses who were testifying for immunity and to protect their own self-interests); Spencer Sherman, *Hells Angels Trial Sent to Jury*, UPI (Feb. 10, 1981), [www.upi.com/Archives/1981/02/10/Hells-angels-trial-sent-to-jury/5904350629200/](http://www.upi.com/Archives/1981/02/10/Hells-angels-trial-sent-to-jury/5904350629200/) [perma.cc/S63X-S7V3] (discussing the first and second trials, the defendants, and the nature of the conspiracy charges, which include murder, attempt murder, and other acts of racketeering).

apply its new tool to fight against organized crime failed,<sup>83</sup> but this failure quickly proved to be just a minor obstacle in the government's use of RICO to decimate organized crime.<sup>84</sup>

Following RICO's underwhelming performance in its unveiling during the 1979 and 1981 trials of the Oakland-based Hell's Angels Motorcycle Club,<sup>85</sup> federal prosecutors bounced back in spectacular fashion over the next three decades.<sup>86</sup> Organized crime suffered a vicious blow from the government when the Commission, bosses of New York and the country's five most infamous and powerful Cosa Nostra families, were charged with violating the United States' RICO statute.<sup>87</sup> For years, these organizations dominated the criminal underworld, labor unions, and several industries critical to infrastructure.<sup>88</sup> At the end of a ten-week trial, the jury delivered a verdict of guilty on all charges against the "Commission" defendants.<sup>89</sup> The former mob bosses were sentenced to over 100 years in prison.<sup>90</sup> By 1988, the government levied over 2,500 indictments against Cosa Nostra, and the government had convicted over seventy-five top ranking mob bosses in leadership roles.<sup>91</sup> The steady stream of prosecutions and convictions of high-ranking members of the mob resulting from RICO indictments continued well into the 2000s.<sup>92</sup> By the turn of the century, Cosa Nostra's former stranglehold was but an archaic memory of the past.<sup>93</sup> Hundreds of former members had been prosecuted and convicted.<sup>94</sup> In addition to criminal prosecutions, the government

83. Turner, *supra* note 81.

84. Nathan Koppel, *They Call It RICO, and It is Sweeping*, WALL ST. J. (Jan. 20, 2011, 5:14 PM), [www.wsj.com/articles/SB10001424052748704881304576094110829882704](http://www.wsj.com/articles/SB10001424052748704881304576094110829882704) [perma.cc/F25A-UKRS].

85. Turner, *supra* note 81.

86. *See, e.g.*, United States v. Turkette, 452 U.S. 576 (1981) (reversing First Circuit and holding defendant's RICO conviction proper despite having legitimate and illegitimate businesses); *see also* United States v. Gotti, 166 F.3d 1202 (2d Cir. 1998) (affirming the decision of the trial court to deny John Gotti's motion for a new trial after his 1992 conviction).

87. Scott McCabe, *Crime History: Fed Use RICO Act to Bring Down Mob Bosses*, WASH. EXAMINER (Nov. 19, 2010, 5:00 AM), [www.washingtonexaminer.com/crime-history-feds-use-rico-act-to-bring-down-mob-bosses](http://www.washingtonexaminer.com/crime-history-feds-use-rico-act-to-bring-down-mob-bosses) [perma.cc/9UUQ-MZEA].

88. United States v. Salerno, 481 U.S. 739 (1987); United States v. Salerno, 108 F.3d 730 (7th Cir. 1997).

89. John M. Doyle, *Defendants Convicted on All Charges in Mafia 'Commission' Trial*, AP NEWS, [www.apnews.com/article/5d67510045a3c52d202b510455ff746d](http://www.apnews.com/article/5d67510045a3c52d202b510455ff746d) [perma.cc/3LLS-EHJH] (last visited Mar. 31, 2024).

90. *Id.*

91. Jacobs, *supra* note 19, at 58.

92. *E.g.*, United States v. Gotti, 413 F. Supp. 2d 287 (S.D.N.Y. 2005).

93. Jacobs, *supra* note 19, at 45.

94. *Id.* at 58.

successfully purged organized crime's influence in labor unions and legitimate business through union reform and RICO's civil punishment provisions.<sup>95</sup>

In addition to RICO virtually wiping Cosa Nostra's influence from United States' businesses and industries, the statute also led to convictions of prominent members of the Latin Kings,<sup>96</sup> Gangster Disciples,<sup>97</sup> and even the Hell's Angels Motorcycle Club.<sup>98</sup> After a questionable start, RICO revolutionized how prosecutors held criminal organizations and their members accountable.<sup>99</sup> The statute also altered the approach to criminal drug prosecutions for the foreseeable future.

### *E. RICO Expanded*

Since the creation of the federal RICO statute, over thirty states have adopted similar provisions to address organized crime in their states.<sup>100</sup> By 1985, approximately forty percent of state prosecutor's offices utilized state RICO statutes in their criminal prosecutions.<sup>101</sup> In addition to the success found in the late 1900s when prosecuting Cosa Nostra, familiarity with RICO and its efficiency in bringing convictions prompted the expanded use of RICO in criminal prosecutions across the country.<sup>102</sup>

RICO indictments bring a myriad of advantages to prosecutors.<sup>103</sup> Prosecutors have a lower threshold to show that a specific defendant committed a crime.<sup>104</sup> Instead, prosecutors only

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95. *Id.*

96. *See, e.g.,* United States v. Garcia, 754 F.3d 460 (7th Cir. 2014) (affirming the RICO conviction of defendant); United States v. Tello, 687 F.3d 785 (7th Cir. 2012).

97. *Gangster Disciples Enforcer and Hitman Convicted of Rico Murder, Killing Witness, and Other Violent Crimes*, DEP'T OF JUST. (Nov. 3, 2021), [www.justice.gov/opa/pr/gangster-disciples-enforcer-and-hitman-convicted-rico-murder-killing-witness-and-other](http://www.justice.gov/opa/pr/gangster-disciples-enforcer-and-hitman-convicted-rico-murder-killing-witness-and-other) [perma.cc/6WSD-B9XZ].

98. *Hells Angels Members Convicted of Racketeering Conspiracy for Their Dealings with Drugs, Guns, Armed Robbery, and Money Laundering*, FBI (Mar. 20, 2013), [archives.fbi.gov/archives/columbia/press-releases/2013/hells-angels-members-convicted-of-racketeering-conspiracy-for-their-dealings-with-drugs-guns-armed-robbery-and-money-laundering](http://archives.fbi.gov/archives/columbia/press-releases/2013/hells-angels-members-convicted-of-racketeering-conspiracy-for-their-dealings-with-drugs-guns-armed-robbery-and-money-laundering) [perma.cc/SY6E-35F2].

99. Gerald E. Lynch, *RICO: The Crime of Being A Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 670 (1987).

100. Matthew J. Smith, *The RICO Act*, CLM MAGAZINE (Apr. 30, 2014), [www.theclm.org/Magazine/articles/the-rico-act-insurance-fraud-claims/786](http://www.theclm.org/Magazine/articles/the-rico-act-insurance-fraud-claims/786).

101. Donald J. Rebovich et al., *Local Prosecution of Organized Crime: The Use of State Rico (Racketeer Influenced and Corrupt Organizations Act) Statutes*, BUREAU OF JUST. STAT., (Oct. 1993), [bjs.ojp.gov/library/publications/local-prosecution-organized-crime-use-state-rico-racketeer-influenced-and](http://bjs.ojp.gov/library/publications/local-prosecution-organized-crime-use-state-rico-racketeer-influenced-and) [perma.cc/RNA5-VDQ6].

102. Keenan, *supra* note 14, at 832-83.

103. Rebovich et al., *supra* note 101.

104. Dmitry Gorin, *Defending Federal RICO Act Charges*, EISNER GORIN

have to prove that the enterprise engaged in the predicate acts to prove guilt of all the participants of the enterprise.<sup>105</sup> Courts have resisted a narrow interpretation of RICO and broadened RICO to apply to issues outside of its original intention.<sup>106</sup> It is difficult to identify an area where the courts' resistance has benefited prosecutors than in the prosecution of drug and gang crimes.

Since the diminution in the power, control, and prevalence of organized crime and the rise of RICO statutes as a favored tool of prosecutors in criminal drug cases, courts have been forced to clarify what constitutes an enterprise<sup>107</sup> and racketeering activity.<sup>108</sup> The main difference between RICO statutes and other criminal law statutes stems from RICO's purpose to hold an enterprise accountable for its actions rather than a lone participant.<sup>109</sup> Despite the specificity of the legislature's intent in drafting RICO to apply to structured and organized crime,<sup>110</sup> the courts have taken a relaxed position regarding what constitutes a criminal enterprise under RICO.<sup>111</sup>

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LLP (Jan. 26, 2021), [www.thefederalcriminalattorneys.com/defending-federal-rico-charges](http://www.thefederalcriminalattorneys.com/defending-federal-rico-charges) [perma.cc/S5XV-Y6E7].

105. *Id.*

106. *See Turkette*, 452 U.S. at 582-83 (reversing the United States Court of Appeals for First Circuit's statutory construction limiting the meaning of "enterprise" to large and influential organizations capable of causing havoc in legitimate business and labor unions, not merely "groups of persons associated together for a common purpose of engaging in conduct"); *see also* *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989) (holding that Indiana's RICO statute does not violate the Fourteenth Amendment for vagueness and resisting narrowing of the statute); *but see* Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970) ("It is the purpose Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."). Notably, the Statement of Findings and Purpose, immediately preceding the sentence quoted in the parenthetical, does not describe the intended targets to include loosely associated groups or those engaged in isolated street conspiracies, but rather, it focuses on those that are involved in "highly sophisticated, diversified, and widespread activity that drain[] billions of dollars from America's economy," who use their proceeds and power "to infiltrate and corrupt legitimate business and labor unions *and* to subvert the corrupt our democratic process." *Id.* (emphasis added).

107. *See generally Turkette*, 452 U.S. 576 (addressing the challenge that the defendant had not formed or entered a criminal enterprise).

108. *See Tenamee v. Schmukler*, 438 F. Supp. 2d 438 (S.D.N.Y. 2006) (addressing the defendants' challenges that the alleged pattern of racketeering was too infrequent to violate RICO).

109. Veneziano, *supra* note 60.

110. Anderson & Jackson, *supra* note 72.

111. *See Turkette*, 452 U.S. 576, 580-83 (broadly interpreting "any union or group of individuals associated in fact although not a legal entity" to be catchall language); *United States v. Applins*, 637 F.3d 59, 71-83 (2d Cir. 2011) (holding that proof of an enterprises is not an essential element to sustain a conviction

The court-made definition of an enterprise does not require any formal connection or structure for an enterprise if the group of individuals are associated in fact to meet illegitimate ends.<sup>112</sup> Along similar lines, courts have held that to violate RICO an enterprise does not have to be established at the time of the racketeering conduct.<sup>113</sup> In addition to broad interpretation of what constitutes an enterprise, courts apply a liberal definition of what constitutes a pattern of racketeering.<sup>114</sup> The text of the statute requires an individual to commit at least two predicate acts of racketeering to satisfy the racketeering activity requirement.<sup>115</sup> Despite the text, courts have diminished the requirement of two specific acts when the defendant had knowledge of the enterprise's illegal conduct.<sup>116</sup> For example, in *United States v. Posada-Rios*, the court held a wife's prolonged knowledge of her husband's racketeering activities in furtherance of a criminal enterprise sufficient to sustain a conviction under the RICO statute.<sup>117</sup>

The courts' resistance in mandating organized structure as a requisite in criminal RICO prosecutions and clear and concise definitions of racketeering encourages indicting those with mere contact or proximity to the alleged enterprise.<sup>118</sup> Prosecutors have increasingly utilized this broad discretion to launch drug prosecutions of defendants loosely affiliated or connected to organized crime by minimal contact.<sup>119</sup> This includes drug addicts who are connected to the enterprise by purchasing drugs for personal use.<sup>120</sup>

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under RICO).

112. *Turkette*, 452 U.S. 576 (1981); 18 U.S.C.A. § 1961(4).

113. *See Applins*, 637 F.3d 59 (2d Cir. 2011) (affirming defendant's conviction for RICO violation and holding that an agreement to form an enterprise in the is sufficient to sustain RICO conviction).

114. *See United States v. Posada-Rios*, 158 F.3d 832 (5th Cir. 1998) (holding that prolonged knowledge of husband's racketeering activity is sufficient to convict on RICO charges even though the wife did not commit two specific acts of racketeering).

115. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (clarifying the definition of racketeering activity in criminal RICO prosecutions).

116. *Posada-Rios*, 158 F.3d 832.

117. *Id.* at 841.

118. *Federal Statutes—Racketeer Influenced and Corrupt Organizations Act—En Banc Ninth Circuit Holds That Rico Enterprise Need Not Have Any Particular Organizational Structure*, 121 HARV. L. REV. 1652, 1654 (2008).

119. *See United States v. Miller*, 116 F.3d 641, 682 (2d Cir. 1997) (holding that conduct for participation is a low bar).

120. Lucy Litt, *RICO: Rethinking Interpretations of Criminal Organizations*, 26 BERKELEY J. CRIM. L. 71, 91 (2021).



### *F. Drug Investigations and Prosecutions Under RICO Statutes*

As previously discussed, the RICO statutes did not make changes to the underlying substantive criminal law.<sup>121</sup> At the heart of the purpose in drafting the statute was the need for the legislation to provide new investigative tools in the prosecution of organized crime.<sup>122</sup> To effectuate this purpose, the legislature expanded the use of grand juries in RICO investigations, drafted a general witness immunity statute, abolished rules of proof, and authorized wiretapping and bugging.<sup>123</sup> Courts have also permitted RICO indictments to lack specificity in the context of drug and gang prosecutions.<sup>124</sup> RICO's broad application and investigative efficiency has been used regularly in the context of criminal drug prosecutions.<sup>125</sup>

RICO and other offshoots of the statute have lowered the investigative effort required in criminal drug investigations.<sup>126</sup> The statute's application leads to prosecutions and convictions resulting from these investigations.<sup>127</sup> Successful prosecutions and efficient investigations build and uphold the public image and approval of prosecutors in local district attorney's offices, the Department of Justice, and everywhere in between.<sup>128</sup> Overall, RICO serves the government as a convenient tool that eases evidentiary requirements and circumvents usual procedures.<sup>129</sup>

It may be true that RICO's expanded use outside of its original

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121. Lynch, *supra* note 99, at 670.

122. *Id.*

123. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 929, 935-36 (1970).

124. See Babe Howell & Priscilla Bustamante, *Report on The Bronx 120 Mass "Gang" Prosecution*, The Bronx 120 Prosecution 14-17 (Apr. 2019), [bronx120.report/the-report](https://bronx120.report/the-report) [perma.cc/JS2Z-LHRE] (expanding on its case study and explaining that nearly one third of the defendants were included in and convicted under the RICO indictment based on selling marijuana, even though the indictments and press releases suggested the conduct, requiring use of the statute, was "multiple murders, attempted murders, shootings, and stabbings" committed by the enterprise). Additionally, the study highlights that many of these individual defendants were included as members of the enterprise, despite being as young as fourteen years old at the time of the conspiracy's inception. *Id.* at 14.

125. Gerard E. Lynch, RICO: *The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 924-25, 946, 950 (1987).

126. Howell & Bustamante, *supra* note 124.

127. *Id.*

128. Ronald L. Soble, *Drug War is Putting Pressure on Trial, Defense Says*, LOS ANGELES TIMES (Oct. 25, 1990, 12:00 AM), [www.latimes.com/archives/la-xpm-1990-10-25-me-4065-story.html](https://www.latimes.com/archives/la-xpm-1990-10-25-me-4065-story.html) [perma.cc/LG6V-TB3U]; Nick Robinson, *The Decline of the Lawyer-Politician*, 65 BUFF. L. REV. 657, 690-94, 720-25 (2017).

129. Taifi, *supra* note 13.

legislative intent to combat specific criminal enterprises results in successful prosecution of criminals engaged in the drug trade.<sup>130</sup> It is also true that the broad scope is being manipulated to include drug addicted individuals in RICO indictments to leverage their addictions to obtain convictions,<sup>131</sup> putting those with the least amount of access to adequate legal representation, political power, or media coverage in danger.<sup>132</sup> In theory, the United States' judicial system adheres to longstanding precedent that a defendant cannot be subjected to criminal punishment because of their drug addicted status.<sup>133</sup> At the same time, this system allows individuals of the same status to be indicted under a criminal provision specifically tailored to convict mob bosses, corporations engaging in fraudulent activity, cartels, and national street gangs in an effort to protect the democratic process, legitimate businesses, and labor unions from being corrupted.<sup>134</sup> Given the difference between its intended targets and goals, at the time of its inception, and its use now, the question arises as to whether these same liberties granted by RICO statutes should be leveraged against unstructured, localized, and isolated criminal conspiracies, who lack the power, finance, influence, and structure to pose a credible threat to facilitate pervasive corruption in the Nation's legitimate markets.

### III. ANALYSIS

The expansion of RICO's application in federal prosecutions and its adoption and application on the state level has proved beneficial in the prosecution of drug crimes.<sup>135</sup> These benefits do not come without negative consequences, prompting the question of whether the negative societal costs should be limited through increased restraint, oversight, and scrutiny, all of which are largely absent from state statutory schemes.<sup>136</sup> prompting the question of whether the negative societal costs should be limited through

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130. Jacobs, *supra* note 19.

131. *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010); *United States v. Millan-Machuca*, 991 F.3d 7 (1st Cir. 2021); *Organized Crime Control Act of 1970*, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970).

132. *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003).

133. *See Robinson v. California*, 370 U.S. 660, 667 (1962) (holding that a defendant cannot be punished because of their status).

134. *See Wilson*, 605 F.3d at 1018 (holding that an individual is not required to participate in the operation or management of an enterprise to be criminally liable and rejecting defendants' arguments that an "association-in-fact enterprise must have structure beyond the attendant pattern of racketeering").

135. Carol Chodroff, *Human Rights Watch Calls on Congress to Support the "Youth Promise Act," H.R. 3846*, Human Rights Watch (Apr. 8, 2008, 8:00 PM), [www.hrw.org/news/2008/04/06/human-rights-watch-calls-congress-support-youth-promise-act-hr-3846](http://www.hrw.org/news/2008/04/06/human-rights-watch-calls-congress-support-youth-promise-act-hr-3846) [perma.cc/KG9M-D3QH].

136. Anna T. Stoeffler, *Iowa's state RICO Statute: Wreaking Havoc on Iowa's Criminal Justice System*, 102 IOWA L. REV. 825, 829 (2017).

increased restraint, oversight, and scrutiny, all of which are largely absent from state statutory schemes. Determining whether the complex problems RICO's expansion solves outweighs the problems it creates requires a balancing of its benefits and drawbacks. On one hand, RICO statutes created an effective pathway for the government to secure criminal convictions of organized crime and criminal enterprises with unprecedented efficiency and success.<sup>137</sup> On the other hand, the statutes' breadth grants prosecutors enormous deference and power to circumvent procedural and substantive safeguards with little to no oversight.<sup>138</sup> This section examines the benefits conferred to the government when indicting drug addicted individuals in drug cases brought using RICO or similar conspiracy statutes. In addition to the benefits conferred to the government, this section also analyzes the dangerous risks and consequences drug-addicted individuals are exposed to when named in these indictments. Finally, this section discusses the impact this approach has on the criminal justice system.

### A. Oversight and Targeting Investigations

#### 1. Lack of Oversight in State RICO Indictments

One of the most useful aids to the government's ability to investigate efficiently is the permission of general and broad indictments for RICO drug and gang prosecutions.<sup>139</sup> Federal RICO prosecutions require federal prosecutors to submit the full indictment and a memorandum supporting the utilization of RICO to the Department of Justice's Organized Crime and Gang Section ("OCGS") for approval prior to proceeding with RICO prosecutions.<sup>140</sup> Although not mandatory, OCGS recommends prosecutors divide the memorandum into seven sections explaining: one, the witnesses and evidence; two, the enterprise; three, the defendants; four, policy considerations and appropriateness of RICO; five, the legal sufficiency of the RICO charges; six, the violent crimes in connection with the alleged enterprise; and seven, civil forfeiture.<sup>141</sup> OCGS does not specify the level of scrutiny the memoranda must overcome for authorization, but it provides federal prosecutors with unlimited consultation, access, and advice on how to draft memoranda sufficient for authorization.<sup>142</sup> While

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137. Jacobs, *supra* note 19.

138. Howell & Bustamante, *supra* note 124, at 7.

139. Litt, *supra* note 120, at 128.

140. CRIMINAL RICO: 18 U.S.C. §§ 1961-1968, A MANUAL FOR FEDERAL PROSECUTORS 17-20, 255-279 (DEPT OF JUST. 2009).

141. Jacobs, *supra* note 19, at 21-23.

142. *Id.*

this process does not completely protect from abuse of the statute, it at least adds a level of preliminary supervision and accountability on prosecutors wishing to bring RICO indictments.<sup>143</sup>

In contrast, states who have adopted RICO statutes for prosecution at the state level do not require RICO indictments to undergo pre-indictment review processes.<sup>144</sup> The only remaining tool for accountability of state prosecutor's decisions to indict under state RICO statutes comes after the resolution of the case.<sup>145</sup> In theory, the grand jury provides an appropriate buffer to check prosecutors' immense power from unjustified prosecution.<sup>146</sup>

In reality, grand juries function as a mere formality in transforming prosecutors' charges into indictments regardless of the strength of evidence.<sup>147</sup> As Justice William O. Douglas recognized over fifty years ago, "[t]oday it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury."<sup>148</sup> Prosecutors are the grand juries' sole source of evidence, information, and narratives.<sup>149</sup> In addition to prosecutorial control over the delivery and context of information, they are not bound to produce substantial exculpatory evidence that may absolve the defendants to the grand jury.<sup>150</sup> Further, grand juries are instructed to look at the evidence and conclude whether all of the essential elements could be met with the evidence.<sup>151</sup> Unlike federal RICO indictments, which undergo some level of scrutiny for the appropriateness of utilizing RICO, grand juries never consider appropriateness because it is not an element of the crime.<sup>152</sup> Not only does logic

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143. *Id.*

144. Russell D. Leblang, *Controlling Prosecutorial Discretion Under State Rico*, 24 SUFFOLK U. L. REV. 79, 90 (1990).

145. *Id.* (highlighting that because of the format and availability of review *post hoc*, infrequency of information will result in insufficient scrutiny because the state RICO act will have been used for years before challenges appear on appeal).

146. *Restoring Legitimacy: The Grand Jury As the Prosecutor's Administrative Agency*, 130 Harv. L. Rev. 1205, 1207 (2017).

147. Leblang, *supra* note 144, at 90; United States v. Cahill, No. 20 CR 521 (CM), 2022 WL 10394481 at \*6 n.2 (S.D.N.Y. Oct. 18, 2022) ("it may often be true that 'a grand jury might indict a ham sandwich' if asked to do so by a prosecutor").

148. *United States v. Dionisio*, 410 U.S. 19, 23 (1973) (Douglas, J. dissenting).

149. *Restoring Legitimacy*, *supra* note 146, at 1208.

150. *See United States v. Williams*, 504 U.S. 36, 53 (1992) (holding indictments may not be dismissed because prosecutors failed to provide the grand jury with exculpatory evidence even when that failure violates a local rule of disclosure which required prosecutors to inform the grand jury of "substantial exculpatory evidence").

151. Leblang, *supra* note 144, at 90-91.

152. The essential elements in a RICO claim are: (1) engaging in (2) a

support the position that grand juries only act as an administrative procedure to legitimize prosecutors' objectives, but empirical data also supports it.<sup>153</sup> Grand juries across the country elect to indict cases brought by the prosecutor between ninety-five and ninety-nine percent of the time.<sup>154</sup> The grand jury does not act as a shield to prevent unjustified prosecution.<sup>155</sup> Instead, grand juries promote the fiction of checks on prosecutorial power while furthering interests of prosecutors.<sup>156</sup>

Lack of oversight in state RICO prosecutions gifts state prosecutors more prosecutorial discretion than their federal counterparts<sup>157</sup> and prosecutor-controlled grand juries are the sole check of their power.<sup>158</sup> The discretion given to prosecutors on who to include in RICO indictments enables indictments that lack specific information and factual allegations tying a defendant to times, dates, location and fail to identify a defendant's alleged conduct in furtherance of the criminal enterprise.<sup>159</sup> Since prosecutors rarely have to worry about grand jury opposition, they cast a wide net when including individual defendants in a RICO indictment without providing a factual basis.<sup>160</sup>

## 2. *Inaccurate Targeting*

Consequently, government investigators and prosecutors often determine the targets of RICO investigation through readily available, inaccurate, and biased gang databases.<sup>161</sup> The inclusion

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pattern of racketeering activity (3) connected to the furtherance of an enterprise. *Trugreen Landcare, L.L.C. v. Scott*, 512 F. Supp. 2d 613, 623 (N.D. Tex. 2007).

153. Debra Cassens Weiss, *Grand Juries Almost Always Indict, Federal Stats Show; Is There a Shooting Exception for Cops?* ABA J. (Nov. 26, 2014, 6:58 AM), [www.abajournal.com/news/article/grand\\_juries\\_almost\\_always\\_indict\\_federal\\_stats\\_show\\_is\\_there\\_a\\_cop\\_shootin](http://www.abajournal.com/news/article/grand_juries_almost_always_indict_federal_stats_show_is_there_a_cop_shootin) [perma.cc/PA9W-742Y].

154. *Id.*; *Restoring Legitimacy*: *supra* note 146, at 1205, 1207; Mark Motivans, *Federal Justice Statistics 2010 – Statistical Tables*, BUREAU OF JUST. STAT. (Dec. 2013), [bjs.ojp.gov/content/pub/pdf/fjs10st.pdf](http://bjs.ojp.gov/content/pub/pdf/fjs10st.pdf) [perma.cc/4TQD-KV7Q].

155. Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 34-35 (2004).

156. *Id.* at 34-36.

157. Howell & Bustamante, *supra* note 124.

158. *Id.*

159. Litt, *supra* note 120, at 128; *see also* *Indictment, State v. Jones*, No. 18-CR 3584-5 (Ga. Super. Aug. 30, 2017), 2017 WL 11540669 (indicting music artist Sergio Kitchens, aka “Gonna” in violation of Georgia’s state RICO statute for a window tint violation and possession of marijuana without asserting factual allegations, providing evidence, or expounding on his role in the alleged criminal enterprise).

160. Litt, *supra* note 120, at 128.

161. The use of emojis, captions, and hand signals without other

of an individual in these databases provides a basis for surveillance of internet activity, communications, and physical activity.<sup>162</sup> Additionally, law enforcement agents use the surveillance of an individual's social media accounts to extend surveillance and inclusion in the database to other individuals who share a connection on social media.<sup>163</sup> Not requiring specific evidence of an individual's conduct or involvement in indictments enables prosecutors to target almost any individual connected to any subject in a database without expending man-power and costly investigative methods.<sup>164</sup> Without proper review processes and other safeguards in place, state prosecutors go uninhibited in indicting individuals under RICO statutes with the threat of massive criminal and civil penalties.<sup>165</sup>

### B. RICO as a Tool of Leverage

In addition to RICO's expansion of prosecutorial power and discretion, especially at the state level, RICO statutes create even more leverage for prosecutors to use against criminal defendants in the pursuit of evidence and resolutions short of trial.<sup>166</sup> RICO's bail restrictions, enhanced criminal and civil penalties, and public disapproval of drug and gang crimes enhance prosecutors' leverage to foster cooperation and encourage guilty pleas.<sup>167</sup> The public perception and fears of drug and gang crime also incentivize prosecutors to aggressively prosecute these offenses efficiently and with severe punishment because of the political benefit.<sup>168</sup>

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corroborating evidence can be sufficient to justify placing an individual into one of the many gang databases across the country. JOSMAR TRUJILLO & ALEX S. VITALE, GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF 'PRECISION POLICING' 6-10 (2019), [www.static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf](http://www.static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf) [perma.cc/49UP-N3J9]; Woods, *supra* note 7.

162. Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J. L. & TECH. 315, 320-24 (2015); Meredith Broussard, *When Cops Check Facebook*, THE ATLANTIC (2015) [www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/](http://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882/) [perma.cc/LSG2-T6KV] (last visited Mar. 30, 2024).

163. Behrman, *supra* note 162, at 320-24.

164. *Id.*

165. Lisa Pritchard Bailey et al., *Racketeer Influenced and Corrupt Organizations*, 36 AM. CRIM. L. REV. 1035, 1077, 1090 (1999).

166. *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, *supra* note 9.

167. Somil Trivedi, *Coercive Plea Bargaining Has Poisoned the Criminal Justice System. It's Time to Suck the Venom Out*, ACLU (Jan. 13, 2020), [www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out](http://www.aclu.org/news/criminal-law-reform/coercive-plea-bargaining-has-poisoned-the-criminal-justice-system-its-time-to-suck-the-venom-out) [perma.cc/6UBW-E7L9].

168. Wendy Sawyer & Alex Clark, *The Rise of the "Prosecutor Politician"*,

### 1. Bail

Government reliance on databases when targeting RICO investigations and prosecutions not only creates a wide pool for prosecutors to include in their indictments, but reliance on databases also supplies prosecutors with a basis to request excessively high bail if any at all.<sup>169</sup> Courts base their decisions on two substantial factors: one, whether the defendant presents a flight risk or two, whether the defendant poses a substantial danger to the community.<sup>170</sup> Inclusion in a gang database, despite bias<sup>171</sup> or inaccuracy,<sup>172</sup> strengthens the government's argument that the defendant poses a significant and justified risk to the community if released.<sup>173</sup>

Often, these mere allegations of gang involvement subject criminal defendants to increased bail, denial of bail, and prejudicial treatment by the court.<sup>174</sup> In a survey of private and public defense attorneys who practice in over forty jurisdictions, in twelve different states, at the state and federal levels, a staggering ninety percent reported that gang allegations had been levied against their clients at bail hearings.<sup>175</sup> Eighty percent of these allegations were inaccurate, and the vast majority of the clients were denied bail or issued an increased bail which they could not pay.<sup>176</sup> More importantly, these allegations and decisions preventing pretrial release are rarely subjected to evidentiary review.<sup>177</sup>

Whether a defendant receives bail while awaiting trial poses substantial challenges to defendants, their attorneys, and reaching justice.<sup>178</sup> To begin, defendants' pretrial incarceration hinders the

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PRISON POLICY INITIATIVE (July 13, 2017), [www.prisonpolicy.org/blog/2017/07/13/prosecutors/](http://www.prisonpolicy.org/blog/2017/07/13/prosecutors/) [perma.cc/WL83-WVVV].

169. Litt, *supra* note 120, at 91.

170. 18 U.S.C. § 3142.

171. Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, JACKSON FREE PRESS (Mar. 29 2018, 1:32 PM), [www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan/](http://www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan/) [perma.cc/4ABN-BW3K].

172. Jasmine Johnson, *Gang Databases: Race and the Constitutional Failures of Contemporary Gang Policing in New York City*, 94 ST. JOHN'S L. REV. 1033, 1052 (2020).

173. Michael Cannell, *Assumed Dangerous Until Proven Innocent: The Constitutional Defect in Alleging Gang Affiliation at Bail Hearings*, 63 DEPAUL L. REV. 1027, 1039-41 (2014).

174. *Id.* at 1039-41; Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991, 1023 (2018).

175. K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pre-Trial Detention*, 23 ST. THOMAS L. REV. 620, 631 (2011).

176. *Id.* at 632-24.

177. *Id.*

178. Juleyka Lantigua-Williams, *Why Poor, Low-Level Offenders Often Plead to Worse Crimes*, THE ATLANTIC (July 24, 2016),

ability of defendants and defense attorneys to communicate with each other, maintain relationships with potential defense witnesses, pay their legal fees, and extensively discuss the merits of the case as the litigation evolves.<sup>179</sup> Pretrial detention prolongs and complicates every step of the defense's investigation.<sup>180</sup> In light of the challenges faced in conducting an investigation and constructing a formidable defense, prosecutors weaponize the difficulties offering disproportionate plea deals, and defendants who remain incarcerated before trial accept the deals even if a defense exists.<sup>181</sup> When resistance is met, prosecutors continue to impose their dominance over the criminal justice system by threatening to take away time served during pretrial detention and advocate for the harshest sentence should the defendant decide to take the case to trial.<sup>182</sup> Like most other decisions made by prosecutors, state prosecutors bringing RICO claims enjoy unfettered discretion in the substance of the pleas, expiration of the plea offers, and proper punishment.<sup>183</sup> Defendants denied or unable to afford bail are less likely to exercise their constitutional rights to a jury trial and more likely to receive offers with enhanced penalties if alleged they are part of a gang or criminal enterprise.<sup>184</sup>

## 2. Enhanced Penalties

Pretrial detention provides enormous negotiating power to prosecutors, but it is far from the only advantage prosecutors receive from utilizing RICO.<sup>185</sup> RICO's purpose as a punitive criminal and civil penalty enhancer creates additional duress, fear, and leverage, encouraging cooperation with the government or premature plea agreements.<sup>186</sup> State and federal RICO statutes enhance the criminal penalties defendants face significantly

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[www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/](http://www.theatlantic.com/politics/archive/2016/07/why-pretrial-jail-can-mean-pleading-to-worse-crimes/491975/) [perma.cc/MYB7-Z2T6].

179. Clara Kalhous & John Meringolo, *Bail Pending Trial: Changing Interpretations of the Bail Reform Act and the Importance of Bail from Defense Attorneys' Perspectives*, 32 PACE L. REV. 800, 847-8 (2012).

180. *Id.* at 848.

181. *Id.* at 847-48.

182. Andrew Manuel Crespo, *The Hidden Law of Plea Bargaining*, 118 COLUM. L. REV. 1303, 1304-07 (2018).

183. Ram Subramarian, et al., *In the Shadows: A Review of the Research on Plea Bargaining*, VERA INSTITUTE OF JUSTICE (Sept. 2020) [www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf](http://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf) [perma.cc/6C2Z-YKN6].

184. Howell, *supra* note 175 at 634-35.

185. Lantigua-Williams, *supra* note 178.

186. *RICO: A Brief Sketch*, CONG. RSCH. SERV. REPS. 2, [www.sgp.fas.org/crs/](http://www.sgp.fas.org/crs/) [perma.cc/T9B2-NXMX] (last visited Nov 3, 2022); *Racketeer Influenced and Corrupt Organizations (RICO)*, JUSTIA, [www.justia.com/criminal/docs/rico/](http://www.justia.com/criminal/docs/rico/) [perma.cc/A2CT-Q6GN] (last visited Nov 2, 2022).



compared to the penalties faced if prosecuted for the predicate act alone.<sup>187</sup>

Under federal law, a predicate act punishable by imprisonment for two years under the substantive law subjects the defendant to the possibility of twenty years imprisonment after RICO's enhancement.<sup>188</sup> Similarly, some state RICO statutes increase potential imprisonment terms by thirty years solely because of RICO's enhancement.<sup>189</sup> The significant penalties available through RICO's application encourage prosecutors to utilize RICO statutes, and prosecutors' broad discretion in determining charging decisions insulates them from repercussions even if the evidence would not support a conviction under RICO at trial.<sup>190</sup> Prosecutors then use the threat of enhanced terms of incarceration to broker plea agreements and agreements to testify against codefendants to obtain convictions even though obtaining a conviction under the originally charged crime would not have materialized.<sup>191</sup> Even though defendants assume they will receive substantial leniency in their sentences, the benefit received in exchange for guilty pleas are often illusions.<sup>192</sup> More often than not, the sentencing recommendations of the prosecutor align with the traditional sentencing of the court even if significantly less than the maximum sentences.<sup>193</sup> Prosecutors make use of their limitless discretion and lack of review process in applying state RICO statutes to obtain convictions short of trial via plea agreements and obtain evidence to use against codefendants in the few cases that make it to a jury.<sup>194</sup>

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187. Tennessee's state RICO statute authorizes sentences between twenty-five and forty years for convicted defendants. TENN. CODE ANN. § 39-12-205(a) (West 2023); Georgia's state RICO statute requires those found guilty of engaging in prohibited activity as defined in the statute to serve at least five years imprisonment but authorizes up to twenty years in prison for each count. GA. CODE ANN. § 16-14-5(a) (West 2015); Oklahoma's state RICO statute imposes a minimum sentence of ten years with multiple restrictions of conditions of confinement. OKLA. STAT. ANN. tit. 22, § 1404(a) (West 2010); 18 U.S.C.A. § 1963(a).

188. 18 U.S.C.A. § 1961(1); 18 U.S.C.A. § 1963(a).

189. TENN. CODE ANN. § 39-17-417(e) (West 2023); TENN. CODE ANN. § 39-12-203(9); TENN. CODE ANN. § 39-12-204 (West 2023); Tenn. Code Ann. § 40-35-112 (West 2010); *Sentence Ranges*, JUSTIA L., [www.law.justia.com/codes/tennessee/2021/title-40/chapter-35/part-1/section-40-35-112/](http://www.law.justia.com/codes/tennessee/2021/title-40/chapter-35/part-1/section-40-35-112/) [perma.cc/Q7W2-N7HE] (last visited Nov 2, 2022).

190. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 435 (2001).

191. Stoeffler, *supra* note 136 at 829.

192. Donald G. Gifford, *Meaningful Reform of Plea Bargaining the Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 56 (1983).

193. *Id.*

194. *Id.*; Davis, *supra* note 190, at 435.

### C. Constitutional Concerns: *Robinson v. California*

The use of RICO as leverage raises a question of whether the enhanced punishment under statute conflicts with a Supreme Court rule, the *Robinson* doctrine, when indicted defendant's connection to the alleged enterprise is their addiction to drugs provided by the enterprise.<sup>195</sup> In 1962, the Supreme Court of the United States heard *Robinson v. California*, where a defendant convicted under California's statute criminalizing addiction to narcotics challenged its constitutionality.<sup>196</sup> The Court held that the statute violated the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>197</sup> Thus, the *Robinson* doctrine was birthed holding that individuals cannot be punished for their status as drug addicts.<sup>198</sup>

While the *Robinson* doctrine has existed for over sixty years since the Supreme Court's 1962 decision,<sup>199</sup> the doctrine is often disregarded by legislators and courts because the Court failed to refine the decision and provide a clear framework for constitutional analysis.<sup>200</sup> Further, the Court has not provided a sufficient answer to the threshold question of what distinguishes an individual's status from an act that can be properly punished.<sup>201</sup> Without clarification on the *Robinson* doctrine regarding narcotic addiction, an argument exists that indicted defendants whose connection to a criminal enterprise exists only because of their addiction to narcotic substances violates the longstanding precedent.<sup>202</sup> Given the

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195. Litt, *supra* note 120, at 91. The Court prohibits meting out criminal punishment for a defendant's status. *Robinson v. California*, 370 U.S. 660 (1962).

196. *See Robinson*, 370 U.S. at 665-68 (holding a California criminal statute that made it a criminal offense for an individual to be addicted to the use of narcotics violated the Cruel and Unusual Punishment Clause of the Eighth Amendment).

197. *See id.* (creating the *Robinson* doctrine).

198. *Id.*

199. *Id.*

200. *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 655 (1966). As early as four years after the *Robinson* decision, legal scholars predicted the protections proscribed by the doctrine would be neglected by the law unless the Court revisited the decision and provided a clear framework for analyzing the doctrine. *Id.*

201. *See Powell v. Texas*, 392 U.S. 514, 531-34 (1968). The Supreme Court last addressed the *Robinson* doctrine in 1968 where it upheld a Texas state conviction for violating a Texas public drunkenness statute. *Id.* at 535-36.

202. *See Benno Weisberg, When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual "Crimes,"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330-31 (2005). Advocates opposing the criminalization of homelessness have argued that criminal statutes directly criminalizing homelessness violate the *Robinson* doctrine. Additionally, advocates have gone further and asserted that laws which punish acts in accordance with *Robinson* are still invalid under the doctrine when it creates circumstances implausible or impossible for an

significant enhancement of punishment lent by RICO statutes, not only is there a risk of punishment based on status, but there is also a substantial risk that the punishment's severity will be exaggerated by RICO statutes.<sup>203</sup>

The *Robinson* doctrine's lack of clarity, the lack of oversight and reliance on inaccurate databases during RICO investigations, and the excessive leverage RICO statutes bestow upon prosecutors is troubling.<sup>204</sup> To protect drug-addicted individuals and ensure their constitutional protections, it is crucial that state governments impose heightened scrutiny and mechanism of review when utilizing RICO statutes.

#### IV. PROPOSAL

State RICO statutes expand prosecutors' broad power in the criminal justice system with limited to no supervision or oversight to balance that expanded power.<sup>205</sup> To shield individuals from improper inclusion in RICO actions and ensure the reasonable and appropriate use of the statutes, legislatures should consider adopting one, if not all, of three proposals to safeguard individuals from unjust harm: first, requirement of a formal review process, codified within the text of the statute;<sup>206</sup> second, providing an avenue for defendants to challenge their inclusion in the indictment by way of a fact intensive hearing, focusing on the specific evidence linking the defendant to the alleged enterprise's pattern of racketeering; and third, narrowing the statute's text to clearly identify, define, and describe the type of crime it seeks to curb, explaining the reasons why preexisting laws governing criminal conduct are insufficient to adequately safeguard the public and prosecute the targeted criminal conduct.<sup>207</sup>

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individual to not break the law. Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices; Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 707-08 (1997).

203. Davis, *supra* note 190; Stoeffler, *supra* note 136, at 189.

204. Behrman, *supra* note 162; *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, *supra* note 200; TRUJILLO & VITALE, *supra* note 161.

205. Leblang, *supra* note 144, at 86 (explaining the problems of prosecutorial discretion in state RICO).

206. *See id.* at 90 (explaining that criminal defendants often have no way to challenge their inclusion in RICO indictments).

207. *See* Keenan, *supra* note 14, at 838-40 (New York and Illinois have adopted state RICO provisions narrowly tailored to address a specific kind of crime); Press-Release, *Governor Quinn Signs Legislation to Fight Street Gang Crime*, ILLINOIS.GOV (June 11, 2012), [www.illinois.gov/news/press-release.10299.html](http://www.illinois.gov/news/press-release.10299.html) [perma.cc/C64A-9JGE].

### A. Formal Review Process

State governments should reevaluate their approach to RICO's enhanced penalties by imposing heightened scrutiny when applying the statute. To achieve this, legislatures should provide preindictment protections via a formal review requirement similar to the federal government's process.<sup>208</sup>

Federal application of RICO requires a formal review process conducted by the OCGS to assess the validity and appropriateness of the statute before authorizing its use.<sup>209</sup> By no means does this system of review adequately safeguard the rights afforded to potential criminal defendants,<sup>210</sup> but it at least provides an additional layer of protection from unnecessary use and abuse of the enhanced latitude inherent in the construction of most RICO statutes.<sup>211</sup> The majority of states that have adopted adaptations of the federal RICO statute, however, failed to adopt or incorporate any review process, system, or guidelines to assess the proper utilization of RICO statutes in prosecution at the state level.<sup>212</sup>

The expanded privileges granted to state prosecutors through RICO statutes, absence of preindictment review, general complexity and misunderstanding of RICO, and state prosecutors' inexperience in handling RICO complexities, create substantial risks of harm, improper use, and abuse in its application.<sup>213</sup> As a result, drug

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208. *Id.*

209. JUSTICE MANUAL § 9-110.200 (DEPT OF JUST. 2018) (“The decision to institute a federal criminal prosecution involves balancing society's interest in effective law enforcement against the consequences for the accused. Utilization of the RICO statute, more so than most other federal criminal sanctions, requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes. One purpose of these guidelines is to reemphasize the principle that the primary responsibility for enforcing state laws rests with the state concerned. Despite the broad statutory language of RICO and the legislative intent that the statute ‘. . . shall be liberally construed to effectuate its remedial purpose,’ it is the policy of the Criminal Division that RICO be selectively and uniformly used. It is the purpose of these guidelines to make it clear that not every proposed RICO charge that meets the technical requirements of a RICO violation will be approved.”).

210. Anderson & Jackson, *supra* note 72, at 86-87. Federal RICO statutes jeopardize the liberties and rights afforded to the people because the statutes' vagueness infringes on the Due Process rights of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the Constitution. *Id.* Further, RICO prosecutions erode the longstanding presumption of innocence until proven guilty. *Id.*

211. Gene W. Ryerson, *RICO: Analyzing the Use of Federal Law to Combat Local Gang Problems*, HOMELAND SEC. DIGIT. LIBR., [www.hsdl.org/?view&did=834589](http://www.hsdl.org/?view&did=834589) [perma.cc/W5VB-Y6AT] (last visited Nov 20, 2022).

212. Leblang, *supra* note 144, at 90-91 (explaining the review process for federal RICO indictments and failure of the states to adopt similar guidelines).

213. Anderson & Jackson, *supra* note 72, at 96. “Our criticism extends far beyond lodging a complaint that RICO is duplicative of other criminal

addicted individuals or individuals with minor or loose connections to members, or a single member, of the targeted enterprise very well may find themselves on the other end of an ambitious state prosecutor's RICO indictment, facing the statute's severe and enhanced punishments.<sup>214</sup> Further, these individuals lack the resources or avenues to protect and challenge the propriety of their inclusion until the resolution of the prosecution.<sup>215</sup> By that point, remedial measures are often inadequate or unavailable given the likelihood of plea agreements, cooperation, limitations on appeals, and other challenges in lodging a post-conviction challenge.<sup>216</sup>

To mitigate the risks and harm arising from the expansion of state RICO statutes across the country, a formal review process resembling the OCGS review process should be implemented in states utilizing RICO statutes. The review process would require prosecutors seeking to file an indictment for violation of the RICO statute to first seek authorization from an independent source outside of the prosecutor's office before proceeding, likely a small review unit or committee comprised of appointed or selected individuals in the state's attorney general's office.<sup>217</sup> Much like the process for federal RICO indictments, state prosecutors would submit the proposed indictment and a memorandum with the basis of the indictment.<sup>218</sup> However, in a slight delineation from the OCGS process,<sup>219</sup> prosecutors would be required, not just encouraged, to organize their memorandum into seven specific sections explaining: the witnesses and evidence supporting the

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prohibitions and unfair in its broad scope and discretionary application by prosecutors. RICO represents the worst the criminal justice system has to offer any citizen: the arbitrary wielding of the government's awesome power to impose criminal sanctions." *Id.*

214. Lantigua-Williams, *supra* note 178.

215. Leblang, *supra* note 144, at 90.

216. *Id.* at 89-94. States that fail to require a preindictment review process expose criminal defendants to substantial risk without the ability to redress or remedy the harm they may suffer. *Id.* at 90-91. Critics of state RICO statutes have highlighted that the states' failure to require a review process like the federal government makes post hoc review the only avenue to challenge inclusion. Further, the post hoc review process is still insufficient because the infrequency of information from annual reporting would not be available until years after the litigation. *Id.* at 90. Arguments against a preindictment review process, assert that the grand jury provides an adequate safeguard to abuse; however, this is not true. *Id.* at 90-91. The grand jury only convenes as an *ex parte* proceeding without respect to the defendants' interest, and it rarely disagrees with the evidence presented by prosecutors in these proceedings. See *Dionisio*, 410 U.S. at 23 (emphasizing that grand juries often act as rubber stamps for prosecutors).

217. JUSTICE MANUAL § 9-110.210 (DEPT OF JUST. 2018).

218. *Id.*

219. Howell & Bustamante, *supra* note 124. OCGS review encourages but does not mandate the organization of the prosecutors' memorandum include all seven categories. JUSTICE MANUAL § 9-110.210 (DEPT OF JUST. 2018).

claims; the composition of the enterprise; each defendant's role or conduct implicating them in the enterprise; policy considerations and the appropriateness of RICO in the case of each defendant; the factual basis and legal sufficiency of the RICO charges; the violent crimes in connection with the alleged enterprise; and the basis for civil forfeiture sought.<sup>220</sup>

Federal prosecutors experienced in RICO prosecutions are still required to undergo this review process to ensure proper use of the statute, and state prosecutors should be held to a similar if not heightened standard of oversight.<sup>221</sup> The proposed system of preindictment reviews serves the public interest in several ways.<sup>222</sup> First, the review process provides guidelines and oversight to prosecutors without impacting RICO's effectiveness in combatting organized crime.<sup>223</sup> Second, the proposed process requires prosecutors to take an extra step requiring approval of an entity outside of the prosecutor's office before proceeding.<sup>224</sup> This extra step deters prosecutors from casting an excessively wide net in RICO indictments, and it encourages RICO prosecutions only when supported by factual allegations and evidence.<sup>225</sup> Further, defendants will be protected from the enhanced penalties under RICO when their conduct is isolated outside the scope RICO's intent.<sup>226</sup> The accountability presented by a formal review system encourages the continued use of RICO when appropriate, encourages public trust in prosecutors, and shields defendants from punishments that are disproportionate to their alleged offense conduct while also protecting drug addicted defendants from excessive punishment primarily based on and resulting from their

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220. Howell & Bustamante, *supra* note 124.

221. *Id.*

222. Doyle, *supra* note 89; Koppel, *supra* note 84; JUSTICE MANUAL § 9-110.320 (DEP'T OF JUST. 2018). The proposed mechanisms for review would ensure the use of the statute is reasonable and appropriate, deter prosecutors from overcharging defendants, and provide guidance to prosecutors regarding how to properly apply RICO's complex statutory scheme without preventing RICO from effectuating its intended purpose.

223. Doyle, *supra* note 89; Koppel, *supra* note 84.

224. JUSTICE MANUAL § 9-110.320 (DEP'T OF JUST. 2018). Federal guidelines state, "[n]o criminal or civil prosecution or civil investigative demand shall be commenced or issued under the RICO statute without the prior approval of the Organized Crime and Gang Section, Criminal Division."

225. Litt, *supra* note 120, at 128. As RICO statutes stand currently, prosecutors are encouraged to use them in prosecutions because indictments brought under the statutes do not require specificity or detail. Thus, prosecutors include individuals peripheral to the alleged criminal enterprise without having to provide evidence to support or defend their assertions. *Id.*

226. *Id.* at 128, 142. Peripheral association with members of the alleged enterprise justifying the inclusion in a RICO indictment would be curtailed if prosecutors knew that their discretionary decision-making would be subject to scrutiny for reasonableness and appropriateness. *Id.*

status.<sup>227</sup>

### *B. Post-Indictment Hearing*

Alternatively, if state legislatures resist adoption of a modified preindictment review system modelled after the OCGS, courts and legislatures should create an avenue for indicted criminal defendants to participate in a hearing early in the litigation to raise challenges to the inclusion in the RICO indictment. This hearing would take place in front of a judge or panel of judges, and it would require prosecutors to provide specific factual allegations and evidence supporting the appropriateness of leveling RICO against the individual criminal defendant. This would allow criminal defendants, believing their inclusion in RICO indictments because their drug addiction and dependency or isolated involvement alone connects them to the alleged enterprise, to raise the issue prior to making decisions that reduce the remedial measures available to them.<sup>228</sup>

To obviate the likely argument that, enacting the suggested proceeding would overly burden the court in every RICO action, the proceeding would not be a guaranteed right to every RICO defendant. Rather, a burden shifting scheme could be established as a threshold matter, where defendants must first provide mitigating evidence supporting their exclusion from the enterprise, before ever being granted a hearing and opportunity to challenge. While this would add an additional hearing on the courts' dockets, it would protect criminal defendants and their constitutional rights. It also deters prosecutors from targeting individuals and engaging in frivolous or unsupported prosecutions against certain individuals in the hope of gaining leverage against the true targets of the indictment.<sup>229</sup> Additionally, the hearing to determine the appropriateness of a criminal defendant's inclusion in the indictment at the outset of the litigation does not prevent prosecutors from holding criminal defendants accountable because those defendants could likely be charged under the underlying criminal statutory scheme.<sup>230</sup>

To reiterate, RICO statutes do not create new crimes.<sup>231</sup> The statutes simply enhance the penalties for violating underlying substantive law.<sup>232</sup> Should the presiding judge or judges find

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227. *Id.* at 142.

228. Subramarian, et al., *supra* note 183.

229. Litt, *supra* note 120.

230. *Id.* at 142. The proposed restrictions would not bar the use of RICO in the prosecutions of criminal organizations. Instead, it would limit the use of RICO only when it would be excessive.

231. Blakey, *supra* note 41.

232. Kalhous & Meringolo, *supra* note 179, at 848.

utilization of RICO inappropriate against the specific defendant, prosecutors would be free to prosecute the defendant for violation of the substantive criminal law without RICO enhancements.<sup>233</sup> State prosecutors would not be precluded from continuing to seek information for their investigation from the defendant through cooperation, but review of the challenge helps to ensure criminal defendants are only subjected to the penalties their conduct warrants.

### C. Narrowing to Meet the Specific Purpose

In addition to a pre-indictment review process, post-indictment hearing to challenge inclusion, or both, state RICO statutes should not be as broad and encompassing as federal counterparts.<sup>234</sup> Federal RICO statutes were constructed to target large, organized, national or multinational enterprises engaged in racketeering activity.<sup>235</sup> State RICO statutes should not and need not be and act as a carbon copy of the text and function of federal RICO.<sup>236</sup> Instead, state RICO statutes should serve as a compliment to their federal counterpart by targeting a specific kind of criminal activity the state seeks to quell.<sup>237</sup> Under this proposal, state RICO statutes would be narrowed and clearly defined to prevent ambiguity and abuse of the statute in prosecutions across the board.

For example, Illinois' RICO statute was crafted by the legislature to specifically target and prosecute the leaders of violent street gangs.<sup>238</sup> On its face, Illinois' RICO statute resembles the federal RICO statute, but it is limited in its application.<sup>239</sup> The goal of the Illinois legislature in drafting the state's RICO statute was to provide prosecutors with the tools needed to successfully prosecute violent street gangs without subjecting Illinoisans to the risk of abuse of an overly broad statute.<sup>240</sup> To effectuate its intent, the legislature carefully defined the requisite elements of a RICO

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233. Blakey, *Debunking RICO*, *supra* note 61.

234. Jason D. Reichelt, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 231. (1995).

235. *Crime Control Act*, *supra* note 53.

236. Keenan, *supra* note 14, at 831-32.

237. *Id.*

238. Senate Transcript of 97th Gen. Assemb., Reg. Sess. No. 122, ILL. GEN. ASSEMB., at 108 (May 25, 2012), [www.ilga.gov/senate/transcripts/strans97/09700122.pdf](http://www.ilga.gov/senate/transcripts/strans97/09700122.pdf) [perma.cc/CVQ9-XMSR].

239. Reichelt, *supra* note 234.

240. Senate Transcript of 97th Gen. Assemb., Reg. Sess. No. 122, ILL. GEN. ASSEMB., at 111 (May 25, 2012), [www.ilga.gov/senate/transcripts/strans97/09700122.pdf](http://www.ilga.gov/senate/transcripts/strans97/09700122.pdf) [perma.cc/CVQ9-XMSR].



violation.<sup>241</sup> Further, the statute requires that an alleged enterprise must have an ascertainable structure distinct from the criminal conduct being alleged to prosecute under RICO.<sup>242</sup> In another departure from federal RICO, the Illinois statute prevents the inclusion of an individual in a RICO indictment unless the individual knowingly advances the enterprise's interests through operation and management for fear of giving prosecutor's too much discretion.<sup>243</sup>

Through its deliberate intent to address specific threats, Illinois created a RICO statute which provides prosecutors with adequate investigative tools, increased discretion, and clarity without infringing or causing harm to those outside of its intended targets.<sup>244</sup> Like Illinois, states have the ability to limit the risk of unjustified harm and punishment by specifying the type of criminal conduct targeted by their statutes while providing prosecutors with the benefits of RICO specific to the context.<sup>245</sup> Not only does a narrow and specific approach protect defendants, but it also creates clear guidelines for prosecutors to understand and explain the statute to a jury. This is a stark contrast to other states' RICO statutes, specifically Georgia's RICO statute, which somehow exceeds the broad and encompassing language of its federal counterpart.<sup>246</sup> For example, unlike federal RICO's requirement of an extended pattern of crime committed by multiple individuals through an enterprise, Georgia's rendition allows for a single individual to be a sufficient enterprise.<sup>247</sup> And the difference does not stop there as Georgia's RICO statute also vastly expands the range of underlying crimes that fall under the legislation's umbrella.<sup>248</sup> Much like federal RICO, Georgia also set out with a specific intent to combat organized crime, but it did not take long for prosecutors to take advantage of its breadth and use it as a catchall for enumerable crimes, further emphasizing the need to balance its breadth and its increased prominence in the criminal justice system by imposing restraints.<sup>249</sup>

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241. 720 ILL. COMP. STAT. 5/33G-3(b)(2)(C) (2012 & Supp. 2019).

242. *Id.*

243. Senate Transcript of 97th Gen. Assemb., Reg. Sess. No. 122, ILL. GEN. ASSEMB., at 111 (May 25, 2012), [www.ilga.gov/senate/transcripts/strans97/09700122.pdf](http://www.ilga.gov/senate/transcripts/strans97/09700122.pdf) [perma.cc/CVQ9-XMSR].

244. *Id.*

245. Steven L. Kessler, *And a Little Child Shall Lead Them: New York's Organized Crime Control Act of 1986*, 64 ST. JOHNS L. REV. 797, 802 (1990).

246. Weiss, *supra* note 2.

247. Ga. Code Ann. § 16-14-4 (West 2015)

248. Greg Farrell, *What is Rico, the Racketeering Law Used to Charge Trump in Georgia?*, BLOOMBERG (Aug. 15, 2023, 4:09 PM), [www.bloomberg.com/news/articles/2023-08-15/rico-charges-explaining-the-racketeering-law-trump-allies-face-in-georgia](http://www.bloomberg.com/news/articles/2023-08-15/rico-charges-explaining-the-racketeering-law-trump-allies-face-in-georgia) [perma.cc/T6BB-JEUP].

249. Timothy M. Phelps, *Use of Gangster Law to Prosecute Atlanta*

## V. CONCLUSION

The rise in utilization, availability, and popularity of federal and state RICO statutes have worked to help the government combat the rampant organized crime that plagued the country during the twentieth century.<sup>250</sup> RICO's success in prosecuting organized crime quickly led states to adopt their own versions of the statute.<sup>251</sup> In turn, prosecutors across the country sought to employ RICO's enhanced penalties, procedural conveniences, and efficiency against sophisticated criminal syndicates and unorganized associated individuals.<sup>252</sup> As the power of RICO became clear to prosecutors, its use has increased with no significant efforts to provide safeguards for the public from the use of the statute.<sup>253</sup>

RICO has outgrown its purpose, and the resistance to narrowing or voiding the statute because of its vagueness combined with increased availability to state prosecutors created a danger of prosecutorial overreach, injustice, and misconduct.<sup>254</sup> To combat this danger and protect Americans from undue persecution and punishment, it is necessary to implement a pre-indictment system of review or provide defendants, unreasonably included and subjected to RICO's enhanced punitive of punishment, with an avenue to challenge or have the propriety of their inclusion reviewed.<sup>255</sup> Additionally, state legislatures should follow the lead of other states in narrowly drafting their state RICO statutes to be unambiguous and target a specific kind of criminal activity.<sup>256</sup> In the absence of implementing these proposals, the United States will continue to put its citizens at risk of being unduly punished without recourse.

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*Educators Sparks Legal, Moral Debate*, L.A. TIMES (Apr. 16, 2015, 10:51 AM), [www.latimes.com/nation/la-na-teachers-rico-20150416-story.html](http://www.latimes.com/nation/la-na-teachers-rico-20150416-story.html) [perma.cc/R7CZ-S74C]; Jeffrey Scott, *Suicide Group Members in Court Friday in Cumming Asking for Dismissal*, THE ATLANTA J. CONST. (Dec. 9, 2010), [www.ajc.com/news/local/suicide-group-members-court-friday-cumming-asking-for-dismissal/uC3glxAyjrNrZO5vPGuSiP/](http://www.ajc.com/news/local/suicide-group-members-court-friday-cumming-asking-for-dismissal/uC3glxAyjrNrZO5vPGuSiP/) [perma.cc/29S7-PX7R]; Christina Lee, *What (or Who) is Behind the Rise of RICO?*, ATLANTA MAG. (June 14, 2023), [www.atlantamagazine.com/news-culture-articles/what-or-who-is-behind-the-rise-of-rico/](http://www.atlantamagazine.com/news-culture-articles/what-or-who-is-behind-the-rise-of-rico/) [perma.cc/XCA9-YGTC].

250. Jacobs, *supra* note 19, at 58.

251. Smith, *supra* note 100.

252. Koppel, *supra* note 84.

253. Anderson & Jackson, *supra* note 72, at 86, 91.

254. Leblang, *supra* note 144, at 86.

255. Anderson & Jackson, *supra* note 72, at 91. RICO statutes have been drafted in a way that encompass far more than organized crime prosecutions. As a result, the statutes "frequently hit targets which were not intended and miss those which were." *Id.* Critics of the statutes argue that the need for oversight and review is exacerbated by the lack of specificity in the statutes, which undermines constitutional and procedural safeguards. *Id.*

256. Keenan, *supra* note 14.

