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THESIS

RICO: ANALYZING THE USE OF FEDERAL LAW TO COMBAT LOCAL GANG PROBLEMS

by

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Gangs are the main contributor to violent crime in the United States. In an attempt to combat such violent crime, the federal government has begun prosecuting street-level gangs with the federal racketeering (RICO) statutes. Although these statutes were developed to address more traditional white-collar crime, the criminalizing of ongoing racketeering activity in a criminal enterprise has successfully been used to prosecute street-level gangs. This thesis provides a review of the scholarly literature on the topic, most of which is biased and averse to the RICO statutes' use in this context. This thesis also evaluates criticisms and concerns on the topic. Federal laws and procedures were analyzed during a comparative analysis of different court systems, which revealed a distinct advantage for federal courts in the investigation and prosecution of violent street gangs. Additionally, the use of the federal racketeering statutes by three different jurisdictions—New York, New York; Detroit, Michigan; and Montebello, California—was researched and analyzed. The research found that use of the RICO statutes facilitated law enforcement initiatives that reduced violent crime and homicides in all three jurisdictions.

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RICO: ANALYZING THE USE OF FEDERAL LAW TO COMBAT LOCAL GANG PROBLEMS

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ABSTRACT

Gangs are the main contributor to violent crime in the United States. In an attempt to combat such violent crime, the federal government has begun prosecuting street-level gangs with the federal racketeering (RICO) statutes. Although these statutes were developed to address more traditional white-collar crime, the criminalizing of ongoing racketeering activity in a criminal enterprise has successfully been used to prosecute street-level gangs. This thesis provides a review of the scholarly literature on the topic, most of which is biased and averse to the RICO statutes' use in this context. This thesis also evaluates criticisms and concerns on the topic. Federal laws and procedures were analyzed during a comparative analysis of different court systems, which revealed a distinct advantage for federal courts in the investigation and prosecution of violent street gangs. Additionally, the use of the federal racketeering statutes by three different jurisdictions—New York, New York; Detroit, Michigan; and Montebello, California—was researched and analyzed. The research found that use of the RICO statutes facilitated law enforcement initiatives that reduced violent crime and homicides in all three jurisdictions.

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I. INTRODUCTION

The ability of the federal government to combat local and street-level crime has expanded exponentially in the past decade.[1] Today, thousands of federal laws are at the disposal of law enforcement and prosecutors to combat violence and punish those responsible for the crimes they commit. Included in these federal laws is the controversial federal Racketeer Influenced and Corrupt Organizations Act (RICO). There have been many positive and negative arguments on the use of RICO to combat gangs in America. This thesis asks the question: Why should federal racketeering laws be utilized to combat local violent gangs? In doing so, the research seeks to explain what RICO is and how it can be applied to gangs. Through research and analysis, this thesis explores the benefits and criticisms of these laws to determine if they should be used to combat gangs in the United States. Included in this research is exploration of the use of RICO by three jurisdictions from across the United States and the impact these cases seemingly had.

A. BACKGROUND

The infiltration of organized crime into legitimate businesses and unions began gaining public notoriety in the early 1950s with the televised U.S. Senate's Kefauver hearings. The hearings were chaired by Senator Estes Kefauver to investigate the magnitude and manner in which organized crime was impacting interstate commerce.[2] Although organized crime and labor racketeering had been occurring for many years, the televised hearings brought light to the reluctance of witnesses to cooperate and the insufficient resources available to combat the issues. The hearings showed that by infiltrating many labor unions, crime syndicates were able to extort both their union members and employees while leveraging their positions for political gain.[3] The hearings

[1] William L. Anderson and Candice E. Jackson, "Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law," *The Independent Review* 9, no. 1 (2004): 85–86.

[2] Joseph Nellis, "Legal Aspects of the Kefauver Investigation," *Journal of Criminal Law and Criminology* 42, no. 2 (1951): 163.

[3] James B. Jacobs and Ellen Peters, "Labor Racketeering: The Mafia and the Unions," *Crime and Justice*, 30 (2003): 235, https://doi.org/10.1086/652232.

eventually led to the passage of the Labor Management Reporting and Disclosure Act of 1959, which, among other things, banned convicted criminals from holding union positions and made it a federal crime to embezzle money from a union.[4] The act, however, was considered a failure by many, with almost no enforcement of its provisions.[5]

The Senate continued to hold anti-crime hearings through the early to mid-1960s. Senator John McClellan, chairman of the Select Committee on Improper Activities in Labor and Management, along with Senate Government Operations Advisor G. Robert Blakely, drafted a new law titled the Racketeer Influenced and Corrupt Organizations Act. RICO was at the forefront of President Richard Nixon's 1970 crime bill, which was passed with minimal opposition.[6] The act's objectives are described as follows:

> 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.[7]

When RICO was created, its text was not limited only to attack traditional organized crime such as the mafia. The statute also "applies to all criminal conduct within its ambit regardless of whether it involves organized crime."[8] Shortly after RICO's inception, law enforcement and federal prosecutors with the U.S. Attorney's Office began utilizing RICO to prosecute street gangs and gang activity.[9] So, what is RICO and why *should* law enforcement/prosecutors use it to combat gangs?

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[4] Labor Management Reporting and Disclosure Procedure, 29 U.S.C. 11 §§ 401–531.

[5] Joseph Rauh, "LMRDA—Enforce It or Repeal It," *Georgia Law Review* 5 (Summer 1971): 643–86.

[6] Alan A. Block, "The Organized Crime Control Act, 1970: Historical Issues and Public Policy," *The Public Historian* 2, no. 2 (Winter 1980): 40, https://www.jstor.org/stable/3376969.

[7] An Act Relating to the Control of Organized Crime in the United States, Pub. L. No. 91-452, 84 Stat. 922–23 (1970), http://uscode.house.gov/statutes/pl/91/452.pdf.

[8] Frank J. Marine, ed., *Criminal RICO: 18 U.S.C. §§ 1961–1968: A Manual for Federal Prosecutors*, fifth revised edition (Washington, DC: Department of Justice, 2009), 20, https://www.scribd.com/document/46162182/Criminal-RICO-Manual-for-Federal-Prosecutors.

[9] Natalie Y. Moore and Lance Williams, *Almighty Black P Stone Nation: The Rise, Fall, and Resurgence of an American Gang* (Chicago, IL: Chicago Review Press, 2011), http://ebookcentral.proquest.com/lib/ebook-nps/detail.action?docID=683861.

B. DEFINITIONS OF THE STATUTE

The Racketeer Influenced and Corrupt Organizations Act is found in the Code of Laws of the United States (commonly known as the U.S. Code, or U.S.C.). Title 18, sections 1961–1968, encompass the racketeering statutes. To understand the scope of the act, the following definitions are important:

- *Racketeering activity*: a list of twenty-seven federal and state crimes, including murder, robbery, kidnapping, financial offenses, and drug dealing, among others.[10]

- *Pattern of racketeering activity*: "requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[11]

- *Enterprise*: "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[12]

- *Interstate commerce*: "includes commerce between one State, Territory, Possession, or the District of Columbia and another State, Territory, Possession, or the District of Columbia."[13]

The prohibited (illegal) acts appear in 18 U.S.C. § 1962. Specifically, subsections B, C, and D provide:

> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain,

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[10] See Appendix A for the full list.

[11] Racketeer Influenced and Corrupt Organizations, Definitions, 18 U.S.C. § 1962(5) (2009).

[12] Racketeer Influenced and Corrupt Organizations, 4.

[13] Interstate Commerce and Foreign Commerce Defined, 18 U.S.C. § 10 (2012).

> directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.[14]

This can be simplified even further when it is applied to gangs. First and foremost, the "enterprise" is the gang, a group of people who are in fact associated with one another. Members of the gang would be culpable of racketeering if they committed (or agreed to the commission of/or conspired to commit) two of the twenty-seven racketeering activities listed in § 1962 (see Appendix A). The government would typically have to prove that the defendant:

- Is part of (or an associate of) the gang
- Committed, conspired to commit, or agreed to the commission of the crimes (one of which occurred within ten years)
- Committed the acts to benefit the gang
- In some way affected interstate or international commerce

When these elements are met, an enterprise can be charged under RICO.

The following example shows how the RICO statutes could apply to the prosecution of a hypothetical gang called the Trident. There are eight members of the Trident: two leaders, four midlevel associates, and two low-level workers. At a gang meeting, the members decide they need to start raising funds to help purchase firearms for the gang. Two low-level workers begin to sell crack cocaine, returning the profits into a fund which is used to purchase two firearms. At the next meeting, the gang members

[14] Racketeer Influenced and Corrupt Organizations, Prohibited Activities, 18 U.S.C. § 1962(b)–(d) (2009).

discuss how a rival gang has been disrespecting them, which makes them look weak and jeopardizes their drug territory. They collectively decide that somebody needs to send a message, and a midlevel associate volunteers for the task. The next day, he takes one of the firearms and shoots a rival gang member.

All members of the Trident can be charged under RICO. The gang is the racketeering enterprise that they are all a part of. They agreed with one another and conspired together, so they share responsibility for the commission of at least two of the twenty-seven enumerated predicate crimes to benefit the gang. All the while, their criminal activities affected interstate commerce through, at a minimum, the buying and selling of narcotics. Although the two leaders and three of the midlevel members never personally sold drugs or committed the shooting, they agreed to the commission of the crimes and benefited from the action. They therefore share responsibility for the conduct. In addition to the racketeering charge, narcotics trafficking, shooting, and firearms offenses could be additional charges.

C. PROBLEM STATEMENT

The vast majority of violent crime nationwide can be attributed to gangs and gang-related violence.[15] Jurisdictions struggling with gang violence are continually seeking ways in which to investigate, prosecute, and ultimately curb gang violence. The New York Police Department, for example, developed an elite unit in the Bronx called the Violent Crimes Squad, which is tasked with these investigations. Unlike many other cities' detectives, who are assigned to investigate gang violence and use the state justice system, the Bronx Violent Crime Squad utilizes the federal court system and racketeering statutes to help address this problem. Although the federal racketeering statutes were not specifically adopted for this purpose, they have been used to prosecute local street gangs.[16]

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[15] Scott H. Decker, "Collective and Normative Features of Gang Violence," *Justice Quarterly* 3, no. 2 (June 1996): 243–64, https://doi.org/10.1080/07418829600092931; National Gang Center, accessed January 2, 2018, https://www.nationalgangcenter.gov/.

[16] Moore and Williams, *Almighty Black P Stone Nation*.

Almost since RICO's inception, law enforcement's use of the statutes to combat local gang problems has drawn numerous criticisms and calls for repeal by human rights groups and defense attorneys.[17] In addition, the literature on the use of these statutes is overwhelmingly disparaging of RICO. Scholars and practitioners complain that the federal government is not satisfying the required elements of the statutes, that using the statutes gives the federal government too much power, and that the statutes violate the doctrine of double jeopardy.[18] There are, however, many advantages that are less commonly discussed. The federal justice system can impose extremely harsh sentences, especially compared to some of its state counterparts.[19] One of the most common ways of avoiding these sentences is to cooperate with the government. Doing so can lead to new informants and intelligence, and strengthen cases. Furthermore, the federal justice system allows for uncorroborated accomplice testimony at trial along with certain hearsay evidence to be admitted in court, whereas numerous states, such as New York, California, and Illinois, do not.[20]

More clarity is needed in evaluating whether the claims on either side of the argument outweigh the others. Additionally, there has yet to be an analysis of whether or not utilizing these statutes has been an influencing factor on the crime rates of any specific neighborhood. While numerous factors can impact crime, a small and defined area of gang activity needs to be analyzed before and after RICO investigations and prosecutions to determine if there was a crime decrease in that area, and whether or not that may indicate an advantage or a disadvantage of utilizing federal RICO statutes.

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17 Kenneth Jost, *Racketeering Law Comes under Attack* (Washington, DC: CQ Press, 1989), 133–48, http://library.cqpress.com/cqresearcher/cqresrre1989031700.

18 Matthew Blumenstein, "RICO Overreach: How the Federal Government's Escalating Offensive against Gangs Has Run Afoul of the Constitution," *Vanderbilt Law Review* 62, no. 1 (January 2009): 211–38; George W. O'Reilly and Robert Drizin, "United States v. Lopez: Reinvigorating the Federal Balance by Maintaining the States' Role as the Immediate and Visible Guardians of Security," *Journal of Legislation* 22, no. 1 (1996): 1–17; United States v. Ruggiero, 754 F.2d 927, 935 (11th Cir. 1985).

19 Joseph Wheatley, "The Flexibility of RICO and Its Use on Street Gangs Engaging in Organized Crime in the United States," *Policing: A Journal of Policy and Practice 2*, no. 1 (January 2008): 82–91, https://doi.org/10.1093/police/pan003.

20 John C. Jeffries and John Gleeson, "The Federalization of Organized Crime: Advantages of Federal Prosecution," *Hastings Law Journal* 46, no. 4 (1995): 1104–1113.

D. RESEARCH DESIGN

While exploring and researching the use of federal racketeering laws to combat gangs and gang violence, it is necessary to be aware of existing biases in the literature and available data. As I navigated the supporting and opposing views of these federal laws, I had to be cognizant of the ethical concerns and opinions which can drive analyses and skew statistics. This is because the culmination of these criminal cases can result in the restriction of one of the most basic human rights: one's freedom.

Being conscious of such biases, I conducted my research in a multitude of ways. While exploring the assets of these laws, I probed the federal code, prosecutors' manuals, and federal rules of procedure for their advantages over state courts. Further, I examined the procedural elements of federal courts such as coconspirator testimony, federal grand juries, and the admissibility of hearsay. When exploring the opposing views of the racketeering laws, I analyzed specific issues raised by critics in the existing literature. I researched existing legal principles and case law to counter some of the objections (such as double jeopardy and interstate commerce) when appropriate.

Furthermore, I explored the use of RICO by three separate jurisdictions: New York, New York; Detroit, Michigan; and Montebello, California. Each of these jurisdictions employed the RICO statutes to address jurisdiction-specific issues. In addition to the reason they chose to use RICO, I researched the outcome of these cases to determine if they were successful in addressing the issue they set out to address. While no direct causal relationship between a racketeering case and crime rates can be claimed, I analyzed the publicly available crime rates before and after the racketeering statutes were employed to infer whether or not these laws can be a tool in combatting gang violence and improving a community's quality of life.

E. CHAPTER OUTLINE

Chapter II encompasses a review of scholarly literature, federal code and manuals, and applicable case law on the federal racketeering statutes. The review in this chapter is grouped into two classes: state versus federal court as a venue, and the application of federal RICO to street gangs. Chapter III researches the use of the federal racketeering

statutes by three jurisdictions—New York, New York; Detroit, Michigan; and Montebello, California. Chapter IV includes an analysis of the literature and the use of the racketeering statutes by the three jurisdictions. This chapter also includes recommendations for future investigations and research, as well as final thoughts on the topic.

II. LITERATURE REVIEW

The literature on using federal racketeering laws to combat gang violence is overwhelmingly dominated by scholars who are averse to such use. While some scholars write about the advantages of utilizing the federal courts instead of state courts, the majority of writings focus on how prosecutors and law enforcement have ill-applied these statutes to gangs. Critics of the RICO statutes have similar main themes for their reasoning: the overreach of prosecutors, double jeopardy, and an imbalance of state vis-à-vis federal power. Defense attorneys have brought these concerns into the courtroom on behalf of their clients; however, legal decisions and appeals have invalidated the majority of them. Additionally, it is important to note that much of the literature on the topic is dated.

A. STATE COURT OR FEDERAL COURT AS A VENUE?

Comparing two separate court systems is inherently difficult. With as many factors as a criminal enterprise investigation and prosecution can hold, a blanket statement of one court system being better than the other is simply impossible to make. This is especially compounded by each state having its own court system, laws, sentencing guidelines, etc.

1. Legislation

Beth Bjerregaard explores the constitutionality of the RICO laws in states that do have anti-gang legislation. She describes many of them as broad and vague, but acknowledges that appellate courts are apt to uphold their constitutionality. Additionally, she identifies that only thirty-three states have laws specifically established to combat gangs.[21]

In his 1998 call for New York to implement strong anti-gang laws, Bart Rubin exclaims that New York is being overrun by gangs, and its current anti-gang laws are woefully inadequate to address the problem. Rubin pits New York's gang laws against the federal RICO statute, as well as states with gang laws similar to RICO such as California,

[21] Beth Bjerregaard, "The Constitutionality of Anti-Gang Legislation," *Campbell Law Review* 21, no. 1 (1998): 31–47.

Alaska, and Florida. He submits that New York would benefit from such laws since the state's then (and still) current anti-gang laws have "done little to effectively address the problem."[22] He also acknowledges that even if more comprehensive laws are adopted, district attorneys must be willing to prosecute them. This is especially true as many states require predicate crimes to satisfy the element of their gang laws.[23] District attorneys must be willing to prosecute the encompassing gang legislation instead of the predicate crimes, which would presumably be easier to charge on their own.

David Truman also analyzed state-level responses to gangs. He argues that in order for a state to be successful in combatting street-level gangs, their anti-gang legislation should model the federal RICO statute, in part due to the success of the statutes.[24] John Floyd examined the states that have laws similar to RICO. He identified that state-level racketeering statutes have some advantages over their federal counterparts. Some of these advantages include broader applications, longer statutes of limitations, and fewer bureaucratic approvals before charging.[25] Truman would counter the advantages mentioned by Floyd, stating that the laws themselves are more difficult to prove and impose substantially fewer prison sentences than the federal versions.[26]

Although she does not compare the federal court system to the state court system, Lesley Suzanne Bonney strongly advocates that the RICO laws are well poised and necessary to eliminate organized crime. Bonney explores how urban street gangs are modernized versions of traditional organized crime, and how/why prosecutions are applicable under the federal racketeering statutes. She further cites examples of how these

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[22] Bart H. Rubin, "Hail, Hail, the Gangs Are All Here: Why New York Should Adopt a Comprehensive Anti-Gang Statute," *Fordham Law Review 66*, no. 9 (1998): 2040.

[23] Rubin, 2089.

[24] David R. Truman, "The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs," *Washington University Law Review* 73, no. 2 (January 1995): 690.

[25] John E. Floyd, "Introduction: RICO State by State: A Guide to Litigation under the State Racketeering Statutes, Second Edition," *GPSolo eReport* 2, no. 4 (November 2012), https://www.americanbar.org/groups/gpsolo/publications/gpsolo_ereport/2012/november_2012/introduction_rico_state_by_state/.

[26] Truman, "The Jets and Sharks Are Dead,"55.

statutes have been levied against violent street gangs.[27] Similarly, Kendal Nicole Smith researches how RICO has been able to be applied to gangs that are involved in human trafficking. She advocates that since RICO can reach offenders who are not directly involved in the violent or coercion aspect of human trafficking, its continued use would serve as a deterrent to perpetrators who would otherwise be shielded from prosecution.[28]

2. The Prosecution

John Jeffries and John Gleeson argue that the federal court prosecutorial advantages are reason enough for all of organized crime, including gangs, to be prosecuted in federal court. They argue that prosecutors at the federal level "do a better job" and "can conduct organized crime investigations more quickly, bring more charges, and win more convictions than state and local authorities."[29]

Similarly, Adam Gershowitz and Laura Killinger explore one of the state's biggest disadvantages: prosecutor caseloads. As Rubin notes, even if adequate gang laws were adopted in every state, district attorneys must be willing to dedicate the time and resources to prosecute them in order for them to be successful.[30] Gershowitz and Killinger take an in-depth look at prosecutors' caseloads and how they negatively affect the entire criminal justice system. They describe many prosecutors as overburdened and argue that they do not have the time to adequately investigate and prosecute serious felony cases because of their crippling caseloads. This can lead to low numbers of plea bargains and the failure to seek charges that are more difficult to prove.[31] Susan Klein and Ingrid Grobey, in their

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[27] Lesley Suzanne Bonney, "The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of Rico," *Catholic University Law Review* 42, no. 3. (1993): 582.

[28] Kendal Nicole Smith, "Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery," *George Mason Law Review* 18, no. 3 (January 2011): 775.

[29] Jeffries and Gleeson, "The Federalization of Organized Crime," 1103.

[30] Rubin, "Hail, Hail, the Ganges Are All Here."

[31] Adam Gershowitz and Laura Killinger, "The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants," *Northwestern University Law Review* 105, no. 1. (2011): 263.

pursuit to discredit notions that the federalization of law is occurring, show that federal prosecutors have significantly lower caseloads than their state counterparts.[32]

While high caseloads can negatively impact the criminal justice system in many ways (such as backlogged cases and defendants who cannot make bail being forced to wait their turn while incarcerated), it can also lead to low plea bargain offers and the refusal of prosecutors to seek higher penalties for the most serious charges, both in an effort to encourage dispositions. If state prosecutors seek anti-gang or more-difficult-to-prove top charges and refuse to offer low plea bargains, they can be severely disadvantaged by the lack of available time to fully investigate and prepare for trial.

Clark County, Nevada, offers a good example of such disadvantages. As recently as 2018, Clark County has struggled with MS-13 gang-related violence.[33] A previous study of prosecutors' caseloads found that the Clark County District Attorney's Office charged more than 70,000 cases in a single year. With ninety prosecutors assigned to these cases, the individual workload is more than 800 cases per attorney, per year.[34] It is unrealistic to believe that prosecutors in Clark County have the time or resources to appropriately investigate and curb gang violence. Federal prosecutors, with significantly lower caseloads and greater budgets, have the ability to utilize the power of federal statutes (such as RICO) to supplement the efforts of municipalities and counties facing these and similar circumstances.[35]

3. Rules of Evidence

J. Arthur Alarcon explores the use of uncorroborated accomplice (coconspirator) testimony and reviews the Federal Rules of Evidence in regards to its admissibility. While

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[32] Susan R. Klein and Ingrid B. Grobey, "Debunking Claims of Over-Federalization of Criminal Law," *Emory Law Journal* 62, no. 1 (2012), http://law.emory.edu/elj/content/volume-62/issue-1/articles/debunking-claims-over-federalization.html.

[33] Nikki Bowers and Cristen Drummond, "Metro Police: MS-13 Gang Committed 10 Murders in Clark County over Past Year," Las Vegas Now, March 26, 2018, https://www.lasvegasnow.com/news/metro-police-ms-13-gang-committed-10-murders-in-clark-county-over-past-year/1080346310.

[34] Gershowitz and Killinger, "The State (Never) Rest," 269–70.

[35] Klein and Grobey, "Debunking Claims," 16–17.

he acknowledges that this type of testimony is admissible, he notes how appellate judges cannot evaluate the credibility of the witnesses who provide it and, as such, trial judges should seek to limit convictions based solely upon it.[36] Lester Orfield further explores accomplice testimony, noting that in most states not only must the testimony be corroborated, but it would be "reversible error" not to instruct a jury that an acquittal would be appropriate if the testimony fails to be corroborated.[37] Christine Saverda agrees with Orfield, and argues that accomplice testimony, especially if in return for a more lenient sentence, needs to be more heavily scrutinized to prevent perjury and wrongful convictions. She applauds the high number of states that specifically require the corroboration of such testimony.[38] Clifford Fishman, along with Jeffries and Gleason, notes that accomplice testimony during an organized crime prosecution is highly relevant.[39] Paul Marcus goes even further, and states that coconspirator testimony may be "the most important advantage available to a prosecutor in a criminal conspiracy case … relied upon by prosecutors in a rather remarkable number of cases."[40]

4. Grand Juries

Niki Kuckes researched the function of the federal grand jury, including the powers it possesses and the role it plays in the criminal justice system. Kuckes argues that since federal grand jury proceedings allow hearsay and other evidence typically not admissible at trial, grand jurors' discretionary powers are similar to that of federal prosecutors.''[41] Robert Gilbert Johnston maintains that the ability of prosecutors to submit hearsay

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[36] J. Arthur L. Alarcon, "Suspect Evidence: Admissibility of Co-conspirator Statements and Uncorroborated Accomplice Testimony," *Loyola of Los Angeles Law Review* 25, no. 3 (April 992): 963.

[37] Lester B. Orfield, "Corroboration of Accomplice Testimony in Federal Criminal Cases," *Villanova Law Review* 9, no. 1 (Fall 1963): 34, http://digitalcommons.law.villanova.edu/vlr/vol9/iss1/3.

[38] Christine J. Saverda, "Accomplices in Federal Court: A Case for Increased Evidentiary Standards," *Yale Law Journal* 100, no. 3 (1990): 787, https://digitalcommons.law.yale.edu/ylj/vol100/iss3/10.

[39] Clifford S. Fishman, "Defense Witness as Accomplice: Should the Trial Judge Give a Care and Caution Instruction," *Journal of Criminal Law and Criminology* 96, no. 1 (Fall 2005): 2.

[40] Paul Marcus, "Co-conspirator Declarations: The Federal Rules of Evidence and Other Recent Developments, from a Criminal Law Perspective," *American Journal of Criminal Law* 7 (1979): 289, https://scholarship.law.wm.edu/facpubs/564.

[41] Niki Kuckes, "The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury," *Georgetown Law Journal* 94 (2006): 1287.

evidence combined with their power to guide grand jury proceedings can manipulate grand jurors to indict cases when there may not be sufficient evidence to do so.[42]

Jeffries and Gleason note that the admission of hearsay into these proceedings allows federal grand jurors to hear the testimony of numerous witnesses recounted by a single law enforcement officer.[43] Most states prohibit hearsay in these proceedings, meaning that each of the witnesses would have to appear before a grand jury to testify in person. This can be extremely time consuming, difficult to schedule, and difficult for grand jurors to follow. Coupled with a lack of time and resources, scheduling difficulties are another example of why state prosecutors would be reluctant or unable to pursue complex gang cases. According to the Federal Rules of Evidence, federal prosecutors do not have to face this hurdle, as hearsay is allowed in federal grand jury proceedings.[44] A law enforcement officer could interview each of the witnesses and recount their testimony to the grand jury. This procedure enables grand jurors to hear a well-structured account of each of the witnesses without prosecutors having to physically find and convince each one to come to appear. The grand jury, though, retains the right to subpoena each witness in lieu of (or to supplement) the law enforcement officer's testimony.

Jeffries and Gleason specifically mention how some states, such as New York, are severely disadvantaged in investigating criminal enterprises because their grand jury proceedings do not allow hearsay to be admitted. They note that states similar to New York have difficulty getting indictments on cases due to witnesses and victims who are unable to be located or refuse to cooperate at the pre-charge stage. This is especially true in organized crime cases where victims and witnesses may be scared to testify, even though grand jury proceedings are secret.[45] States that face this hurdle may not be able to indict a person when a primary witness does not show up, whereas a federal racketeering indictment can be obtained despite a witness's absence. When a federal criminal case is

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[42] Robert Gilbert Johnston, "The Grand Jury—Prosecutorial Abuse of the Indictment Process," *Journal of Criminal Law and Criminology* 65, no. 2 (1974): 161.

[43] Jeffries and Gleeson, "The Federalization of Organized Crime," 1109.

[44] Federal Rules of Evidence, Article VIII, Rule 804.

[45] Jeffries and Gleeson, "The Federalization of Organized Crime," 1113.

first filed, a defendant does not know which charges may end up being dismissed due to an uncooperative witness. The advantage to the prosecution is that the incentive either to plea or to cooperate with the government is retained until the time of trial. Moreover, after indictment, when the gang member is in custody pending trial, a witness who was fearful for his or her safety may now be persuaded to testify.

5. Sentencing

According to the U.S. Sentencing Commission, in 2017, 97.2 percent of all federal cases were adjudicated with guilty pleas. There were 940 racketeering/extortion cases, which yielded a mean sentence of 107 months (roughly nine years). These sentencing figures reflect only the RICO charge in each case, not the underlying predicate acts or other charges commonly also brought against defendants in RICO cases (such as drug dealing, which averages ninety additional months [7.5 years], and firearms offenses, which average sixty-nine months [5.75 years]).[46]

The federal sentencing guidelines, most recently revamped in November 1987, restrict the discretionary latitude federal judges previously possessed.[47] Also known as ranges, the sentencing guidelines have undergone so many changes and revisions that scholars such as R. Barry Ruback and Jonathan Wrobelwski describe them as controversial, complex, and in much need of reform.[48] Federal judges have agreed, with one referring to them as "mind-numbingly complex."[49] The x-axis of the guidelines table encompasses the defendant's criminal history, assigning his or her past criminal conduct a point value and grouping them into categories. The y-axis encompasses the current criminal act that the defendant is presently charged with. Taking into account aggravating or mitigating factors

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[46] "2017 Sourcebook of Federal Sentencing Statistics," U.S. Sentencing Commission, accessed August 2, 2019, https://www.ussc.gov/research/sourcebook-2017.

[47] Jeffries and Gleeson, "The Federalization of Organized Crime," 1118.

[48] R. Barry Ruback and Jonathan Wroblewski, "The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification," *Psychology, Public Policy, and Law* 7, no. 4 (2001): 739, 762, http://dx.doi.org/10.1037/1076-8971.7.4.739.

[49] United States v. Williams, 431 F.3d 767, 773 (11th Cir. 2005); Gilbert v. United States, 640 F.3d 1293, 1309 (11th Cir. 2011).

(such as a lengthy criminal history or cooperation with the government), a point value is assigned; where the points meet is the sentencing range.

While most scholars and practitioners agree that the federal guidelines are complex; most also agree that they impose severe sentences. Michael Tonry goes as far as saying the "laws are rigid, harsh, and often unjust."[50] In 2005, Frank Bowman published an entire article on the failure of the federal sentencing system. Calling for reform, Bowman asserts that federal sentences have only been raised, and are rarely lowered.[51] Joseph Wheatley does not disagree that the sentences are harsh, however he contends that the harsh sentencing has "made RICO a formidable weapon" and enabled RICO to be successful in combatting gangs.[52] Regina Peterson agrees, and argues that severe sanctions are necessary for RICO to accomplish its goal—the eradication of criminal enterprises. Furthermore, she states that restricting RICO would remove an indispensable tool for the government. When a person is found guilty under RICO, he or she is being found guilty of a minimum of two state or federal crimes (the predicate acts previously described in Chapter I) in addition to violating the racketeering act. Therefore, Peterson maintains that consecutive sentences could be levied.[53] Alternatively, these defendants could already have been sentenced in a state court for their predicate acts and later tried in federal court, which will (upon a finding of guilty) impose its own sentence in addition to the state sentence.

Prior to the case of *United States v. Booker*, judges were mandated to follow federal sentencing guidelines. In this Supreme Court decision, it was found that the guidelines unlawfully escalate sentences because the court can consider information that was not proved at trial beyond a reasonable doubt.[54] Because of this decision, the guidelines

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[50] Michael Tonry, "Making American Sentencing Just, Humane, and Effective," *Crime and Justice: A Review of Research* 46, no. 1 (2017): 443.

[51] Frank O. Bowman III, "The Failure of the Federal Sentencing Guidelines: A Structural Analysis," *Columbia Law Review* 105 (April 2005): 1315.

[52] Joseph Wheatley, "The Flexibility of RICO."

[53] Regina Kwan Peterson, "Liberal Construction and Sever Sentencing Help RICO Achieve its Legislative Goals," *Loyola University Chicago Law Journal* 13, no. 4 (1982): 1057.

[54] United States v. Booker, 543 U.S. 220, 267 (2005) .

became advisory, though they are largely followed and departures are heavily scrutinized. There are only limited circumstances where judges can depart from mandatory minimums and the sentencing guidelines. Reasons for departure are governed by 18 U.S.C. § 3553(e).[55]

Under 18 U.S.C. § 3553(e), the court may depart from the minimum sentencing guidelines when a defendant enters a cooperation agreement and has given substantial assistance to the government, such as in the form of providing intelligence to investigators or testifying against coconspirators. According to the U.S. Sentencing Guide, a reduction can be considered for the following reasons:

1. the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
2. the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3. the nature and extent of the defendant's assistance;
4. any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
5. the timeliness of the defendant's assistance.[56]

The sentencing guidelines have given a significant advantage to federal law enforcement in combatting gangs, as they all but guarantee harsh sentences upon a guilty verdict. One of the few ways to avoid these harsh sentences is for the defendant to cooperate with the government by providing substantial assistance to the prosecution.[57] Strict guidelines removed any doubt that, even if found guilty, a judge would take pity on defendants or their situation and impose a lenient sentence. Therefore, defendants' incentive to cooperate and "turn" on their associates is immense.

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[55] Imposition of a Sentence, 18 U.S.C. § 3553(e).

[56] Substantial Assistance to Authorities, U.S.S.C. § 5k1.1.

[57] Imposition of a Sentence.

Michael Simons agrees that harsh sentencing has directly led to increased cooperation agreements among defendants.[58] This is among the several advantages that Jeffries and Gleeson also identify in support of their call for the prosecution of all of organized crime to be federalized. They say the "[s]entencing guidelines are the envy of state and local prosecutors" and that "state systems do not create the same incentive to cooperate."[59] A gang that has committed violent acts, with the same evidence against them, could have drastically different outcomes in state and federal courts. Just one gang member fearful of additional prison time could lead to cooperation and impact the strength of an entire case.

B. APPLICATION OF FEDERAL RICO TO STREET-LEVEL GANGS

One school of thought investigates how the RICO statutes are being applied to street-level gangs and argues that prosecutors are failing to meet all of the required elements of the statute. Matthew Blumenstein explores the necessity for street-level gangs to affect interstate commerce, a requirement to be culpable under federal law.[60] He argues that because their crimes are noneconomic, street-level gangs are not affecting interstate commerce and these groups should not be charged using federal anti-racketeering statutes.[61] Defense attorneys have explored and unsuccessfully used Blumenstein's concerns during motions to have their clients' cases dismissed.[62] Brian Nisbet examined court decisions in light of his argument that Congress should have been clearer in its

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[58] Michael Simons, "Retribution for Rats: Cooperation, Punishment, and Atonement," *Vanderbilt Law Review* 56, no. 1 (January 2003): 7–11.

[59] Jeffries and Gleeson, "The Federalization of Organized Crime," 1123–24.

[60] Blumenstein, "RICO Overreach," 228–30.

[61] Interstate commerce is any traffic or transactions that either cross state lines or involve more than one state. The Constitution gives Congress the power to regulate interstate commerce, and thus this is the authority granted to Congress to create federal laws. For more information see U.S. Const., art. 1, sec. 8, clause 3.

[62] See Waucaush v. United States, 03-1072 (6th Cir. 2004); United States v. Nascimento, 06-1152 (1st Cir. 2007).

language, and these types of cases (targeting noneconomic racketeering activity) should be deemed unconstitutional, and found mixed results.[63]

There have been several RICO prosecutions against noneconomic street gangs, which has led to a split in decision between the First and Sixth Circuit Courts of Appeals. In 1997 in the Sixth Circuit, a gang member from Detroit by the name of Robert Waucaush belonged to a criminal enterprise called the Cash Flow Posse 201. This gang was charged under RICO for a host of heinous crimes, including numerous murders and attempted murders, but no narcotics or economic crimes. Waucaush pled guilty, but the Sixth Circuit later overturned the conviction, stating the enterprise was not engaged in economic activity and more than a minimal effect on interstate commerce was necessary to support a federal prosecution.[64] In 2007, in *United States v. Nascimento*, the First Circuit Court of Appeals departed from the Sixth Circuit precedent and upheld a similar conviction. The First Circuit ruled that the statutory language provided by Congress and enacted into law requires only that interstate commerce be "affected." Although Nascimento's actions did not have a direct economic effect, such as drug sales, the firearms used to commit the crimes were purchased out of state and, thus, were found to affect interstate commerce. Additionally, the court decided that the aggregate effect of actions taken by violent gangs also impacts commerce.[65] Although this issue has yet to reach the U.S. Supreme Court, Kristina Miller argues that the court would likely uphold a RICO conviction of a noneconomic street gang using reasoning similar to that found in *Nascimento*.[66] Miller compares this to the decision by the Supreme Court in *United States v. Raich*, where the majority found that Congress has the authority to control noneconomic activity if commerce is *eventually* impacted. This

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[63] Brian Nisbet, "What Can Rico Not Do: Rico and the Non-economic Intrastate Enterprise That Perpetrates Only Non-economic Racketeering Activity," *Journal of Criminal Law and Criminology* 99, no. 2 (Winter 2009): 539.

[64] *Waucaush v. United States.*

[65] United States v. Nascimento, 491 F.3rd 25, 30 (1st Cir. 2007).

[66] Kristina Miller, "After Gonzalez v. Raich: Can RICO Be Used to Prosecute Intrastate Noneconomic Street Gang Violence?" *Widener Law Review* 16, no. 1 (2010): 197–238, https://heinonline.org/HOL/LandingPage?handle=hein.journals/wlsj16&div=9&id=&page=.

includes intrastate activity if it is part of a "class of activities" that significantly affects interstate commerce.[67]

Matthew Blumenstein disagrees with *Nascimento* and *Raich*, arguing that a minimal effect on interstate commerce is not enough for the government to pursue racketeering charges against noneconomic gangs.[68] However, while noneconomic gangs may not directly affect commerce, their aggregate actions certainly can. Gang-related shootings and homicides can shut down roads and transports. Businesses can be forced to close, and payrolls can be affected. These are all direct impacts on commerce. Additionally, gangs typically control a particular area or drug territory.[69] If a population of people cannot (or will not) visit or patronize businesses in a certain area, commerce is certainly affected and, thus, the federal government should have the authority to regulate it.

C. DOUBLE JEOPARDY

Lawyers and human rights groups have argued that racketeering statutes violate the double jeopardy clause of the U.S. Constitution by charging individuals who have stood trial in state courts for some (or all) of their criminal activity again in federal court.[70] The doctrine of double jeopardy protects the American people from another prosecution following an acquittal or conviction, and against being punished more than once for the same offense. The Fifth Amendment of the Constitution reads, in relevant part, "No person shall … be subject for the same offense to be twice put in jeopardy of life or limb."[71] Double jeopardy concerns are inherent given the compounding nature of the RICO statute: as noted in Chapter I, a RICO charge requires two acts to have been committed (known as

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[67] Gonzales v. Raich, 545 U.S. 1 (2005).

[68] Blumenstein, "RICO Overreach," 225–28.

[69] P. Jeffrey Brantingham et al., "The Ecology of Gang Territorial Boundaries," *Criminology* 50, no. 3 (August 2012): 851–85, https://doi.org/10.1111/j.1745-9125.2012.00281.x.

[70] George Thomas, "Rico Prosecutions and the Double Jeopardy/Multiple Punishment Problem," *Northwestern University Law Review* 78, no. 6 (February1987): 1360–403; Barry Tarlow, "RICO: The New Darling of the Prosecutor's Nursery," *Fordham Law Review* 49, no. 2 (1980): 257–64.

[71] U.S. Const., amen. V.

predicate offenses) in addition to racketeering activity, and the defendant might already have been arrested and gone to trial for one or both of the acts.

Sandra Guerra agrees with the criticism of RICO, arguing that the Double Jeopardy Clause has become powerless and its protections need to be restored.[72] Additionally, Adam Adler argues that prosecutions such as RICO not only violate double jeopardy claims but also due process.[73] However, David Owsley argues that such double jeopardy concerns are invalid as addressed in the doctrine of dual sovereignty, a legal concept that allows for separate governments, such as multiple states or state and federal, to prosecute an individual for the same act.[74] In his interpretation, the state and the federal governments are separate entities, each of whom have the power to enact and enforce its own laws. This includes when and if the criminal conduct overlaps jurisdictions.

One fear that this doctrine has generated is that federal prosecutors who are unhappy with a state court acquittal can retry a defendant in federal court. In addition, the fear of being tried federally, even if it results in an acquittal, could sway defendants into taking guilty pleas.[75] The Department of Justice has recognized how this may cause an injustice in certain scenarios and has implemented safeguards to curb such misapplications, which will be discussed later in this chapter, in Section E.

D. THE BALANCE OF POWER BETWEEN STATES AND THE FEDERAL GOVERNMENT

More of a theoretical concern for applying federal laws to combat gangs, as opposed to a legal concern, is how the utilization of federal laws such as anti-racketeering ones can shift the balance of power between state and federal governments. George O'Reilly and Robert Drizin argue that if the federal government inserts itself into territory

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[72] Sandra Guerra, "Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy," *North Carolina Law Review* 73, no. 3 (1995): 1210.

[73] Adam J. Adler, "Dual Sovereignty, Due Process, and Duplicative Punishment: A New Solution to an Old Problem," *Yale Law Journal* 124, no. 2 (November 2014): 482–83.

[74] David Owsley, "Accepting the Dual Sovereignty Exception to Double Jeopardy: A Hard Case Study," *Washington University Law Review* 81, no. 3 (January 2003): 773, 797.

[75] O'Reilly and Drizin, "United States v. Lopez," 1.

previously dominated by the states, it could be the first step to completely centralizing the criminal justice system.[76] They stress that such centralization would strip individual states of enormous power, shifting it to the federal government.

Illustrating a similar concern, the Supreme Court in *United States v. Lopez* found a federal law prohibiting firearm possession on school grounds unconstitutional, stating that Congress had overstepped its boundaries and that the Constitution did not afford it the power to enact such a law.[77] *United States v. Lopez* demonstrated the court's desire to maintain a balance and, therefore, reiterated that the state has the primary role in enforcing criminal laws. This was not a new concept, but rather a protection of what the Supreme Court believed was originally called for by the Constitution. The sentiment can be found in the words of Alexander Hamilton, who declared the states were the "immediate and visible guardians of life and property."[78]

Since racketeering charges require a pattern of criminal activity (typically state crimes), some critics argue that state government should address the criminal acts.[79] Allowing the federal government to address the same crimes shifts the balance of power, they argue. As a result, criminals can grow to fear the federal system over the state, and citizens may begin to look to the federal government to solve their crime problems (or to lay blame if they remain unsolved). Consequently, the states' criminal justice system becomes weaker while the power of the federal government increases. The fear is that, eventually, the states will depend on the federal government for public safety and order.

E. ABUSE SAFEGUARDS

Scholars such as Linda Koenig and Doris Godinez-Taylor have argued that the language in the RICO statutes is too broad and gives prosecutors too much discretion in

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[76] O'Reilly and Drizin, 5–8.

[77] United States v. Lopez, 115 S. Ct. 1624, 1626 (1995).

[78] Ian Shapiro, ed., *The Federalist Papers: Alexander Hamilton, James Madison, and John Jay*: *Rethinking the Western Tradition* (New Haven, CT: Yale University Press, 2009).

[79] O'Reilly and Drizin, "United States v. Lopez."

terms of who can be charged.[80] It is solely the discretion of federal prosecutors to decide whom to charge and what criminal charges to pursue. The federal court system, however, has important policies and safeguards in place that are rarely mentioned by advocates or even proponents. First, no RICO case can enter the court system without the prior approval of the Criminal Division's Organized Crime and Gang Section (OCGS) of the U.S. Attorney's Office. Updated in February 2012, an OCGS prosecution memorandum specifies how the RICO approval process must proceed:

> Every request for approval of a proposed prosecution under section 1959 must be accompanied by a final draft of a proposed indictment and by a thorough prosecution memorandum. The prosecution memorandum should generally conform to the standards outlined for RICO prosecutions. See USAM 9–110.400. The memorandum must contain a concise summary of the facts and a statement of the evidentiary basis for each count, a statement of the applicable law, a discussion of anticipated defenses and unusual legal issues (federal, and where applicable, state), and a statement of justification for using section 1959. It is especially important that the memorandum include a discussion of the nexus between the enterprise and the crime of violence, the defendant's relationship to the enterprise, and the evidentiary basis for each section 1959 count. Submission of a thorough memorandum is particularly important, because of the complexity of the issues involved and because of the statute's similarity to RICO. OCGS has sample prosecution memoranda.[81]

The OCGS reviews and ultimately approves a prosecution memo, which provides the legal basis and justification of the necessity to use the RICO statutes. Memoranda are typically drafted and resubmitted back and forth between a federal prosecutor and OCGS, with OCGS requesting clarification and/or raising potential legal concerns for the prosecutor to address.[82]

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[80] Linda Koenig and Doris Godinez-Taylor, "The Need for Greater Double Jeopardy and Due Process Safeguards in RICO Criminal and Civil Actions," *California Law Review* 70, no. 3 (May 1982): 724, https://doi.org/10.2307/3480217.

[81] Organized Crime and Racketeering Prosecution, § 1959 9-110.815.

[82] Organized Crime and Racketeering Prosecution.

In 2016, the OCGS revised its comprehensive RICO manual to guide federal prosecutors in drafting the memoranda and handling subsequent prosecutions.[83] The manual is a 556-page document that covers the history of RICO, the proposal memorandum, and its legal implications. Most importantly, this clarification to the RICO manual requires that the prosecution memorandum contain a detailed report on seven matters:

I. State of the Witnesses and Evidence

II. The Enterprise (discussing the enterprise's history, structure, and effect on interstate or foreign commerce and the specific admissible evidence to prove these facts)

III. The Defendants (briefly discussing each defendant's pedigree and position in the enterprise; grouping defendants with similar positions is recommended)

IV. Legal/Policy Considerations (explaining why RICO is appropriate based on the factors in Section V(A) below and addressing any special considerations such as (1) Petite issues, (2) death eligible offenses; (3) juvenile issues, including juvenile acts included in the pattern of racketeering; (4) anticipated defenses, (5) any statute of limitations issues, (6) extraterritoriality; and (7) any unusual federal and state legal issues).

V. Legal Sufficiency of the RICO and/or RICO Conspiracy Count(s) (addressing the sufficiency of the admissible evidence for each defendant, including the nexus to the enterprise for the racketeering activity)

VI. Legal Sufficiency of the 18 U.S.C. § 1959 Count(s)

VII. RICO Forfeiture.[84]

The prosecution memorandum is one of the first steps for prosecutors, and it is designed as a safeguard to ensure the legal justification to proceed with a RICO prosecution is satisfied. In addition, the federal prosecutor must provide a copy of the indictment to the OCGS for approval prior to filing it with the court. Furthermore, federal prosecutors must "keep the Organized Crime and Gang Section informed of any unusual legal problems that

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[83] Department of Justice Organized Crime and Gang Section, *Criminal RICO: 18 U.S.C. §§ 1961–1968: A Manual for Federal Prosecutors*, sixth revised edition (Washington, DC: Department of Justice, 2016), https://www.justice.gov/usam/file/870856/download.

[84] Department of Justice Organized Crime and Gang Section, 22.

occur during the duration of the case" so it can provide guidance.[85] Each RICO case is so heavily scrutinized because any of these cases could end up before the Supreme Court and become case law that impacts every subsequent racketeering case.

Another safeguard is the "Petite policy," which the Department of Justice put in place to address the double jeopardy concern. Found in title 9, section 2.031 of the Justice Manual, the Petite policy (formally known as the dual and successive prosecution policy) sets the criteria for dual or successive prosecutions:

> This policy precludes the initiation or continuation of a federal prosecution, following a prior state or federal prosecution based on substantially the same act(s) or transaction(s) unless three substantive prerequisites are satisfied: first, the matter must involve a substantial federal interest; second, the prior prosecution must have left that interest demonstrably unvindicated; and third, applying the same test that is applicable to all federal prosecutions, the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. In addition, there is a procedural prerequisite to be satisfied, that is, the prosecution must be approved by the appropriate Assistant Attorney General.[86]

The Petite policy derives from the case of *Petite v. United States*, where the question of double jeopardy was raised for multiple federal prosecutions involving substantially similar criminal conduct. Defendant Petite's double jeopardy motion was denied and he was convicted of the federal charges. The Fourth Circuit Court of Appeals affirmed his conviction on appeal. A writ of certiorari to the Supreme Court was filed and granted without opposition from the U.S. Attorney's Office. The solicitor general, however, requested that the case be remanded back to the trial court to enter an order dismissing the case, stating the successive prosecution was not aligned with the U.S. Attorney's Office's general policy regarding multiple prosecutions of the type at issue here.[87] The case was remanded to the Court of Appeals, which vacated its judgment and returned the case to the

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[85] Organized Crime and Racketeering § 1959 9-110.816.

[86] Justice Manual, Title 9 § 2.031.

[87] Petite v. United States, 361 U.S. 529, 530 (4th Cir. 1960).

district court, which likewise vacated its judgment.[88] The internal policy at issue thus became known as the Petite policy.

Notably, the Petite policy is an internal policy, or guide, developed solely as a safeguard against abuse of unnecessary successive prosecutions. This self-imposed control assumes that any previous crime that a state adjudicates has also vindicated the federal interest in prosecution. As mentioned in the policy, it is required for the appropriate assistant attorney general to personally approve the dual and successive prosecution based on the three prerequisites to continue or commence prosecution.[89]

It is also important to note, for the purpose of this research, that the Petite policy may not directly apply to RICO prosecutions. The RICO statute criminalizes not just the predicate crimes (which may have been adjudicated by the states or in federal court) but also membership in a racketeering enterprise and an ongoing pattern of illegal activity. For the Petite policy to apply, the states would have had to have charged virtually the same overall criminal conduct, not just the underlying (predicate) crimes. However, this internal policy does speak to the Department of Justice's mission to curb the misapplication or the abuse of federal law.

88 *Petite v. United States*, 531.

89 See Appendix B.

III. RICO IN USE

As previous chapters have shown**,** scholars and practitioners have long debated the legal principles, advantages, and disadvantages of the racketeering statutes. However, in order to fully understand the ongoing applicability of RICO in combatting gangs, it would be remiss not to research the real-life application of these statutes. This chapter explores the use of RICO in three different jurisdictions: New York, New York; Detroit, Michigan; and Montebello, California.

A. THE BRONX, NEW YORK

Nestled outside the Parkchester complex and community in the Bronx, within the confines of the NYPD's 43rd Precinct, a small neighborhood became a warzone for its residents. Shootings, stabbings, homicides, and all kinds of violent crimes plagued this neighborhood for over a decade. The disproportionate number of crimes committed in less than one square mile—and across the precinct—raised alarm bells among community members and the leadership at 1 Police Plaza.[90] Community Board Chairman William Rivera met with precinct officials several times to voice his concerns about this violent area, attributing the problem to the "recidivism of violent criminals."[91] The NYPD deemed the area so violent that it became part of an "impact zone," where droves of officers flooded the area on foot posts every night to deter crime.[92]

Although numerous police resources were directed to the area, they were unable to thwart the ongoing violence. On May 5, 2015, an innocent bystander was struck in the head

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[90] Kerry Wills, "Crime Spike in Sprawling 43rd Precinct has Bronx Communities Seeking More Police Presence," *New York Daily News*, January 15, 2012, http://www.nydailynews.com/new-york/bronx/crime-spike-sprawling-43rd-precinct-bronx-communities-seeking-police-presence-article-1.1005829.

[91] "Shootings, Robberies Concern Parkchester Community," News 12 the Bronx, March 09, 2015, http://bronx.news12.com/story/34807103/shootings-robberies-concern-parkchester-community.

[92] "Operation Impact" was a program developed by then NYPD Commissioner Raymond Kelly that used analytics to identify "hot spots" of violence. After these areas were identified scores of new police officers were assigned to foot patrol in these areas. For more information, see Al B aker and Karen Zraick, "Police Project Credited with Cutting Crime in Tough Precincts," *New York Times*, December 23, 2008, https://www.nytimes.com/2008/12/24/nyregion/24crime.html.

by a stray bullet meant for a gang member, permanently disabling him.[93] Only two months later, on July 7, a twenty-one-year-old man holding his one-year-old daughter in his arms was shot to death in broad daylight by a rival gang member.[94] In an apartment listing review, an anonymous person expressed frustration and fear of living of living in the area:

> The first 3 months of living here I witnessed, heard, and was involved in over 20 shootouts. One time I was coming from the store and decided to talk to my neighbor about the shootings, when a shootout began right in front of me. I've been here 3 years, unfortunately. This summer alone there have been 2 murders right in front of my building, so now NYPD has a surveillance tower on the corner to try to protect my block. Well now they just murder you around the corner from the view of the tower. Two killings, both only a block away. One of the people killed was holding a baby in their arms when they were killed. I am afraid for my children and my lives.[95]

This review echoes the fear and power violent criminals had over residents of the community.

The Bronx Violent Crimes Squad, an elite major case unit of the NYPD, along with federal counterparts at the Drug Enforcement Administration (DEA) and Homeland Security Investigations (HSI), commenced a federal racketeering investigation. Their investigation revealed that the majority of the violence could be attributed to a brutal dispute between two rival gangs over drugs and territory. The two criminal enterprises were identified as the Taylor Avenue Crew and the Leland Avenue Crew. The Taylor Avenue crew was predominately a Blood gang affiliate, operating mostly on the 1500 block of Taylor Avenue. Running the entire length of one side of the same block was an elementary school, however gang members seemed unfazed by the presence of children as they peddled crack cocaine and engaged in shoot-outs. The Leland Avenue crew was a predominately Crip gang affiliate that operated only two streets over, on the 1500 block of

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93 "Shooting in Parkchester Leaves Man with Head Wound," ABC7 NY, May 7, 2015, https://abc7ny.com/news/man-shot-in-head-on-leland-avenue/702093.

94 Caitlin Nolan, Thomas Tracy, and Corky Siemaszko, "Bronx Dad Dead While Holding Baby Was Victim of Gang War: Police," *New York Daily News*, July 8, 2015, http://www.nydailynews.com/new-york/nyc-crime/baby-girl-fine-father-shot-dead-bronx-article-1.2285393.

95 "1516 Leland Ave," Apartments.com, accessed August 2, 2019, https://www.apartments.com/1516-leland-ave-bronx-ny/6mw5g8t/.

Leland Avenue. The Leland Avenue crew also peddled crack cocaine, and each gang protected their drug trade and status through acquiring illegal firearms and engaging in numerous shoot-outs and assaults with one another.

After prosecutors filed a case using the federal RICO statute, the U.S. Attorney's Office for the Southern District of New York described the Taylor Avenue crew as follows:

> The Taylor Avenue Crew was a criminal enterprise that operated principally in and around the Bronx, New York, from at least 2012 up to and including 2015. One of the Taylor Avenue Crew's principal objectives was to sell cocaine base, commonly known as "crack cocaine," primarily in and around Taylor Avenue in the Bronx. The Taylor Avenue Crew controlled crack cocaine sales within this area by prohibiting and preventing non-members, outsiders, and rival narcotics dealers from distributing crack cocaine in the area controlled by the enterprise.
>
> Members and associates of the Taylor Avenue Crew engaged in acts of violence against the Leland Avenue Crew, a rival gang that sold crack cocaine primarily in and around Leland Avenue, which runs parallel to Taylor Avenue and is located two blocks east. These acts of violence included assaults, attempted murder, and murder, and were committed to protect the Taylor Avenue Crew's drug territory, to retaliate against members of rival gangs who had encroached on the territory controlled by the Taylor Avenue Crew, and to otherwise promote the standing and reputation of the Taylor Avenue Crew amongst rival gangs.
>
> The violence perpetrated by the Taylor Avenue Crew turned deadly in March 2015. On or about March 3, 2015, ELIJAH DAVILA and Allen McQueen, a now deceased member of the Taylor Avenue Crew, murdered Pablo Beard, a member of the Leland Avenue Crew, by shooting Beard in the vicinity of 1512 Leland Avenue in the Bronx. As alleged in the *Ortiz* Indictment, DAVILA committed this murder to maintain and increase his position in the Taylor Avenue Crew.[96]

And the Leland Avenue Crew was described this way:

> The Leland Avenue Crew was a criminal enterprise that operated principally in and around the Bronx, New York, from at least 2012 up to and including 2015. One of the principal objectives of the Leland Avenue Crew was to sell crack cocaine, primarily in and around Leland Avenue in

[96] "Seventeen Members and Associates of Two Rival Bronx Street Gangs Charged in Federal Court with Racketeering and Narcotics Offenses, Including Two Murders," U.S. Attorney's Office, Southern District of New York, September 9, 2015, https://www.justice.gov/usao-sdny/pr/seventeen-members-and-associates-two-rival-bronx-street-gangs-charged-federal-court.

> the Bronx. Members and associates of the Leland Avenue Crew engaged in acts of violence against the Taylor Avenue Crew. These acts of violence included assaults, attempted murder, and murder intended either to protect the Leland Avenue Crew's drug territory, retaliate against members of rival gangs who had encroached on the territory controlled by the Leland Avenue Crew, or to otherwise promote the standing and reputation of the Leland Avenue Crew among rival gangs.
>
> The violence perpetrated by the Leland Avenue Crew also turned deadly in July 2015. On or about July 7, 2015, JAMES CAPERS murdered Allen McQueen, a member of the Taylor Avenue Crew, by shooting McQueen in the vicinity of 1531 Taylor Avenue in the Bronx. As alleged in the *Capers* Indictment, CAPERS committed this murder to maintain and increase his position in the Leland Avenue Crew.[97]

A total of seventeen defendants were charged following a racketeering investigation (nine from the Taylor Avenue crew and eight from the Leland Avenue crew). The perpetrators were charged with a host of crimes including racketeering, murder in aid of racketeering, murder in connection with a drug crime, narcotics conspiracy, and various firearms offenses. All seventeen members of the two rival enterprises faced a maximum sentence of life in prison, and two faced a maximum sentence of the death penalty.[98]

Following the initiation of the racketeering case, almost all violent crime in this small neighborhood plunged at a rate far greater than experienced in both the borough of the Bronx and city of New York, as a whole. Comparing the three years after the arrest warrants were executed to the three years before (September 7, 2012–September 7, 2015, versus September 7, 2015–September 7, 2018):

- Homicides fell 50 percent (compared to 1 percent in the borough and 7 percent in the city)
- Shootings fell 70 percent (compared to 8 percent in the borough and 24 percent in the city)

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[97] .S. Attorney's Office, Southern District of New York.

[98] United States v. Irvin Ortiz et al., 15 Cr. 608 (KPF) (2015); United States v. James Capers et al., 15 Cr. 607 (WHP) (2015).

- Robberies fell 26 percent (compared to 10 percent in the borough and 18 percent in the city)
- Felony assaults fell 23 percent (compared to a 9 percent *increase* in the borough and a 2 percent *increase* in the city)
- All seven major crimes combined fell 16 percent (compared to 1 percent in the borough, and 8 percent in the city)[99]

The NYPD and its federal counterparts used the federal racketeering statutes to charge and dismantle two rival gangs who violently protected their drug territory with no regard for the safety of those around them. With the exception of Leland Avenue gang member James Capers, all other members from both crews plead guilty. James Capers was charged with murder in addition to racketeering for the death of rival gang member Allen McQueen, who was holding his one-year-old daughter in his arms. Capers was found guilty at trial and sentenced to a minimum of forty years in federal prison.[100]

B. DETROIT ONE INITIATIVE

The number of homicides in Detroit, Michigan, was becoming alarming and the city saw its recent highest tally of 386 homicides in 2012.[101] The city topped *Forbes*'s most dangerous cities list that year, and there was no reason to think that status would change any time soon.[102] That same year, the police chief was suspended and the mayor arrested on federal charges (ironically, racketeering charges). Barbara McQuade, the U.S. attorney for the Eastern District of Michigan, was appointed in 2010 and served in this

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99 Edward Dolan, email message to author, April 25, 2019. The seven major crimes, designated by the FBI, are murder, rape, robbery, felony assault, burglary, grand larceny, and grand larceny auto.

100 United States v. James Capers et al., 15 Cr. 607 (2015).

101 "Michigan: Offenses Known to Law Enforcement by City, 2012," FBI, accessed August 2, 2019, https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/8tabledatadecpdf/table-8-state-cuts/table_8_offenses_known_to_law_enforcement_by_michigan_by_city_2012.xls.

102 Daniel Fisher, "Detroit Tops the 2012 List of America's Most Dangerous Cities," *Forbes*, October 18, 2012, https://www.forbes.com/sites/danielfisher/2012/10/18/detroit-tops-the-2012-list-of-americas-most-dangerous-cities/#2ffb0d8a2931.

capacity until 2017.[103] McQuade recognized that the criminal justice system was failing to address the violence, so she assembled top federal and local law enforcement leaders from different agencies to devise a new plan. Out of this session, the Detroit One Violent Crime Reduction Initiative was born.[104]

At the core of the initiative were three principles: "(1) identify and prosecute priority offenders; (2) dismantle violent gangs and criminal organizations; and (3) engage the community to act."[105] To dismantle the violent criminal enterprises, law enforcement and federal prosecutors for the Eastern District of Michigan relied heavily on the federal RICO statutes. Prior to this initiative, the office had not used the racketeering statutes to prosecute gangs in more than ten years. Between 2012 and 2017, over 100 gang members were charged in more than a dozen racketeering cases. Notable prosecutions include:

- Eighteen members of the Seven Mile Blood street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Nine members of the Bounty Hunter Bloods street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Fourteen members of the Rollin' 60's Crips street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Thirteen members of the Latin Counts street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering

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103 "U.S. Attorney Barbara L. McQuade Resigns," U.S. Attorney's Office, Eastern District of Michigan, March 13, 2017, https://www.justice.gov/usao-edmi/pr/us-attorney-barbara-l-mcquade-resigns.

104 Christopher Graveline and Joseph Wheatley, "The Detroit One Violent Crime Reduction Initiative: How it Works and How Similar Program May Benefit Your District," *United States Attorneys' Bulletin* 65, no. 2 (June 2017): 85, https://www.justice.gov/usao/page/file/976481/download.

105 Graveline and Wheatley, 84.

- Three members of the Band Crew street gang charged under the state of Michigan gang felony statute for violent acts in furtherance of their gang activities, and eight members of the Band Crew for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Ten members of the RTM street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Five members of the YNS street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering
- Eleven members of the 6 Mile Chedda Grove street gang for federal racketeering conspiracy and other violent acts in furtherance of racketeering[106]

The U.S. Attorney's Office for the Eastern District of Michigan made the use of RICO a fundamental principle in its revamped approach to combatting gang violence. The results of the initiative were described as "significant."[107] Shootings and homicides plummeted. In 2014 there were 298 homicides, which marked the first time homicides dropped below 300 in nearly fifty years. From 2012 to 2016, shootings and homicides combined fell by 24 percent. In 2018 homicides continued to fall, to a new low of 261.[108] In a press release about the sentencing of a high-ranking gang member convicted of racketeering, the Bureau of Alcohol, Tobacco, Firearms, and Explosives noted that the Detroit One Initiative "had led to significant indictments, convictions and sentences against a number of street gangs who are responsible for much of the violent crime in Detroit,

106 Graveline and Wheatley, 86–87.

107 Graveline and Wheatley, 88.

108 "Crime Rate in Detroit, Michigan (MI): Murders, Rapes, Robberies, Assaults, Burglaries, Thefts, Auto Thefts, Arson, Law Enforcement Employees, Police Officers, Crime Map," City-Data, accessed July 10, 2019, http://www.city-data.com/crime/crime-Detroit-Michigan.html.

including members of Latin Counts, Vice Lords and others, and a reduction in homicide and violent crime in Detroit."[109]

C. MONTEBELLO, CALIFORNIA'S, OPERATION SUDDEN IMPACT

The city of Montebello is located in Los Angeles County, California, mere miles away from downtown Los Angeles. The city is approximately 8.4 square miles with a population of roughly 65,000 people.[110] In the early to mid-2000s, law enforcement and prosecutors in Montebello were grappling with gang-related violence. The Southside Montebello (SSM) street gang had claimed parts of the city as its territory and engaged in violent disputes with rival gangs who encroached on the areas.

The SSM gang was created over fifty years ago and has had ties to the Mexican mafia since its inception. It marked its territory with graffiti upon buildings, walls, and street signs to alert and warn rivals and law enforcement of its turf. To fund its gang activities, members sold crack cocaine and methamphetamine. Not only did they sell narcotics, they also imposed a "tax" and charged other drug dealers who wished to sell drugs on their territory. The drug dealings and gang activities led to a troubling number of shootings and homicides.[111]

In an attempt to combat the gang violence, the city of Montebello utilized many traditional police tactics, including filing an injunction against the SSM gang.[112] The gang injunction initiated a curfew in a designated safety zone and prohibited numerous gang behaviors such as associating with one another, making graffiti, and carrying weapons. The injunction, however, proved to be ineffective in the long term, as gang-related homicides

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109 "Detroit One Collaboration Leads to 30-Year Sentence of Major Gang Leader for Violent Racketeering Crimes," U.S. Attorney's Office, Eastern District of Michigan, April 19, 2016, https://www.atf.gov/detroit-field-division/pr/detroit-one-collaboration-leads-30-year-sentence-major-gang-leader-violent.

110 "Montebllo [sic] Census 2010–2024," City of Montebello, accessed, July 10, 2019, https://www.cityofmontebello.com/about-montebello/about-demographics.html.

111 Reema M. El-Amamy, "Operation Sudden Impact: The Effective Use of Federal and State Resources to Combat Gang Violence," *United States Attorneys' Bulletin*, 65, no. 2 (June 2017): 64–65.

112 Ruby Gonzales, "Policy Say Gang Injunction Help Curb Gang Crime in Whittier, Montebello," *Whittier Daily News*, August 29, 2017, https://www.whittierdailynews.com/2013/09/14/police-say-gang-injunction-help-curb-gang-crime-in-whittier-montebello/.

in the small city continued to occur.[113] In a short span of time, two gang members were killed execution style, and an innocent father and his twelve-year-old son were caught in the crossfire and also killed.[114]

In April 2011, a task force of local and federal law enforcement convened to combat the issue. Detectives from the Montebello Police Department and the Los Angeles County Sheriff's Office teamed up with agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives and, in coordination with the U.S. Attorney's Office for the Central District of California, initiated Operation Sudden Impact. A myriad of investigational techniques, including confidential informants and undercover officers, were deployed to understand the inner workings of the gang. The investigation revealed that in all relevant parts, the SSM gang was an organized and criminal enterprise. Its members committed numerous homicides, robberies, and narcotics and firearms offenses on behalf of and to benefit the gang.

A total of thirty-eight SSM gang members were charged in regard to Operation Sudden Impact.[115] Close collaboration between state and federal prosecutors allowed for some gang members to be charged in state court but others in federal court. A total of fifteen were charged in federal court for a host of federal crimes including violation of RICO. Andrew Birotte, Jr., U.S. attorney for the Central District of California, outlined the magnitude and danger of this gang:

> As alleged in the RICO indictment, members of Southside Montebello gang established what they called a 'Killer Squad' unit within the gang to challenge their rivals. The federal racketeering indictment describes how the gang maintained an arsenal of weapons, engaged in violent acts, and operated a robust drug trade that frightened and intimidated the people of Montebello. The United States Attorney's Office is committed to working with District Attorney Jackie Lacey, and our partners at agencies like the

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113 El-Amany, "Operation Sudden Impact," 67.

114 Brian Day, "Feds Nail South Side Montebello Street Gang and 'Killer Squad' Clique," *Whittier Daily News*, August 29, 2017, https://www.whittierdailynews.com/2013/05/15/feds-nail-south-side-montebello-street-gang-and-killer-squad-clique/.

115 Operation Sudden Impact, "Operation Sudden Impact Solves Six 'Cold Case' Murders and Leads to Charges against Nearly 40 Montebello Gang Members and Associates," Bureau of Alcohol, Tobacco, Firearms and Explosives, May 15, 2013, https://www.atf.gov/resource-center/docs/050515-la-operation-sudden-impact-solves-six-cold-case-murders-and-leads-0/download.

> ATF [Bureau of Alcohol, Tobacco, Firearms, and Explosives] and the Montebello Police Department, to protect the public by dismantling the street gangs that are the root cause of so much crime and violence in our local communities.[116]

In the year following the investigation, the city of Montebello recorded a record low for homicides. The collaboration of federal and state resources led to arrests in six cold-case homicides, the seizure of almost twenty-five firearms (some of which were fully automatic), and the dismantling of a violent street gang. In the months following the filing of the cases, the police chief stated that, as a result, "the city of Montebello is now a safer and more peaceful place."[117] During the two years following the Operation Sudden Impact investigation and arrests (2011 and 2012 versus 2013 and 2014):

- Homicides fell 100 percent
- Robberies fell 19 percent
- Felony assaults fell 24 percent
- Burglaries fell 34 percent
- Grand thefts fell 54 percent[118]

D. CONCLUSION

In each of these three jurisdictions, federal racketeering statutes were used to dismantle criminal gangs and hold them responsible for violence that terrorized their communities. These examples show how specific and targeted enforcement of gangs was used in communities struggling with violence. After specific gangs were charged with violating the racketeering act, the community appeared to see some relief as violent crime dropped in the areas these gangs operated in. In Detroit's example, authorities specifically

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116 Operation Sudden Impact.

117 Sarah Parvini, "Montebello Gang Member Convicted of Federal Racketeering and Firearm Charges," *Los Angeles Times*, May 6, 2016, https://www.latimes.com/local/lanow/la-me-ln-montebello-sudden-impact-20160506-story.html.

118 Omar Rodriguez, email to author, June 18, 2019.

used the statutes as part of an overall documented initiative for combatting criminal enterprises, which was credited for the subsequent decrease in homicides. These three examples demonstrate the power that federal racketeering statutes wield. Not only were individuals held responsible for participating in a violent gang, but thereafter each community experienced a relief from violent crime.

The anonymous apartment review for the building on Leland Avenue in the Bronx really exemplifies the stronghold that violent gangs can have on their communities. These three examples show how federal racketeering statutes can be used to aid in removing violence-prone gang members from the street.

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IV. CONCLUSION

Federal RICO laws fill gaps and inconsistencies among state criminal justice systems, providing an avenue for every jurisdiction that may be struggling with gang violence to pursue. Former Attorney General Alberto Gonzales argued that the utilization of "federal RICO laws is an innovative approach to fighting criminals with tough penalties that may be unavailable in the state system."[119] Since federal laws apply to every state and municipality, states that have their own aggressive anti-gang laws can focus the federal prosecutors' time and attention on other crimes. In states that do not have such laws or whose gang problems are not effectively addressed by state laws, federal prosecutors can step in and utilize RICO. New York City is an example of a jurisdiction with gaps in its gang laws. Here, state and federal prosecutors routinely meet to discuss whether prosecution of cases would be advantageous in federal or state courts. These conversations typically cover the ease of prosecution and length of sentencing, both common strengths of federal prosecution. Despite these strengths, many scholars and practitioners are averse to RICO's use. As demonstrated in this research, the majority of their fears have been discredited, and some have already been evaluated and rejected by the courts.

The RICO statutes are not shifting power from states to the federal government. The statistical data does not support a fear of a growing federal system that is taking control of the country's criminal justice system. Although the number of federal crimes has increased, the percentage of felony cases brought to state and federal courts has been consistent for decades. Since 1980, only 2–5 percent of all felony cases were filed at the federal level. The only categories to experience a statistically relevant increase in federal cases were immigration and narcotics-trafficking offenses. These numbers are especially important when examining how RICO could shift any such balance, as RICO prosecutions have represented merely 0.1 percent of federal prosecution caseloads from 2001 to 2011.[120]

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[119] Alberto R. Gonzales, remarks by the attorney general at the Noble Training Conference, Standard Newswire, July 30, 2007, http://www.standardnewswire.com/news/148721401.html.

[120] Klein and Grobey, "Debunking Claims," 22, 29.

The notion that the states should retain sole power over matters of criminal justice also incorrectly assumes that states have the ability and resources to sufficiently address the ongoing gang problem. Rather, RICO was enacted in part to address the states' inability to combat organized crime and, similarly, gangs. Many states are not equipped to address gang violence for a myriad of reasons—budgets, caseloads, and a lack of comprehensive anti-gang laws, to name a few. The procedural advantages of the federal court system along with its use of racketeering statutes can help fill this void. The admissibility of uncorroborated accomplice testimony and the strong incentive to cooperate derived from the federal sentencing guidelines are an enormous advantage of the federal court system.

The looming threat of severe federal sentencing guidelines when a defendant is arrested for a charge like racketeering directly leads to increased assistance and cooperation agreements.[121] Prosecutors can use this to their advantage to focus on and convict criminals who are more dangerous than a cooperating defendant. The increased cooperation specifically aids in gang-related investigations and prosecutions because, often, only members of the criminal enterprise possess insider information that investigators and prosecutors desperately need to secure a conviction. Moreover, as one might imagine, a gang member turned cooperator would likely have incriminating information on every other fellow gang member.

Not only will a defendant's cooperation strengthen the current case at hand, but cooperators also must admit to all knowledge of criminal conduct, including their own. The information can be used to gain an advantage in other cases, open new investigations, and provide intelligence that otherwise would not have been uncovered. Whether a defendant who has agreed to provide "substantial assistance" benefits from cooperating is left solely to the discretion of the prosecutor. *United States v. Forney* demonstrates the power of prosecutorial discretion—when prosecutors did not seek a departure from the federal guidelines even though the defendant had cooperated. In that case, the defendant, Mark Forney, pled guilty to a federal narcotics-trafficking charge and agreed to cooperate with the government. At the conclusion of the case, the court asked the prosecutors numerous

[121] Simons, "Retribution for Rats," 8.

times whether they sought a downward departure from the sentencing guidelines. The prosecutors did not. Although Foley had provided information to the government, it was the prosecutor's opinion that he had not provided *substantial* assistance as required by the cooperation agreement because, in part, none of the information led to any arrests.[122] Similarly, in *United States v. Brechner*, the government refused to request a downward departure after the defendant, Milton Brechner, misrepresented his own criminal conduct. The prosecutor in that case argued that because Brechner had not been completely truthful, he would no longer be a good testifying witness, and thus, substantial assistance had not been provided.[123] These cases illustrate the magnitude and truthfulness of information that must be provided to prosecutors to avoid harsh sentencing, which criminal enterprise leaders would typically face.

Criminal enterprise leaders may never personally commit a crime or "get their hands dirty," but they are no less culpable than the individuals they order to commit crimes on their behalf. Since these leaders are often removed from the physical crime that was committed, their convictions often rely heavily on the testimony of accomplices. Federal courts allow the opportunity to convict defendants on the testimony of their accomplices, even if the information in their testimony is largely uncorroborated. Though juries are instructed to use caution and weigh this testimony with care, they are also instructed of the ability to convict a defendant entirely on it. This is not the case in many states, such as New York. In fact, it is the opposite. The New York Criminal Procedural Law 60.22 prohibits a conviction based on such testimony. Furthermore, in many state courts such as New York, multiple accomplices cannot corroborate each other in their testimony against an individual. Going back to the Trident gang scenario introduced in Chapter I, if the two leaders of the Trident gang in their meetings ordered their subordinates (and thus, accomplices) to commit shootings and homicides for the enterprise, it is extremely likely that the only evidence of their culpability would be in the testimony of the coconspirators.

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[122] United States v. Forney, 9 F. 3d 1492, 1494 (11th Cir. 1993).

[123] United States v. Brechner, 99 F.3d 96, 97 (2d Cir. 1996).

In New York, those leaders could never be charged based upon accomplice testimony, but in the federal system, they may.

Simultaneous prosecutions under RICO and state laws do not constitute double jeopardy under the Fifth Amendment. Defendants have unsuccessfully argued that when a court already has adjudicated the predicate offenses, a subsequent prosecution under RICO triggers double jeopardy.[124] For example, a defendant can be arrested and prosecuted for two separate shootings, and then those same two shootings can be used as predicate acts to qualify for a RICO prosecution in connection with racketeering activity. Courts have rejected double jeopardy claims in this context, stating that when Congress enacted the laws, they were clear that the predicate offenses and the RICO offense were distinct criminal acts. Additionally, to substantiate a RICO charge, an element must be proven in addition to the predicate offenses. Specifically, the prosecution also must prove beyond a reasonable doubt that the defendant was part of a racketeering enterprise and engaged in a "pattern" of racketeering activity.[125] The existence of the additional element distinguishes the federal prosecution from either of the predicate offense cases.

A. RICO'S USE

The three examples researched for this thesis show how RICO can be used as both an avenue to attack individual violent gangs and part of an overall strategy to reduce violence. The three jurisdictions were able to identify drivers of violence and conduct precision investigations targeting those responsible. By using the RICO statutes, authorities proved not only membership but ongoing participation in the defendants' respective criminal enterprises. These types of investigations address the problem head-on. Unfortunately, a tactic that may be used by law enforcement is to cast a dragnet of arrests and hope that the individuals committing the violence are snared in its reach. These types of cases could be considered "indict-the-block" narcotics and conspiracy investigations. Drug dealing is illegal and many involved in the trade are tied to violence; however, this

124 *United States v. Ruggiero*.

125 Racketeer Influenced and Corrupt Organizations, Prohibited Activities, 18 U.S.C. § 1962 (2009).

thesis submits that racketeering investigations and prosecutions have shown their ability to dismantle criminal enterprises and potentially drive down crime in the area where the gangs operate. The neighborhoods in these examined cases saw significant decreases in crime following the investigation and arrests.

The U.S. Attorney's Office for the Eastern District of Michigan recognized that Detroit was already dangerous and getting worse year after year. Astutely, the Eastern District prosecutors recognized that they, too, had not just the responsibility but the power to impact the ongoing safety of Detroit's citizens. After not having used the RICO statutes against gangs in almost ten years, they made the statutes' use a priority as part of a larger strategy to address crime. The homicide rate began to fall and the overall initiative was deemed a success. Admittedly, much less statistical relevance should be placed on examining the homicide rate of an entire city after they institute a single policy. However, at the very least, the volume of violence charged in these Detroit area cases shows that the Eastern District of Michigan used these federal statutes to hold criminal enterprises accountable for their collective actions.

B. RICO AND CRIME

Though crime rates of specific neighborhoods before and after racketeering cases were prosecuted are presented in Chapter III, this thesis makes no attempt to directly correlate the two, nor determine cause and effect. There has been and will continue to be a significant amount of research dedicated to what causes crime and how to reduce crime. Although the crime rates plummeted after each of the reviewed jurisdictions used the federal RICO statutes, the sample sizes were too small and there were too many variables to make a direct/linear causal link. Many scholars and practitioners have made grand claims on crime that have later been seemingly debunked. This thesis does not seek to do that or claim that the use of the federal racketeering statutes will cause crime to decrease. However, it does assert that law enforcement agencies who are struggling with gang violence should be aware of the functionality of these laws and consider their use.

C. LAW ENFORCEMENT COLLABORATION

The collaboration of state, local, and federal resources is an asset that cannot be overlooked or overemphasized. Typically known as "task forces," teams of investigators pool the strengths of each agency to further joint investigations. Local police are usually the subject matter experts in a particular geographic area. They know the players, the drug dealers, and the community and may already have confidential informants in operation. Investigators with federal agencies know the federal laws and procedures and may have access to resources local investigators do not. If jurisdictions are struggling with gang violence, melding the assets of multiple agencies into a single investigative team is an avenue to consider. In each of the three examined examples, resources were pooled from numerous agencies to partner toward the goal of reducing violence, with notable results.

Another collaborative tool is the cross-designation of an attorney as both a state and federal prosecutor. Special assistant U.S. attorneys, allowable under federal law, can be an enormous asset to law enforcement. An attorney knowledgeable in both the laws and procedures of the different court systems can direct which cases or criminal acts should be brought and to which venue based on a predicted outcome or achievement of a stated goal. Without a cross-designated prosecutor, when an arrest is made and the federal court prosecutor is not yet ready to charge the act federally or deems more investigation is needed to ensure a federal crime was violated, the criminal case could begin in the state court system. A prosecution could later be filed in federal court and, sans limited circumstances, the state court case would have to be dismissed. However, that would mean that the state prosecutors squandered manpower, time, and resources into the case only to dismiss it and hand it to federal prosecutors. This is a major hurdle when requesting a state district attorney to drop charges. If for any reason federal charges cannot be brought initially, but it is recognized that there is a potential for these charges later, involving a cross-designated attorney from the beginning removes the need for involving two prosecution teams.

D. FUTURE RESEARCH

It is difficult to determine what makes an investigation and prosecution "successful." An argument can be made that it is convictions, adequate punitive measures,

community impact, etc., that would make a case successful. This thesis analyzed and evaluated the advantages of federal court and of using the racketeering statutes to combat gangs and gang-related violence. To home in on when it would be most beneficial to use these statutes, and since no two cases are the same, future researchers and practitioners may benefit from studying mock cases. With assistance from law enforcement, prosecutors, and judges, mock cases could be "presented" from start to finish in both state and federal court. Using the same background and facts to prove crimes committed by a hypothetical gang, the outcomes between state charges and federal charges could be more accurately compared and analyzed.

Future research could also build off of the model currently investigated in this thesis. Law enforcement agencies should be tracking where their manpower and resources are being used, and where they are getting the best return on investment. Crime statistics should be kept and analyzed after investigations to determine whether or not the types of cases they are bringing to prosecutors are potentially having an impact on crime rates and the community's quality of life. An expert in interpreting crime statistics could be consulted to consider the numerous and relevant variables affecting crime rates in addition to the investigations.

E. FINAL THOUGHTS

The federal racketeering statutes are a powerful set of laws which have demonstrated themselves to be successful in dismantling violent criminal organizations. They are particularly valuable in states with weak anti-gang laws or unaggressive state court attorneys. Local law enforcement agencies may be apprehensive to seek the use of federal prosecutors to assist them in addressing their gang problems. Unfamiliarity with the federal court system or the RICO statutes is an unacceptable reason for law enforcement to continue with gang investigations if they are not proving to have a positive impact on the community. In order to address crime, law enforcement must be flexible and innovative, and must seek any assistance that is available from outside their agencies. The cost of gang violence is too high not to consider all available options to eradicate violent street gangs. Federal racketeering statutes are one of these options.

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APPENDIX A. RACKETEERING ACTIVITY (18 U.S.C. § 1962)

In 18 U.S.C. § 1962, "Definitions," racketeering activity as defined as follows:

> (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891–894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461–1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581–1592 (relating to peonage, slavery, and trafficking in persons).,[1] sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of

murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phone records, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B).[126]

[126] Racketeer Influenced and Corrupt Organizations, 18 U.S.C. § 1962(1) (2009).

APPENDIX B. PETITE POLICY

According to the Petite policy, the Assistant Attorney General can overcome the presumption that the state has vindicated federal interests if:

> a conviction was not achieved because of the following sorts of factors: first, incompetence, corruption, intimidation, or undue influence; second, court or jury nullification in clear disregard of the evidence or the law; third, the unavailability of significant evidence, either because it was not timely discovered or known by the prosecution, or because it was kept from the trier of fact's consideration because of an erroneous interpretation of the law; fourth, the failure in a prior state prosecution to prove an element of a state offense that is not an element of the contemplated federal offense; and fifth, the exclusion of charges in a prior federal prosecution out of concern for fairness to other defendants, or for significant resource considerations that favored separate federal prosecutions.
>
> The presumption may be overcome even when a conviction was achieved in the prior prosecution in the following circumstances: first, if the prior sentence was manifestly inadequate in light of the federal interest involved and a substantially enhanced sentence—including forfeiture and restitution as well as imprisonment and fines—is available through the contemplated federal prosecution, or second, if the choice of charges, or the determination of guilt, or the severity of sentence in the prior prosecution was affected by the sorts of factors listed in the previous paragraph. An example might be a case in which the charges in the initial prosecution trivialized the seriousness of the contemplated federal offense, for example, a state prosecution for assault and battery in a case involving the murder of a federal official.
>
> The presumption also may be overcome, irrespective of the result in a prior state prosecution, in those rare cases where the following three conditions are met: first, the alleged violation involves a compelling federal interest, particularly one implicating an enduring national priority; second, the alleged violation involves egregious conduct, including that which threatens or causes loss of life, severe economic or physical harm, or the impairment of the functioning of an agency of the federal government or the due administration of justice; and third, the result in the prior prosecution was manifestly inadequate in light of the federal interest involved.
>
> The third substantive prerequisite is that the government must believe that the defendant's conduct constitutes a federal offense, and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact. This is the same test applied to all

federal prosecutions. See Principles of Federal Prosecution, JM 9–27.200 et seq. This requirement turns on the evaluation of the admissible evidence that will be available at the time of trial. The possibility that, despite the law and the facts, the fact-finder may acquit the defendant because of the unpopularity of some factor involved in the prosecution, or because of the overwhelming popularity of the defendant, or his or her cause, is not a factor that should preclude a proposed prosecution. Also, when in the case of a prior conviction the unvindicated federal interest in the matter arises because of the availability of a substantially enhanced sentence, the government must believe that the admissible evidence meets the legal requirements for such sentence.[127]

[127] Justice Manual, Title 9 § 2.031(D).

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