

RICO: Rethinking Interpretations of Criminal Organizations

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Prosecutions under the federal criminal Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961–1968, hereinafter referred to as “RICO”) and the related Violent Crimes in Aid of Racketeering Activity Act (18 U.S.C. § 1959, hereinafter referred to as “VICAR”) are being used to target alleged street gangs that are not the complex criminal organizations for which the RICO statute was originally intended. RICO prosecutions have an inappropriate and disproportionately negative impact on young Black and Brown men (including adolescents) in low-income communities. Law enforcement officers use notoriously inaccurate gang databases to target these RICO investigations, arrests, and prosecutions. Young people of color are overrepresented in gang databases, and this overrepresentation is a major factor driving their overrepresentation in gang raids and RICO prosecutions.

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If gang databases are faulty and are also infused with bias, then it is appropriate to question whether the raids and prosecutions that are based on those databases are also faulty and infused with bias. Therefore, given the influence of flawed gang databases on the use and impact of RICO, we must examine its legitimacy as applied to alleged street gangs.

The inaccurate and biased dragnet created by RICO street gang prosecutions sweeps up many people who are not involved in the targeted organizations and certainly are not contributing members of complex and criminal conspiracies. Courts that interpret RICO and VICAR broadly create a low bar for prosecutors and a nearly insurmountable one for defendants in these cases. Consequently, young Black and Brown men who were inappropriately charged in the first place decide to plead guilty to avoid the draconian sentences imposed by the RICO Act.

If the RICO Act were an effective response to organized crime, then the targeted crimes would presumably have diminished in the low-income communities of color in which young Black and Brown men are arrested and charged under RICO—resembling the decrease in La Cosa Nostra activity over the past few decades (due at least in part to RICO). That demonstrably has not happened, and the people directly and indirectly affected are suffering the consequences of ineffective and inappropriate law enforcement intervention.

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This paper problematizes the application of the federal RICO and VICAR statutes to alleged neighborhood gangs in low-income communities. It provides a brief history of the RICO Act and its VICAR expansion; analyzes the aforementioned issues, including how racial bias informs RICO “gang” prosecutions; and proposes reforms to begin addressing the systemic injustice these prosecutions cause.

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INTRODUCTION

Prosecutions under the federal criminal Racketeer Influenced and Corrupt Organizations Act¹ (“RICO”) and the related Violent Crimes in Aid of Racketeering Activity Act² (“VICAR”) have an inappropriate and

¹ 18 U.S.C. §§ 1961–1968. For a summary of the RICO Act, see CONG. RSCH. SERV., 96–950, RICO: A BRIEF SKETCH, (2021), <https://fas.org/sgp/crs/misc/96-950.pdf>.

² 18 U.S.C. § 1959.

disproportionately negative impact on young³ Black and Brown⁴ men and

³ References to young people throughout this Article are meant to encompass minors through those in their early twenties. Brain development continues to occur during this phase, and the available data suggests that many, if not most, of the defendants in RICO cases against alleged “neighborhood gangs” fall within this age range; *see, e.g.*, BABE HOWELL & PRISCILLA BUSTAMANTE, REPORT ON THE BRONX 120 MASS “GANG” PROSECUTION 14, THE BRONX 120 PROSECUTION (2019), <https://bronx120.report/the-report> (“The average age of the Bronx 120 defendants [who were charged as part of a mass gang raid in 2016,] was 25 years old 110 of the defendants were thirty years of age or younger, with an average age of 23. Because the conspiracy went back to 2007, these 110 defendants’ average age was only 14 when prosecutors claimed that a RICO conspiracy was formed Of course, individuals can join an existing conspiracy years after it begins, but many of the Bronx 120 were quite young even at indictment . . . the youngest charged defendants were 18 . . . they were [all] indicted for a conspiracy that dated back nine years.”); *see also* CONG. RSCH. SERV., *supra* note 1, 28–29, (citing *Miller v. Alabama*, 567 U.S. 460, 479 (2012); *United States v. Gonzalez*, 981 F.3d 11, 18–21 (1st Cir. 2020); *United States v. Sierra*, 933 F.3d 95, 97 (2d Cir. 2019); *United States v. Chavez*, 894 F.3d 593, 609 (4th Cir. 2018); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Enmund v. Florida*, 458 U.S. 782 (1982)) (“Juveniles convicted of murder in aid of racketeering have sometimes challenged their sentences on grounds of Eighth Amendment limitations. In *Miller*, the Supreme Court held that the Eighth Amendment’s ban on cruel and unusual punishments precludes a mandatory sentence of life imprisonment without any possibility of parole for an offense the defendant committed while a juvenile. However, Congress has largely abolished parole, and the VICAR provision states that murder ‘shall be’ punished by one of two sentences—death or life imprisonment. The Fifth Circuit resolved the issue under a similarly worded statute by concluding that in the case of juveniles the language establishes alternative maximum penalties and ‘provides discretion to the sentencing judge to sentence anywhere between no penalty and the maximum penalty.’ Most recently, the Supreme Court in *Jones v. Mississippi* observed that a juvenile who commits a homicide when under the age of 18 may be sentenced to life imprisonment without the possibility of parole as long as the sentencing authority did so as a matter of discretion and might have imposed a less severe sentence. A number of other lower federal courts have rejected *Miller* protection claims from over-aged VICAR murder defendants. The Eighth Amendment also cabins sentencing authority in capital cases. It forbids imposing the death penalty upon juveniles; execution of [people with intellectual disabilities]; and forbids sentencing to death those convicted of felony-murder who neither killed, attempted to kill, nor intended to kill. In *United States v. Savage*, the Third Circuit upheld a sentence of death for a drug dealer convicted of RICO conspiracy, twelve counts of murder in aid of racketeering, conspiracy to commit murder in aid of racketeering, witness retaliation, and fire bombing. *Savage*, who ordered the firebombing that killed his intended victim and five other occupants of the house, argued unsuccessfully that the *Enmund* felony-murder limitation should be extended to accomplices who incur liability by operation of the transferred intent doctrine.”) (internal citations omitted).

⁴ Throughout this Article, I capitalize the “B” in “Black” and “Brown” in recognition of the fact that the terms encompass the several ethnic groups that collectively experience discrimination and violence across ethnicities when perceived as a single Black or Brown “race.” In particular, white people stripped myriad Black people of their ethnicities

adolescents⁵ in low-income communities.⁶ Law enforcement officers use

through enslavement, so the term “Black,” can also provide a sense of identity and community to people who choose that identifier. Several Black journalists and diversity guides observe a general preference for capitalization of the term “Black,” and other racial and ethnic categories are often capitalized (e.g., Asian (race) and Peruvian (ethnicity)). Outside of what I have written in this Article, if someone whom I might call “Black” or “Brown” for the present purpose expresses their preference for another term (e.g., Senegalese, or Jamaican), I honor that request; however, I have chosen to use “Black” and “Brown” in this Article to hopefully avoid causing harm. As a white person, my decision not to capitalize “Black,” and even “Brown,” could, arguably, be an orthographic violation. With that said, Black and Brown people do not operate as a monolith; they differ on this subject among themselves. I also acknowledge that the terms “Black” and “Brown” can obscure the vast heterogeneity within and across these “identity categories.” I would likely perpetuate the most harm by using terms like “non-white,” and I do not know how each of the individuals who collectively comprise the young men targeted as alleged gang members would wish to be described. I do not capitalize “white” in this Article because that term has a different history: capitalizing “white,” especially as a white person myself, risks perceived alignment with, or at least validation of, white supremacists. Any error, ignorance, or misrepresentation in this Article is entirely my own, and I appreciate readers’ grace in reading my work.

⁵ Throughout this Article, I will use the term “young Black and Brown men” to refer to the young Black and Brown men and adolescents who are disproportionately targeted and harmed in federal criminal RICO prosecutions of the nature I describe. I will also occasionally say “young men of color” or “young people” to refer to this group, but I try to be as specific as possible throughout. Young women also identify as “gang members” and are sometimes targeted as such; the number of incarcerated women has also increased in recent years. See, e.g., ZHEN ZENG, U.S. DEP’T OF JUSTICE, JAIL INMATES IN 2018 (2018), <https://bjs.ojp.gov/content/pub/pdf/ji18.pdf>; WENDY SAWYER, PRISON POLICY INITIATIVE, THE GENDER DIVIDE: TRACKING WOMEN’S STATE PRISON GROWTH (2018), https://www.prisonpolicy.org/reports/women_overtime.html; ALEKS KAJSTURA, PRISON POLICY INITIATIVE, WOMEN’S MASS INCARCERATION: THE WHOLE PIE 2019 (2019), <https://www.prisonpolicy.org/reports/pie2019women.html>; Nazish Dholakia, *Women’s Incarceration Rates Are Skyrocketing. These Advocates Are Trying to Change That*, VERA INST. JUST. (2021), <https://www.vera.org/blog/womens-voices/womens-incarceration-rates-are-skyrocketing>. Still, the number of incarcerated women remains much smaller than the number of incarcerated men, and young men have been central to the gang studies field. Accordingly, I have decided to focus entirely on young men in this paper, but the effects of gang policing and prosecution on young women warrant further research.

⁶ Alice Speri, *The Largest Gang Raid in NYC History Swept Up Dozens of Young People Who Weren’t in Gangs: The Prosecution of the Bronx 120 Raises Serious Questions About Due Process and the Abuse of Federal Conspiracy Charges*, INTERCEPT (Apr. 25, 2019), <https://theintercept.com/2019/04/25/bronx-120-report-mass-gang-prosecution-rico/> (“Police and prosecutors spent years building a case against the Bronx 120. When the conspiracy allegedly started, in 2007, the average age of those who would eventually be swept up in it was 14. The youngest were 9. By the time the raid happened, most of those involved in crimes had already been caught by the system — and most others had moved on with their lives, if not out of the neighborhood, and had jobs and

notoriously inaccurate gang databases to target RICO investigations, arrests, and prosecutions. Young people of color are overrepresented in gang databases, and their overrepresentation is a major factor driving their overrepresentation in gang raids and RICO prosecutions. Given the influence of flawed gang databases on the impact of the RICO Act, we must question the legitimacy the RICO Act as applied to alleged street gangs. If gang databases are flawed and may also be infused with bias, then it is appropriate to question whether the raids and prosecutions that are based on those databases are also flawed and infused with bias.

The inaccurate and biased dragnet created by RICO street gang prosecutions sweeps up many young people who are not involved in the targeted organizations at all and certainly are not contributing members of complex criminal conspiracies. Courts that interpret RICO and VICAR broadly in these cases create a low bar for prosecutors and a nearly insurmountable one for defendants.⁷ Consequently, young Black and Brown men who were inappropriately charged in the first place decide to plead guilty to avoid the draconian sentences imposed by the RICO Act.

Once an individual is charged under RICO, escaping the statute's grasp is nearly impossible. RICO and VICAR convictions lead to severe sentences by design, including possible sentence enhancements for the activities of other people with whom a defendant was merely associated (or alleged to have been associated).⁸ Separate and apart from whether

families.”). While some cases, such as the Bronx 120 cases (formally entitled *United States v. Burrell*, S2 15-CR-95 (S.D.N.Y. 2016) and *United States v. Parrish*, S1 16-CR-212 (S.D.N.Y. 2016)) to which I frequently refer as an example, involve additional charges (e.g., conspiracy to distribute narcotics; charge of possession or use of a firearm), I will focus on RICO and VICAR for the purposes of this paper. Both RICO and VICAR are common prosecutorial tools in mass “gang” indictments that target young Black and Brown people in low-income communities. While outside the scope of this paper, it is worth noting the following from HOWELL & BUSTAMANTE, *supra* note 3, at 19:

The 35 [Bronx 120 defendants] accused of selling marijuana (typically a misdemeanor at state law) were all required to plead to federal felonies. Conspiracy and federal sentencing law[s allow] aggregation of the amount of marijuana that all the defendants sold during the span of the conspiracy (120 defendants over nine years). As a result, most individual defendants had to plead to participating in a conspiracy to sell more than 50 kilos of marijuana.

⁷ For federal prosecutors, some RICO cases involve VICAR charges while others do not; the result either way is a colossal advantage for prosecutors over defendants.

⁸ Prosecutors can charge conspiracy in these kinds of cases with relative ease—they only need to show the existence of an agreement and intent to commit some target crime. This means that a small group of friends could say that they will steal from a local store, but if one of them looks up the hours or address of the store (an overt act towards the target offense), prosecutors can conceivably prove a conspiracy charge against the entire group. However, children are rarely assumed to have the maturity to enter into binding

they are deemed unlawful, the practical consequences are likely not what Congress intended. In theory, the criminal statutes Congress passes presume that the courts will apply them fairly over time—that innocent people can have faith in the system and will exercise their right to an adversarial trial, complete with safeguards protecting their due process rights. Instead, as I will discuss in greater detail, most RICO “street gang” prosecutions circumvent the courts: in many cases, people who are innocent, or at least did not participate in a complex criminal organization, plead guilty to avoid harsh RICO-sanctioned sentences—a decision that can still result in a felony record, incarceration, and other forms of punishment. Since much of the plea-bargaining process occurs outside of public scrutiny, Congress might not even know how prosecutors currently use the statute or the extent to which defendants are opting into plea deals. Thus, the consequences of inappropriately overextending this robust prosecutorial tool⁹ are vast and especially evident among young Black and

agreements—especially of the magnitude that warrant lengthy prison sentences—and it is not clear that becoming part of a so-called “crew” requires an agreement and specific intent to commit target crimes. See Speri, *supra* note 6 (explaining that, in the 2016 “Bronx 120” gang raid, 35 people were ultimately convicted of federal conspiracy charges based on selling marijuana, which is only a misdemeanor in New York State. Unfortunately, the aggregate drug sales amounted to over 50 kilograms of marijuana (whether or not any of this was even common knowledge) across all defendants in the raid, throughout the duration of the alleged conspiracy; multiple defendants were charged with the aggregate amount, rather than the much smaller quantities each might have sold.); see also HOWELL & BUSTAMANTE, *supra* note 3, at 7 (“In federal and state ‘mass takedown’ indictments, defendants generally face conspiracy charges, whether ordinary or RICO conspiracy. . . . As a substantive matter, proof of conspiracy does not require proof that a person committed a particular target crime, was present at the time of the crime, or even knew of the crime. Instead, to prove conspiracy, the prosecution need only prove the existence of an agreement to commit a target crime, and that some party to the agreement committed an overt act in furtherance of the agreement. The agreement need not be explicit, but [it] can be inferred from conduct or circumstantial evidence. Thus, although in theory the prosecution must prove beyond a reasonable doubt an agreement to commit a crime, they need not prove that crimes were ever discussed, planned, or specifically agreed to, instead, they can point to commission of crimes as proof of agreement. . . . In a typical case, proof of the crimes of other individuals would be excluded as irrelevant. In contrast, if a defendant is accused of a conspiracy robbery, evidence of every robbery any member of the group [or alleged group] has ever committed . . . can be admitted at trial to support the inference that joining or associating with the group shows the agreement to agree to commit robbery.”) (internal citations omitted).

⁹ City University of New York (CUNY) School of Law Professor and Interim Senior Associate Academic Dean Fareed Nassor Hayat has used the term “weapons” instead of “tools” in his gang policing and prosecution scholarship. Much of my analysis in this Article supports his rationale for implementing the term “weapons,” and I have included

Brown men from low-income communities.

Prior legal scholarship has addressed racial profiling, gang databases, gang statutes, and the RICO Act, but it rarely addresses the convergence of these issues. One recent article by Keegan Stephan (a journalist, community organizer, 2019 graduate of the Cardozo School of Law, and current judicial law clerk at the Eastern District of New York)¹⁰ engages with upstream practices that influence the outcomes I emphasize in this Article by analyzing how the vagueness doctrine as proposed in *City of Chicago v. Morales*,¹¹ and later applied in *Floyd v. City of New York*,¹² might provide an opportunity to challenge the constitutionality of discriminatory gang databases on the same basis as the successful 2013 challenge to former stop-and-frisk policies in New York City. Certainly, a similar approach could apply in the RICO context as described in this Article, but further analysis of that possibility is beyond the scope of this paper. Importantly, the gang policing and prosecution research by Babe Howell (professor at City University New York (CUNY) School of Law) and Priscilla Bustamante (adjunct lecturer at Baruch College and Ph.D. candidate at CUNY), especially with respect to the Bronx 120 gang raid, as well as legal scholarship by Fareed Nasser Hayat¹³ (Interim Senior

his explanation here. See Fareed Nasser Hayat, *Killing Due Process: Double Jeopardy, White Supremacy and Gang Prosecutions*, 69 UCLA L. REV. DISC. 18, 20 n.1 (2021), available at <https://www.uclalawreview.org/killing-due-process-double-jeopardy-white-supremacy-and-gang-prosecutions/> (“This Article uses the word weapons rather than tools because the prosecutorial state designs and weaponizes laws against Black and Brown people in furtherance of mass incarceration.”).

¹⁰ Keegan Stephan, *Conspiracy: Contemporary Gang Policing and Prosecutions*, 40 CARDOZO L. REV. 991 (2019), <http://cardozolawreview.com/conspiracy-contemporary-gang-policing-and-prosecutions>.

¹¹ *City of Chicago v. Morales*, 527 U.S. 41, 97 (1999).

¹² *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (appeal dismissed by Second Circuit pursuant to joint stipulation by the parties).

¹³ I do not detail the work and relevance of abolitionist efforts to dismantle harmful and historically racist institutions (especially police and the prison industrial complex) in this Article, but this Article should not be construed to undermine their important work. The abolition movement is relevant to the issues I discuss here, and that connection warrants further attention. This Article is intended to offer insight into the current problem of racial bias in federal criminal RICO and VICAR gang prosecution and to inspire action that will halt its resulting harms, detailed herein, to low-income communities of color. Still, what I propose in this Article is not itself enough—at best, I offer some steps on the route to an end that abolitionists have long envisioned. For more on gang policing and prosecution through an abolitionist lens, see Fareed Nasser Hayat, *Abolish Gang Statutes with the Power of the 13th Amendment: Reparation for the People*, WASH. & LEE L. REV. (forthcoming), abstract available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3981955 (“[T]his paper calls upon

Associate Dean for Academic Affairs and Associate Professor at CUNY School of Law) were instrumental as I crafted my arguments.¹⁴

As noted, this Article discusses the unaddressed convergence of racial profiling, gang policing and prosecution practices, and the RICO Act; it does so by demonstrating that application of the statute to young Black and Brown men in alleged neighborhood gangs is inappropriate, ineffective, and has a disproportionately harmful impact on these young men and on low-income communities of color generally. Only one piece of legal scholarship, by Professor Jordan Blair Woods,¹⁵ raises the central problem described in this Article; however, that article was published ten years ago and emphasizes somewhat different aspects of the problem. This Article will introduce generative updated information and expanded analysis necessary to reengage with the important issue of RICO as inappropriate, ineffective, and harmful in its application to young Black and Brown men from low-income communities.

This Article challenges the application of the federal RICO and VICAR statutes to alleged neighborhood “gangs” (hereinafter interchangeably called “criminal street gangs”¹⁶) in low-income

the United States Supreme Court to . . . target anti-gang statutes as but one incident of slavery that must be toppled. . . . [It] offers a proposal for the reallocation of funds towards anti-racist structural change and a centering of community justice based in the power of the Thirteenth Amendment.”). I have also included a non-exhaustive list of abolitionist materials and texts for easy reference: Amna Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1784 n.6, 1817–37 (2020); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003); CRITICAL RESISTANCE, WHAT IS THE PIC? WHAT IS ABOLITION?, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> (last visited Dec. 26, 2021); MARK MORRIS, INSTEAD OF PRISONS: A HANDBOOK FOR ABOLITIONISTS, (PRISON RSCH. EDUC. ACTION PROJECT 1976); Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. TIMES MAG. (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>; *Intercepted: Ruth Wilson Gilmore Makes the Case For Abolition*, INTERCEPT (June 10, 2020), podcast and transcript available at <https://theintercept.com/2020/06/10/ruth-wilson-gilmore-makes-the-case-for-abolition/>; ALEX S. VITALE, THE END OF POLICING, (2018); MORGAN BASSICHIS, ALEXANDER LEE & DEAN SPADE, *Building an Abolitionist Trans and Queer Movement with Everything We’ve Got*, in CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX, (Eric A. Stanley & Nat Smith, eds., 2011); MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME: THE HARMFUL CONSEQUENCES OF POPULAR REFORMS (NEW PRESS 2020); MARIAME KABA & NAOMI MURAKAWA, WE DO THIS ‘TIL WE FREE US, (Tamara K. Nopper ed., HAYMARKET BOOKS 2021).

¹⁴ See, e.g., HOWELL & BUSTAMANTE, *supra* note 3, at 9–10.

¹⁵ Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 311 (2012).

¹⁶ I employ the statutory terms “gang” and “criminal street gang” to promote clarity in my analysis of the disparate harm caused by RICO and VICAR prosecutions, but these

communities: charging young Black and Brown men as “gang members” under RICO damages their lives, their loved ones, their communities, and their prospects for legitimate employment. The practice also recklessly exceeds the statute’s intended purpose.¹⁷ In this Article, I analyze these issues and propose reforms.

At the outset, it is important to note that the limited available data about RICO gang prosecutions makes it difficult to prove to a certainty the thesis that these prosecutions have a disproportionately negative impact on young Black and Brown men in low-income communities. The Department of Justice (“DOJ”) does not share information with the public about the alleged gangs it prosecutes under RICO, groups it chooses not to label as gangs, and groups it declines to prosecute as gangs under RICO.¹⁸ Consequently, criminologists rarely conduct empirical studies on RICO prosecutions. Only four such studies have been published, and just one of those four analyzes RICO within the racial bias and gang prosecution context.¹⁹ The one criminologist who has evaluated racial bias and gang prosecution under RICO was further limited in that he could

terms should not be read to suggest inherent criminality among neighborhood groups of young Black and Brown men and adolescents.

¹⁷ Speri, *supra* note 6 (“It may be illegal, but let’s leave it to New York State to prosecute the drug cases,” said [Melissa Geller, a lawyer who specializes in RICO cases and previously represented an alleged Bronx gang member]. “Do we really need to decimate this entire community to make a point? . . . All you’re doing is putting an entire generation of people in jail.”); *see also* HOWELL & BUSTAMANTE, *supra* note 3, at 10 (“RICO . . . was designed as a powerful tool to combat organized crime, particularly when such crime infiltrated the legitimate economy Congress armed federal prosecutors with the RICO Act . . . to root out wealthy, criminal enterprises that could hide criminality in legal enterprises or informal associations, retain the most sophisticated legal teams, and avoid prosecution using ill-gotten wealth In contrast to the well-resourced ‘criminal racketeering enterprise’ that was the target of RICO as initially conceived, the 120 defendants named in the April 2016 [Bronx 120] indictment are nearly all indigent.”).

¹⁸ *See* Woods, *supra* note 15, at 311.

¹⁹ *See id.* at 323 (explaining that, as of 2012, “three criminological studies on RICO’s application in criminal contexts [had] been published. None of these studies specifically examines RICO’s application to gang prosecutions.” Professor Woods’ study was the first criminological RICO study to focus on gang prosecutions and racial bias); *see, e.g.*, Martin G. Urbina & Sara Kreitzer, *The Practical Utility and Ramifications of RICO: Thirty-Two Years After Its Implementation*, 15 CRIM. J. POL. REV. 294, 294 (2004) (providing a general practitioner survey about the use and effects of RICO); John Dombrink & James W. Meeker, *Racketeering Prosecution: The Use and Abuse of RICO*, 16 RUTGERS L. J. 633, 642–44 (1985); Carlo Morselli & Lila Kazemian, *Scrutinizing Rico*, 12 CRITICAL CRIMINOLOGY 351, 359 (2004). The last two studies each evaluated over 75 federal appellate RICO cases to assess trends in applications of the RICO statute by courts.

not rely on past studies or cases available in legal databases, given the large number of RICO defendants who agree to plea bargains (presumably at least in part to avoid the likely draconian impact of not doing so in these cases).²⁰

I have included highly suggestive data about racial disparities in federal racketeering and extortion “offender” numbers reported to the United States Sentencing Commission (controlling for gender, age, and level of educational attainment) in Appendix A to this Article. That data, while compelling, could also be less than representative of the full story. DOJ data limitations create challenges to proving racial bias or racially disparate outcomes in federal criminal RICO “street gang” prosecutions. With that said, news articles²¹ covering mass street gang arrests in major

²⁰ See MARK MOTIVANS, FEDERAL JUSTICE STATISTICS (2019), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6506> (explaining, “Of the 76,639 defendants whose cases were terminated in U.S. district courts in 2016, 91% were convicted More than 9 in 10 defendants charged with immigration (98%), weapons (94%), drug (92%), property (92%), and violent (91%) offenses were convicted. In 2016, 89% of defendants were convicted following a guilty plea, and 2% of convicted defendants received a bench or jury trial.”); see also Woods, *supra* note 15, at 324 (citing, Donald Crump, *Criminals Don’t Pay: Using Tax Fraud to Prohibit Organized Crime*, 9 HOUS. BUS. & TAX. L. J. 386, 391 (2009) (“Because RICO charges are easy for the prosecution to prove, defendants will often choose a plea bargain.”)); Joan Wong, *Prisons are packed because prosecutors are coercing plea deals. And, yes, it’s totally legal.*, NBC NEWS (Aug. 8, 2019), <https://www.nbcnews.com/think/opinion/prisons-are-packed-because-prosecutors-are-coercing-plea-deals-yes-ncna1034201> (paraphrasing the Pew Research Center: “of the roughly 80,000 federal prosecutions initiated in 2018, just two percent went to trial. More than 97 percent of federal criminal convictions are obtained through plea bargains, and the states are not far behind at 94 percent.”); Alice Speri, *New York Gang Prosecutions Use Conspiracy Charges to Criminalize Whole Communities*, INTERCEPT (June 7, 2018), <https://theintercept.com/2018/06/07/rico-gang-prosecution-nyc/> (“Defendants in these kinds of cases, often from New York City’s poorest neighborhoods, can’t afford to hire attorneys. The conspiracy charges they face — in the Bronx case, under . . . RICO, a federal law passed in 1970 to combat the Mafia — are broad and hard to fight, because proving individuals ‘conspired’ with others accused of crimes is easier for prosecutors than proving they committed that crime Ninety-seven of the 103 individuals charged after the 2014 Manhattan raid — on state charges — entered guilty pleas. Of the 120 defendants charged following the Bronx raid, 110 have pleaded so far [on federal charges].”).

²¹ See generally Karen Savage & Daryl Khan, *Teens Remain Squarely in Crosshairs of NYC Law Enforcement, Panelists Say*, JUV. JUST. INFO. EXCH. (Feb. 13, 2017), <https://jjie.org/2017/02/13/teens-remain-squarely-in-crosshairs-of-nyc-law-enforcement-panelists-say/>; Clarissa Sosin, *A Civil Rights Movement Grows in Brooklyn*, YOUTH TODAY (Mar. 22, 2017), <https://youthtoday.org/2017/03/a-civil-rights-movement-grows-in-brooklyn/>; Max Rivlin-Nadler, *A Year After NYC’s Biggest “Gang Raids,” Families Say It’s Just Stop And Frisk By Another Name*, VILL. VOICE (Apr. 28, 2017), <https://www.villagevoice.com/2017/04/28/a-year-after-nycs-biggest-gang-raids->

U.S. cities over the past thirty years offer overwhelming evidence that young Black and Brown men from low-income communities are the primary suspects who are later convicted and harshly sentenced through federal RICO prosecutions.²²

I. THE RICO AND VICAR STATUTES: AN ABRIDGED HISTORY

The RICO statute was enacted by Congress in 1970 with the goal of protecting white Americans from organized crime by targeted ethnic groups.²³ Specifically, legislators enacted RICO in response to constituents' growing concerns about the threat of La Cosa Nostra (also known as the "Mafia"), a complex enterprise involving many people who were engaged in extensive, organized, criminal activities throughout the United States, that was infiltrating and threatening legitimate businesses. Whether the Italians who were targeted were considered "white" in that era remains controversial, and they did experience anti-immigrant discrimination and violence, especially before World War II; Anglo-Saxon Americans, who were more definitively considered "white" throughout the nineteenth and early twentieth centuries, did not share that experience of discrimination. Politicians cited members of immigrant ethnic groups as the perpetrators of organized crime. In the years leading up to the enactment of RICO, members of the Mafia were mostly of Italian descent;²⁴ therefore, Italian Americans became one of the original targeted ethnic groups in the early years of the RICO Act.²⁵

families-say-its-just-stop-and-frisk-by-another-name/; Speri, *supra* note 6.

²² See, e.g., *United States v. Parrish*, 755 F. App'x 59 (2d Cir. 2018).

²³ Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941-48 (codified as amended at 18 U.S.C. §§ 1961-68 (2006)).

²⁴ The term "Italian" here is meant to encompass descendants from within the modern geographical boundaries of Italy, including Sicily. Some scholars describe the Mafia as being comprised of *both* Italians and Sicilians. My referring to those involved in the Mafia as "Italian" is not meant to discount the historical tensions and discrimination Sicilians have endured for being considered non-Italian; see generally Woods, *supra* note 15.

²⁵ See, e.g., THE PRESIDENT'S COMM'N ON LAW ENF'T AND ADMIN. OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 6-10 (1967) (President Lyndon B. Johnson established the President's Commission on Law Enforcement and Administration of Justice shortly before the enactment of the RICO Act. That commission proclaimed a direct connection between Americans of Italian descent and organized crime: "Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively men of Italian descent, they are in frequent communication with each other, and their smooth functioning is insured by a national body of overseers . . ."); see also Frank D'Angelo,

In the 1980s, as the “War on Drugs”²⁶ became a recognized phenomenon, the Supreme Court issued its *United States v. Turkette* opinion, in which it attempted to crystalize the definition of a RICO enterprise; unfortunately, the Court settled on a very broad interpretation that led to the inconsistency among federal courts that I describe in more detail later in this Article.²⁷ Still, the broad “enterprise” definition, which largely stemmed from concerns about organized crime threatening legitimate businesses, coalesced with the similarly ambiguous “criminal street gang” definition in federal gang statute 18 U.S.C. § 521(a) (2002) to provide prosecutors tremendous support in targeting the predominantly low-income Black and Brown people perceived to be the “threat” at the heart of the crack boom. Further, RICO provided the foundation for state gang statutes, the application of which has been reflective of the racist myth that young Black and Brown men from low-income communities

Turf Wars: Street Gangs and the Outer Limits of RICO’s “Affecting Commerce” Requirement, 76 FORDHAM L. REV. 2075, 2080–81 (2008) (outlining the legislative history of the RICO Act in greater detail, including a discussion of the Kefauver and McClellan Committees, a 1965 congressional address by President Lyndon B. Johnson discussing organized crime, President Johnson’s “Katzenbach Commission,” and the collaboration between Senators John L. McClellan (D-AR) and Roman Hruska (R-NE) that led to Senate Bill 30, which was the precursor to what ultimately became the RICO Act); *see generally* Woods, *supra* note 15, at 310–11 (“RICO’s legislative history suggests that racial stereotyping was a key factor motivating RICO’s enactment Some scholars may explain RICO’s enactment in terms of the broad expansion of federal criminal laws during the second half of the twentieth century. But the included historical analysis makes it difficult to deny the connection between RICO, racial subordination, and the protection of mainstream white America. The urgent need for a federal statute to protect American society from criminal groups like the Mafia (Italian and Sicilian ‘outsiders’) has transformed into an urgent need for a federal statute to protect American society from [‘]criminal groups[‘] like the Bloods, Crips, and MS-13 (Black and Latino ‘outsiders’)” (internal citations omitted); *id.* at 311 n.38 (citing MARCELLA BENCIVENNI, ITALIAN IMMIGRANT RADICAL CULTURE: THE IDEALISM OF THE SOVVERSIVI IN THE UNITED STATES, 1890-1940, 8 (2011)) (“To Anglo-Saxon Americans, the looks, habits, and cultural traditions of the new immigrants appeared backward, primitive, and ultimately inferior. Italians were seen as not only of a lower stock, but also frequently not as ‘white.’”) (also citing DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE. THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS (2006)).

²⁶ This phrase is in quotes because it was a misnomer that played a significant role in America’s incarceration crisis. *See* Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 12 (2011) (“The War on Drugs and the ‘get tough’ movement explain the explosion in incarceration in the United States and the emergence of a vast new racial undercaste. In fact, drug convictions alone accounted for about two-thirds of the increase in the federal system and more than half of the increase in the state prison population between 1985 and 2000.”).

²⁷ *United States v. Turkette*, 452 U.S. 576, 583 (1981).

are violent, dangerous, and “gang-affiliated.”²⁸

Elected officials were incentivized by the “War on Drugs” to shift some of the attention they were dedicating to white-collar and Mafia forms of organized crime to drug trafficking and violence in low-income urban neighborhoods.²⁹ Today, use of the RICO statute has expanded to encompass “street gangs” such as the Bloods, Crips, MS-13, and small neighborhood “crews,” which are predominantly Black and Latino/x.³⁰ Thus, the historic subordinating and racially stereotyping effects of the RICO Act have shifted to Black and Latino/x alleged “criminal street gangs,” very loosely defined. Congress passed the RICO Act to enable prosecutors to target sophisticated networks colluding in illegal activities; the statute was not designed for the amorphous, often informal, neighborhood groups to which it is now being applied.

Prosecutors have numerous advantages when they bring RICO charges against alleged street gangs. Fundamental among those prosecutorial advantages is the centrality of enterprise theory³¹ to RICO prosecutions—this renders evidence of the conduct of *everyone in an entire group admissible against everyone in the group*, beyond evidence of any individual defendant’s acts.³² RICO sentences are extremely

²⁸ See Hayat, *Killing Due Process*, *supra* note 9, at 21–24 n.7–8, 22 (first quoting Frances Lee Ansley, *Stirring the Ashes: Race, Class, and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989); then quoting ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 17 (2020); and then citing Fareed Nasser Hayat, *Preserving Due Process: Applying Monell Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 138 (2019)); Woods, *supra* note 15, at 304 (citing NATALIE Y. MOORE AND LANCE WILLIAMS, *THE ALMIGHTY BLACK P STONE NATION: THE RISE, FALL, AND RESURGENCE OF AN AMERICAN GANG* 169 (Chi. Rev. Press, 2001)); MICHELLE ALEXANDER, *THE NEW JIM CROW* 162–65, 190, 199–200 (2011).

²⁹ See Speri, *supra* note 6.

³⁰ Woods, *supra* note 15, at 311.

³¹ See *id.* at 305 (“From a prosecutor’s perspective, RICO’s focus on the criminal activity of group enterprises, as opposed to the criminal activity of individuals, provides major advantages over other criminal laws to combat gangs. RICO’s reliance upon enterprise theory enables prosecutors to introduce all aspects of a gang’s history and criminal conduct into evidence. The scope of admissible evidence is thus not limited to the conduct of specific defendants.”) (internal citations omitted).

³² See MICHAEL C. CERNOVICH, *GANGS*, *ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES*, 1334–35 (Paul Finkelman, ed., vol. 1 2006); Speri, *supra* note 6 (“In practice, that means that if someone is claimed to be a member of a gang and is found guilty of selling marijuana as part of the gang’s activities, then that person is also liable for any other crimes committed by the gang as a whole. ‘If a defendant is accused of a conspiracy to commit robbery, evidence of every robbery any member of the group has ever committed, as well as knowledge that the group committed other crimes, can be admitted at trial,’ the [2018 report by INTERCEPT] notes. ‘Showing that a defendant was nowhere near the scene

lengthy, and they are easily enhanced based on a defendant's level of cooperation with grand juries and the prosecution, or the nature of conduct attributed to the defendant (e.g., violent acts can invite a VICAR charge in addition to a RICO charge). Violent Crimes in Aid of Racketeering Activity was one of the offenses Congress added when it passed the Comprehensive Crime Control Act of 1984.³³ VICAR was originally codified in 18 U.S.C. § 1952B, and it was updated to its current version in 1988.³⁴ This provision serves as a corollary to RICO, and VICAR charges can be added to RICO charges against alleged gang members to compound the effect of both statutes for violent offenses committed with any connection to a purported RICO enterprise.³⁵

II. ELEMENTS OF FEDERAL RICO CLAIMS

The RICO Act prohibits a variety of acts when their commission relates to a pattern of racketeering activity.³⁶ This statute has been used to prosecute cases in the areas of government corruption and white-collar crime, among others, in addition to street gangs.³⁷ Pursuant to 18 U.S.C. § 1962, RICO claims require that the government establish three elements about the defendant: (1) formal or informal ties with an “enterprise”; (2)

of the actual robbery would be no defense The single defendant is faced with the prospect of defending against allegations relating to all the crimes committed by the defendant himself as well as dozens of co-conspirators over a span of years,’ the [2018 report by INTERCEPT] continues.”).

³³ See U.S. DEP’T OF JUST., *VIOLENT CRIMES IN AID OF RACKETEERING* 18 U.S.C. § 1959: A MANUAL FOR FEDERAL PROSECUTORS, 1 n.1 (2006), <https://www.justice.gov/sites/default/files/usam/legacy/2014/10/17/vcar.pdf>.

³⁴ See *id.*; see also *Stantini v. United States*, 268 F. Supp. 2d 168, 180 (E.D.N.Y. 2003); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690 § 7053(b), 102 Stat. 4402 (1988) (clarifying, “[a]fter noting that the statutes the defendants were convicted of violating were re-numbered from 18 U.S.C. §§ 1952B(a)(5) and (a)(1) to 18 U.S.C. §§ 1959(a)(5) and (a)(1) without substantive change, he states the following His view of § 1959 suggests that it is aimed at a conspiracy only and not at a substantive offense. He is wrong.”).

³⁵ See *infra* Part IV for further explanation of the advantages that RICO and VICAR afford federal prosecutors.

³⁶ See, e.g., 18 U.S.C. § 1962(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, 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.”).

³⁷ See *id.* (“It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”); see generally *United States v. DeLeon*, No. CR 15-4268, 2020 WL 353856 (D.N.M. Jan. 21, 2020).

engagement in a pattern of racketeering activity; (3) engagement in enterprise activities that affect interstate or foreign commerce.³⁸ Prosecutors are subject to limited accountability³⁹ and can assert extremely broad statutory interpretations when attempting to demonstrate that each of these three elements has been satisfied.

The government must establish at least two predicate acts in order to establish a pattern of racketeering activity, “the last of which [must have] occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity.”⁴⁰ Racketeering activities include state-law felonies⁴¹ and violations of federal law.⁴² 18 U.S.C. § 1961(1) enumerates extensive predicate acts (both state and federal) that satisfy this requirement.⁴³ Here, too, prosecutors can assert that, even if a defendant was otherwise acquitted, a mere allegation can sometimes qualify as a “predicate act” for the purpose of establishing a pattern of racketeering activity for a RICO charge.⁴⁴

³⁸ 18 U.S.C. § 1962(c).

³⁹ See Woods, *supra* note 15, at 340–43 (discussing “how easy it is for the government to construct groups of racial minorities who are involved in criminality as criminal street gangs for RICO purposes One interpretation . . . is that the term ‘gang’ has taken on a racialized meaning, independent of its formal definition under the law, which increases the likelihood that crimes committed by small groups of racial minorities will be labeled as gang-related crimes [T]he Esmond Street Crew, the Pitch Dark Family, and the Chain Gang/Wolf Pack cases show that law enforcement and prosecutors are sometimes the primary players in this labeling process, and that racial stereotypes enable these players to use race as a proxy in order to construct crime, perhaps erroneously, as gang-related. The low burden of proof that the government must meet to establish a RICO criminal enterprise facilitates these racially biased constructions of group criminality. The incredible difficulty of raising a successful selective prosecution claim under the U.S. Constitution makes it even more difficult to challenge these racially biased constructions of gang crime.”).

⁴⁰ 18 U.S.C. § 1961(5).

⁴¹ 18 U.S.C. § 1961(1)(A) (State-law felonies).

⁴² 18 U.S.C. § 1961(1)(B)–(G) (Violations of federal law).

⁴³ See 18 U.S.C. § 1961(5) (“[A]t 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”); 18 U.S.C. § 1961(1)(A) (“[A]ny [state or federal] act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance . . . any act which is indictable under [§ 1961(1)(B)–(G)].”).

⁴⁴ See CONG. RSCH. SERV., *supra* note 1, at 1 n.5–6 (“The statute describes these underlying offenses as “racketeering activities.”). 18 U.S.C. § 1961(1) (defining “racketeering activity” to mean “any act or threat involving” specified state offenses, any “act which is indictable under” specified federal statutes, and certain federal “offenses”). They are often referred to as “predicate offenses.” *RJR Nabisco, Inc. v. Eur. Cmty.*, 579

18 U.S.C. § 1962 (2006) requires that the pattern of predicate racketeering activity affect interstate or foreign commerce in some way. During the first few years after RICO was enacted, courts wrestled with whether interstate or foreign commerce needed to be affected by the enterprise, on the one hand, or by the predicate racketeering acts, on the other.⁴⁵ Today, the majority of courts take a broad view that an enterprise's predicate acts need only have a *de minimis* (or trivial) effect on interstate or foreign commerce.⁴⁶

There is some controversy among the circuit courts over two questions the Commerce Clause (U.S. Const. Art. I, § 8, cl. 3) raises with respect to RICO: (1) whether it is constitutional to prosecute predominantly non-economic⁴⁷ organizations under RICO; and (2) whether the government must prove that the non-economic organization's racketeering activities have a sizable impact on interstate commerce. The Sixth Circuit has held that RICO can only be constitutionally applied to

U.S. 325, 329–30 (2016) (“RICO is founded on the concept of racketeering activity. The statute defines racketeering activity to encompass dozens of state and federal offenses known in RICO parlance as predicates.”); *Eller v. EquiTrust Life Ins. Co.*, 778 F.3d 1089, 1092 (9th Cir. 2015) (“A RICO claim requires a racketeering activity (known as predicate acts).”); Sean M. Douglass & Tyler Layne, *Racketeer Influenced Corrupt Organizations*, 48 AM. CRIM. L. REV. 1075, 1080–81 (2011), at 9 (listing the state and federal crimes that qualify as RICO predicate offenses); *see also* D’Angelo, *supra* note 25, at 2083 (citing 18 U.S.C. § 1962(b)–(c), 1962(d), 1963(a) (2000)); James B. Jacobs & Lauryn P. Gouldin, *Cosa Nostra: The Final Chapter*, 25 CRIME & JUST. 129 (1999) (“A defendant charged with violating RICO may be sentenced for each of his predicate acts, meaning the substantive crimes that were committed to acquire or maintain interest in the enterprise or conduct the affairs of the enterprise. But, in addition, a defendant faces a twenty-year maximum sentence for a RICO violation and up to twenty additional years if the government can prove there was a conspiracy under RICO.”) (internal citation omitted).

⁴⁵ *See, e.g.*, *United States v. Nerone*, 563 F.2d 836, 853–54 (7th Cir. 1977) (favoring the enterprise-commerce nexus approach).

⁴⁶ *See United States v. DeLeon*, No. CR 15-4268, 2020 WL 353856, at *97 (D.N.M. Jan. 21, 2020) (“Courts of Appeals repeatedly have held that ‘*Lopez* did not alter the principle that where the type of activity at issue has been found by Congress to have a substantial connection with interstate commerce, the government need only prove that the individual subject transaction has a *de minimis* effect on interstate commerce.’”) (quoting *United States v. Miller*, 116 F.3d 641, 674 (2d Cir. 1997). *United States v. Castleberry*, 116 F.3d 1384, 1386 (11th Cir. 1997).

⁴⁷ *Waucaush v. United States*, 380 F.3d 251 (6th Cir. 2004) (offering a discussion of the reach of the Commerce Clause, and whether Congress can regulate non-economic activity, such as violence, that has an aggregate effect on interstate commerce. The Sixth Circuit explains how restrictions on congressional authority to regulate non-economic activity under the Commerce Clause have evolved as a result of three main cases: *United States v. Alfonso D. Lopez, Jr.*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); and *Jones v. United States*, 529 U.S. 848 (2000)).

non-economic organizations engaged in activities that *substantially* affect interstate commerce—violence alone is not enough to qualify a non-economic organization for prosecution under RICO.⁴⁸ Conversely, the First Circuit has emphasized the *de minimis* standard, holding that non-economic organizations qualify for RICO prosecutions as long as their actions have *any* impact on interstate commerce.⁴⁹

VICAR adopts the RICO definition of racketeering⁵⁰ and requires a defendant to have committed, or attempted to commit, an underlying state-law offense, (e.g., murder; kidnapping; various forms of assault).⁵¹ The requisite underlying offense translates into a federal VICAR violation when committed either as (1) consideration for receiving or compelling a promise of “anything of pecuniary value” in connection with the RICO enterprise; or (2) “for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity.”⁵² VICAR provides as follows:

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

⁴⁸ See *id.*; see, e.g., ORGANIZED CRIME & GANG SECTION, U.S. DEP’T OF JUST., CRIMINAL RICO 18 U.S.C. §§ 1961–1968: A MANUAL FOR PROSECUTORS 376–77 (6th ed., May 2016), <https://www.justice.gov/archives/usam/file/870856/download>.

⁴⁹ See *United States v. Nascimento*, 491 F.3d 25, 37–38 (1st Cir. 2007).

⁵⁰ See 18 U.S.C. § 1961(1); 18 U.S.C. § 1959(b)(1).

⁵¹ 18 U.S.C. § 1959(a).

⁵² *Id.*

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine . . . under this title, or both.

(b) As used in this section—

(1) “racketeering activity” has the meaning set forth in section 1961 of this title [18 USCS § 1961]; and

(2) “enterprise” includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.⁵³

The VICAR definition “includes any partnership, corporation, association, or other legal entity, and any union or group of individuals *associated in fact* although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.”⁵⁴ In order to prove “association-in-fact,” the government must establish that the enterprise has (1) a common purpose, (2) associates who are acquainted with one another, and (3) been established for long enough that members can pursue their common purpose.⁵⁵

III. YOUNG BLACK AND BROWN MEN FROM LOW-INCOME COMMUNITIES ARE OVERREPRESENTED IN FLAWED GANG DATABASES AND THE MISGUIDED RICO PROSECUTIONS THOSE GANG DATABASES ENABLE

Some researchers have theorized that the majority of neighborhood gangs are *per se* comprised of Black and Brown young people engaged in criminal activity,⁵⁶ but this is a flawed assumption:

⁵³ 18 U.S.C. § 1959.

⁵⁴ 18 U.S.C. § 1959(b)(2) (emphasis added).

⁵⁵ See *United States v. Kamahele*, 748 F.3d 984, 1003 (10th Cir. 2014); *Boyle v. United States*, 556 U.S. 938, 948 (2009); *United States v. DeLeon*, No. CR 15-4268, 2020 WL 353856, at *53 (D.N.M. Jan. 21, 2020).

⁵⁶ See, e.g., National Gang Center, *National Youth Gang Survey Analysis: Demographics*, U.S. DEP’T OF JUST., <https://nationalgangcenter.ojp.gov/survey-analysis/demographics> (last visited Oct. 19, 2021) (“The most recent figures provided by law enforcement are 46 percent Hispanic/Latino gang members, 35 percent African-American/black gang members, more than 11 percent white gang members, and 7 percent other race/ethnicity of gang members.”); Finn-Aage Esbensen & Dana Peterson Lynskey, “*Young Gang Members in a School Survey*,” *THE EUROGANG PARADOX*, ., 94 (Malcolm

“Audits, lawsuits, and studies have . . . revealed that many people are erroneously included in gang databases. Across the United States, communities have complained about the lack of notice given as to who is added to gang databases and why, the discretion afforded police in adding people, the police adding people erroneously, and the racial disparity of those indicted.”⁵⁷ Law enforcement agencies rely on inaccurate and biased racial stereotypes when they attempt to identify gang members, and this misplaced reliance heavily influences the accuracy and demographic makeup of gang databases and “gang-related” RICO defendants.⁵⁸ Antonio Reynoso (New York City Council Member for the 34th District, representing parts of Brooklyn), and Mr. Taylornn Murphy Sr. (a Harlem father-turned-activist whose daughter, Tayshana Murphy, was killed in 2011, and whose son, Taylornn Murphy Jr., was one of the 103 people arrested by the New York City Police Department (NYPD) and Federal Bureau of Investigation (FBI) during the 2014 “gang raid” in the Manhattanville projects) explained the impact of gang databases in a recent article for the *New York Daily News*:

Inclusion in the database can mean intensive surveillance, police harassment, overcharging, increased bail, risk of deportation and prejudicial treatment in court: a separate track of justice based on an allegation that doesn’t even have to be proven. Despite claims that the database isn’t being shared, the NYPD has coordinated “gang takedowns” with federal agencies.

This approach cannot be reformed. The NYPD has a long history of ignoring and subverting reforms. And there is no “better” database. The database—like stop-and-frisk before it—doesn’t

W. Klein ed., 2001) (citing G. David Curry et al., *Estimating the National Scope of Gang Crime From Law Enforcement Data*, NAT. INST. OF JUST.: BRIEF IN REVIEW (1996); G. David Curry et al., *Gang Crime and Law Enforcement Recordkeeping*, NAT. INST. OF JUST.: BRIEF IN REVIEW (1994); Cheryl L. Maxson & Malcolm W. Klein, *Street Gang Violence: Twice as Great or Half as Great?*, GANGS IN AMERICA: DIFFUSION, DIVERSITY, AND PUBLIC POLICY at 71–100 (C.R. Huff ed., 1990); Irving A. Spergel, *YOUTH GANGS: CONTINUITY AND CHANGE*, 12 CRIME AND JUST.: A REVIEW OF RESEARCH, at 171 (Michael Tonry ed., 1990) (“[S]ome gang researchers rely on law enforcement records to describe gang offenses and gang members (e.g., Curry, Ball, and Decker, 1996; Curry, Ball, and Fox, 1994; Maxson and Klein, 1990; Spergel, 1990)). This body of research echoes the general picture of gang members being disproportionately male and from ethnic/racial minorities, an image often reinforced by the popular press.”)

⁵⁷ Stephan, *supra* note 10, at 1017.

⁵⁸ See Finn-Aage Esbensen & L. Thomas Winfree, *Race and Gender Differences Between Gang and Nongang Youths: Results from a Multisite Survey*, 15, JUST. Q. 505, 510 (1998); see generally Woods, *supra* note 15.

make us safer; it has been fully operational amid rises in shootings and violence.⁵⁹

A. Gang Databases are Inaccurate

Gang databases in cities such as Boston, Chicago, the DC-Maryland-Virginia (DMV) region, Los Angeles, and New York have all been criticized for serious inaccuracies. Josmar Trujillo (a New York City writer and organizer) and Alex S. Vitale (an author and professor of sociology at Brooklyn College) illustrate the weak foundation on which law enforcement officers select people for inclusion in gang databases in their report entitled *Gang Takedowns in the De Blasio Era: The Dangers of 'Precision Policing'*:

The NYPD admits to categorizing local ‘crews’—smaller, more local and less formal groupings—alongside gangs within its database. Like gangs, ‘crews’ have no consensus definition. Therefore, the NYPD gang database [is] a database of people that police believe to be grouped together. There is no requirement of a criminal conviction, much less a violent conviction, to [be] added to the database.⁶⁰

Disconcerting revelations about gang database inaccuracies abound. For example, a 2016 state audit revealed that California’s state gang database (CalGang) contained “scant documentation for nearly one in five of the 100,000 database entries. Many people remained in the system long after they should have been purged . . . with no documented gang activity. [Also,] CalGang inexplicably contained reports on several

⁵⁹ Antonio Reynoso & Taylorn Murphy Sr., *Delete the NYPD Gang Database*, N.Y. DAILY NEWS (Dec. 19, 2021), <https://www.nydailynews.com/opinion/ny-oped-erase-the-nypd-gang-database-20211219-fzg62kyfmzbunc673tgpwmdmv5m-story.html> (They provide further explanation and a brief description of their proposed legislation: “Interpersonal violence in Black, Brown and underserved communities is not simply a ‘gang’ problem but an economic, social and political one. Lack of resources and opportunities exacerbate conflicts and lead people to feel like they have few choices. The lack of safe spaces for young people and access to mentorship and guidance are few and far between. This is where the city should put its resources—not databases. Our bill to end the gang database closes a pipeline of needless criminalization and puts the focus on community-based violence reduction initiatives rather than failed police-centered strategies. While the city has added some anti-violence programs, they’re a drop in the bucket compared to what’s spent on policing.”).

⁶⁰ JOSMAR TRUJILLO & ALEX S. VITALE, BROOKLYN COLL. POLICING & SOC. JUST. PROJECT, *GANG TAKEDOWNS IN THE DE BLASIO ERA: THE DANGERS OF ‘PRECISION POLICING’* 6 (2019), <https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf>.

dozen purported gang members less than a year old.”⁶¹ As recently as 2017, the Chicago Police Department gang database included over 100 people who exceeded 75 years old; information about the same database in 2018 revealed that 13 “gang members” were approximately 118 years old and two were 132 years old.⁶²

People are labeled “gang associates” for having dated “gang members” or even having close relationships with people who formerly dated “gang members.”⁶³ Simply wearing local sports team paraphernalia while attending school has, in some cases, been sufficient for “gang member” designation:

Three reasons were given for Jorge’s arrest The first was that he dressed like a gangster. “MS-13 members currently wear Chicago Bulls or Brooklyn Nets hats,” the memo stated, citing, as its source, a resource officer at Brentwood High School. (Resource officers are members of the Suffolk County Police Department who are posted inside local schools.) Jorge was seen wearing a Brooklyn Nets hat that was, according [to] the document, “indicative of membership in a gang.” He’d also been seen “performing a gang handshake,” though the memo offers few details about what it looked like. And, lastly, he was observed in the company of two people on ICE’s radar—a “confirmed gang member,” whose name was redacted in the document, and [his girlfriend, who previously dated, but was later kidnapped and

⁶¹ For the full CalGang audit report, see CALIFORNIA STATE AUDITOR, THE CALGANG CRIMINAL INTELLIGENCE SYSTEM (2015), <http://www.voiceofsandiego.org/wp-content/uploads/2016/08/CalGangs-audit.pdf>; see also Alan Judd, *L.A.’s Gang-Tracking Database Offers Lessons to Others*, GOVERNMENT TECHNOLOGY (Mar. 9, 2020), <https://www.govtech.com/public-safety/las-gang-tracking-database-offers-lessons-to-others.html>; Stephan, *supra* note 10, at 1017.

⁶² See Mick Dumke, *Chicago’s Gang Database Is Full of Errors — And Records We Have Prove It*, PROPUBLICA (Apr. 19, 2018), <https://www.propublica.org/article/political-insider-chicago-gang-database> (“During January 1984, the Chicago Police Department labeled more than 700 people as suspected gang members following arrests for various crimes. One was in his early 30s and identified as a member of the Black P Stones. By last fall, nearly 34 years later, that individual was 77—and still in what police commonly refer to as the department’s ‘gang database.’ In fact, the 77-year-old was one of 163 people in their 70s or 80s in the database, which now includes information about 128,000 people and counting, according to records I obtained through a series of requests under the state Freedom of Information Act. It’s hard to fathom that there are so many elderly, active gang members in Chicago who need to be tracked by police. But those aren’t the only curious entries in the database. As of this March, it also included 13 people who are supposedly 118 years old—and two others listed as 132.”).

⁶³ Jonathan Blitzer, *How Gang Victims Are Labelled as Gang Suspects*, NEW YORKER (Jan 23, 2018).

assaulted by, someone who notoriously claimed MS-13 membership and was now serving time for killing someone].

ICE identifies someone as a gangster if he meets at least two criteria from a long list that includes “having gang tattoos,” “frequenting an area notorious for gangs,” and “wearing gang apparel.” Such nebulous indicators are a recipe for racial profiling, according to immigrant-rights advocates. “Any student at Brentwood High School would be at risk of arrest just for interacting with other students and wearing clothing representing local sports teams,” Jorge’s lawyer, Alexandra Lampert, an attorney at Brooklyn Defender Services, told me.⁶⁴

The U.S. Immigration and Customs Enforcement agency (ICE) has even reportedly added a child to its gang database for wearing a blue shirt that was actually just part of the child’s mandatory school uniform.⁶⁵

Adding to this problem, there are rarely any internal mechanisms to correct gang database inaccuracies (to the extent that is even possible in such a flawed system).⁶⁶ People do not know they have been added, or the criteria on which their inclusion in a database was founded, and most individuals in databases have no recourse or means of removing themselves. Even proposals to implement some sort of appeal process for people who wish to challenge their inclusion in a gang database are flawed because they require individuals to know that they are in a gang database and to have access to critical information as to why they were labeled “gang members.” Some cities claim to have taken steps to improve their gang labeling practices following scandalous revelations about their gang databases, but in most cases, little, including the lack of transparency,

⁶⁴ *Id.*

⁶⁵ LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RES. CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS (2018), <https://www.immigrationresearch.org/report/immigrant-legal-resource-center/deportation-any-means-necessary-how-immigration-officials-are>.

⁶⁶ See, e.g., Alex Nitkin, *Police Gang Database Is ‘Riddled With Errors’ And Has Ruined Lives, Aldermen Say — So Why Is CPD Still Using It?*, BLOCK CLUB CHICAGO (July 28, 2021), <https://blockclubchicago.org/2021/07/28/police-gang-database-is-riddled-with-errors-and-has-ruined-lives-aldermen-say-so-why-is-it-cpd-still-using-it/> (“Deputy Inspector General for Public Safety Deborah Witzburg elaborated on the 2-year-old report on Tuesday, telling aldermen that ‘there was no regular review or purge of outdated or faulty designations, and there were no internal mechanisms to amend inaccurate information.’ . . . ‘There are no existing protections around the use of the existing data that are in place today that are any different than what was in place in 2019,’ Witzburg said. ‘So the gang arrest card data, with its flaws in accuracy and reliability, has still been in use.’”).

seems to have changed.⁶⁷

Thus, acts as innocuous as lending a cell phone, wearing a shirt of a particular color while standing on a street corner, or posting a reference to an alleged gang on social media can implicate someone for “furtherance of a conspiracy.”⁶⁸ Moreover, the NYPD, for example, permits assertions

⁶⁷ CITY OF CHICAGO OFFICE OF INSPECTOR GENERAL, FOLLOW-UP INQUIRY ON THE CHICAGO POLICE DEPARTMENT’S “GANG DATABASE” (Mar. 2021), <https://igchicago.org/wp-content/uploads/2021/03/OIG-Follow-Up-Inquiry-on-the-Chicago-Police-Departments-Gang-Database.pdf>.

⁶⁸ Stephan, *supra* note 10, at 1021; *see generally* Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers into Instant Felons*, INTERCEPT (Dec. 5, 2018), <https://theintercept.com/2018/12/05/nypd-gang-database>; *see also* Jake Offenhartz, *The NYPD’s Expanding Gang Database is Latest Form of Stop & Frisk, Advocates Say*, GOTHAMIST (June 13, 2018, 3:00 PM), http://gothamist.com/2018/06/13/nypd_gang_database_nyc.php; JAMES C. HOWELL & ELIZABETH GRIFFITHS, *GANGS IN AMERICA’S COMMUNITIES* 35–36 (3rd. ed. 2019) (describing gang research findings that young people often had some interactions and relationships with other young people they identified as gang members, and they had often acted in ways that might erroneously suggest gang affiliation to law enforcement); Alice Speri, *New York Schools Gang Unit Pushes The Criminalization of Children*, INTERCEPT (Feb. 13, 2020), <https://theintercept.com/2020/02/13/new-york-city-schools-gang-law-enforcement> (“[I]n recent years the NYPD has massively expanded a secretive ‘gang database’ that lists tens of thousands of New Yorkers, mostly black and Latino men, even as gang-related incidents make up a fraction of crime in the city. Police can add individuals to the database based on a set of broad and arbitrary criteria that include the people they associate with and locations they frequent—criteria that critics say effectively punish entire communities. You don’t even have to commit any crimes to be added to the database, and there is no clear way for people to learn whether they are listed on it or why.”); Eileen Grench, *Department of Investigation Confirms Probe of NYPD Gang Database after Advocates Rally*, CITY (July 27, 2021), <https://www.thecity.nyc/2021/7/27/22597212/departments-of-investigation-probes-nypd-gang-database> (“‘By using invasive surveillance technologies to create networks of social affiliation, the so-called gang database criminalizes Black and [B]rown New Yorkers for what they wear, where they live, and how they express themselves,’ Aly Panjwani, of the nonprofit Surveillance Technology Oversight[.]”); TRUJILLO & VITALE, *supra* note 60, at 7 (listing factors that NYPD officers consider to “determine” gang membership for entry into its database). ALEXANDER, *supra* note 28, at 136–37 (discussing the racial disparities and profiling involved in the NYPD’s then-active stop-and-frisk program, and how those practices also created an on-ramp for young Black and Brown men into the criminal legal system, Michelle Alexander explained: “Ultimately . . . stop-and-frisk operations amount[ed] to much more than humiliating, demeaning rituals for young men of color, who must raise their arms and spread their legs, always careful not to make a sudden move or gesture that could provide an excuse for brutal—even lethal—force. Like the days when black men were expected to step off the sidewalk and cast their eyes downward when a white woman passed, young black men know the drill when they see police crossing the street toward them; it is a ritual of dominance and submission played out hundreds of thousands of times each year. But it is more than that. These routine

from select “independent sources” to qualify individuals for its gang database. One troubling example of an acceptable “independent source” is the New York City Department of Corrections (DOC): “The [DOC] has its own internal gang tracking system, the Gang Intelligence Unit (GIU). Because DOC oversees a confined population that often has to associate with gangs and others for safety, gang designations can be more overreaching—and follow individuals after they leave jail.”⁶⁹ Given that Black and Brown people are disproportionately likely to be criminalized as children,⁷⁰ held in pre-trial detention,⁷¹ wrongfully convicted,⁷² and incarcerated in general,⁷³ NYPD’s reliance on DOC data is inherently biased and problematic.

Social media also plays an important role in gang database determinations. Trujillo and Vitale emphasize the arbitrary ways in which

encounters often serve as the gateway into the criminal justice system. The NYPD made 50,300 marijuana arrests in 2010 alone, mostly of young men of color. As one report noted . . . [t]hese arrests . . . ‘are the most effective way for the NYPD to collect fingerprints, photographs and other information on young people not yet entered into the criminal databases.’ A simple arrest for marijuana possession can show up on a criminal database as ‘a drug arrest’ without specifying the substance or the charge, and without clarifying even whether the person was convicted. These databases are then used by police and prosecutors, as well as by employers and housing officials In Denver, displaying any two of a list of attributes—including slang, ‘clothing of a particular color,’ pagers, hairstyles, or jewelry” could qualify a young person for entry into the gang database in that city.”) (internal citations omitted).

⁶⁹ TRUJILLO & VITALE, *supra* note 60, at 8.

⁷⁰ See generally KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021); ALEXANDER, *supra* note 28, at 162–65, 190, 199–200.

⁷¹ See generally RAM SUBRAMANIAN, LÉON DIGARD, MELVIN WASHINGTON II & STEPHANIE SORAGE, VERA INST. OF JUST., *IN THE SHADOWS: A REVIEW OF THE RESEARCH ON PLEA BARGAINING* (Sept. 2020), <https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf>; WENDY SAWYER, PRISON POLICY INITIATIVE, *HOW RACE IMPACTS WHO IS DETAINED PRETRIAL* (Oct. 9, 2019), https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/.

⁷² See DANIELE SELBY, INNOCENCE PROJECT, *8 FACTS YOU SHOULD KNOW ABOUT RACIAL INJUSTICE IN THE CRIMINAL LEGAL SYSTEM* (Feb. 5, 2021), <https://innocenceproject.org/facts-racial-discrimination-justice-system-wrongful-conviction-black-history-month/>; SAMUEL R. GROSS ET AL., NAT’L REGISTRY OF EXONERATIONS, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* (Mar. 7, 2017), http://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf.

⁷³ Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, THE SENTENCING PROJECT (Oct. 13, 2021), <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>.

law enforcement officers infer gang membership from young people's social media accounts:

Police interpretation, or perhaps willful misinterpretation, of gang admission on social media can include emojis, hashtags, or other forms of communication. There is also the question of how police can authenticate who is posting or operating a social media account. Making matters worse, the use of social media posts as a way to authenticate gang membership significantly expands an already questionable process by turning the internet into a virtual police precinct.⁷⁴

Attorney Naz Ahmed (who works with the CUNY Creating Law Enforcement Accountability & Responsibility Project, which serves individuals who are either being surveilled by the FBI, or approached to help the FBI surveil Muslim communities) has expressed concern about what he views as an overlap of his work at CUNY on surveillance and racial profiling, and the practices that precipitated the Bronx 120 raid: “Gang raids and Muslim surveillance are no different. The NYPD was surveilling these kids when they were twelve. The FBI does the same thing to Muslim communities. It looks at their online activities and says, ‘Oh, you’re going to be a terrorist.’”⁷⁵ The arbitrariness and inaccuracy of gang member designation is further undermined by the overrepresentation of young people of color in gang databases—an indicator of racial bias in the system.

B. Young Black and Brown Men are Overrepresented in Gang Databases

Systemic racism in the United States socializes Americans, especially white and privileged Americans, to associate crime and gang activity primarily with young Black and Brown men.⁷⁶ Law enforcement gang labeling practices are illustrative of this systemic racial bias. As scholar Babe Howell explains, the gang database information she received in 2018 showed starker racial disparities than the already-striking disparities she identified in 2014:⁷⁷

⁷⁴ TRUJILLO & VITALE, *supra* note 60, at 7.

⁷⁵ Rivlin-Nadler, *supra* note 21 (quoting Naz Ahmed).

⁷⁶ See END CRIMINALIZATION OF YOUTH POLICY BRIEF, THE MOVEMENT FOR BLACK LIVES (May 2020), <https://m4bl.org/wp-content/uploads/2020/05/End-Criminalization-of-Youth-Policy-Brief.pdf>; see generally HENNING, *supra* note 70.

⁷⁷ See also TRUJILLO & VITALE, *supra* note 60, at 6 (“New figures from March of 2018 acquired by Howell indicated that over 17,000 people were added to the database from December 2013 through February 2018, mostly under Mayor Bill de Blasio. The rate at which people [were added] into the database under de Blasio was 70% higher than that of the previous administration. Of those added, over 98% were identified as either Black

[L]aw enforcement itself determines whether a group is a gang and whom to tag as a gang member or associate.

....

[Using the NYPD as an example,] no one outside the NYPD reviews these [gang member] designations.

The NYPD Patrol Guide does not define a “gang member,” but the NYPD can certify individuals as gang members without any proof of criminality. The requirements for activation in the NYPD’s Enterprise Case Management System “Criminal Group” list provide three bases to certify a gang member.

....

None of these criteria require any criminal conduct. This, too, is typical of criteria for identifying gang members in other states and cities.

As with gang databases across the country, there is no notice provided by the NYPD to those certified as gang members and no opportunity to appeal or challenge this designation. Similarly, groups that are deemed gangs . . . based on peer groups . . . [or growing] up on a particular block[] are not notified . . . that these groups are being identified as gangs and targeted for surveillance. . . .

Fewer than 1% of the individuals in the NYPD’s Gang Database . . . [is] white. . . . [And] over 98% . . . is Black or Latinx, While the media portrays gang membership in racialized terms, gang researchers using self-reports by teenagers find that gang membership is rare among all groups. Additionally, whites make up a substantial portion (40%) of gang members in absolute numbers. Although the NYPD’s definition of a gang could include every marching band, fraternity, sorority, and youth group one could think of, and certainly should include organized crime and hate groups, the database apparently omits the Mafia, white supremacist groups, the Proud Boys, and other organized criminal groups.⁷⁸

or Hispanic—an even more racially disparate scenario than from the previous years.”).

⁷⁸ BABE HOWELL, *Gang Narratives and Race-Based Policing and Prosecution in New York City*, in *ROUTLEDGE INT’L HANDBOOK OF CRITICAL GANG STUD.* 177, 178–180 (David C. Brotherton, & Rafael Jose Gude eds., 2021) (citations omitted); see Nick Pinto, *NYPD Added Nearly 2,500 New People to Its Gang Database in the Last Year*, *INTERCEPT* (June 18, 2019), <https://theintercept.com/2019/06/28/nypd-gang-database-additions/> (citing Rosa Goldensohn (@RosaGoldensohn), *TWITTER* (Oct. 15, 2018, 8:18 PM), <https://twitter.com/RosaGoldensohn/status/1052036066277056513>) (According to reporter Rosa Goldensohn, an NYPD official stated that, even though the Proud Boys were active in New York, as of late 2018, members of the Proud Boys were not included in the database. Notably, the Proud Boys is a nationally-recognized group that publicly requires the commission of violent acts in furtherance of the group’s goals in order to join

Professor Andy Clarno (who teaches sociology at the University of Illinois at Chicago and studies the Chicago Police Department gang database) has articulated similar sentiments: “Gang databases transform racial stereotypes into so-called facts to circulate amongst these agencies, which creates a network of criminalizing surveillance that has had devastating impacts on Black and Brown people and communities in Chicago.”⁷⁹ Others have noted that, instead of identifying “gang members” in any accurate way that serves as meaningful law enforcement intelligence, gang databases are instead more often used by schools to inform expulsion decisions, agencies pressuring public housing authorities to more aggressively ban certain individuals from using their programs, and hundreds of local and federal agencies, such as the New York City Department of Investigations or ICE, with which police departments share their inaccurate data.⁸⁰

Such labels disproportionately target, and therefore have a

its highest ranks.); *see, e.g.*, Alyxandra Goodwin, *What You Need to Know About Chicago's 'Gang Database' and the Lawsuit From Local Activists*, BLACK YOUTH PROJECT (May 7, 2017), <http://blackyouthproject.com/chicago-gang-database-deportation>; Jillian Jorgensen, *Activists Urge Inspector General to Probe NYPD's Gang Policing Tactics*, N.Y. DAILY NEWS (May 16, 2017), <http://www.nydailynews.com/new-york/manhattan/activists-urge-inspector-general-probe-nypd-gang-databases-article-1.3171323>; Donna Ladd, *Only Black People Prosecuted Under Mississippi Gang Law Since 2010*, JACKSON FREE PRESS (Mar. 29, 2018), <http://www.jacksonfreepress.com/news/2018/mar/29/only-black-people-prosecuted-under-mississippi-gan>; Philip Marcelo, *Gang database made up mostly of young black, Latino men*, AP NEWS (July 30, 2019), <https://apnews.com/article/massachusetts-immigration-us-news-ap-top-news-ri-state-wire-dd5643e358c3456dbe14c16ade03711d>; Emmanuel Felton, *Gang Databases Are A Life Sentence for Black and Latino Communities*, PAC. STANDARD (Mar. 15, 2018), <https://psmag.com/social-justice/gang-databases-life-sentence-for-black-and-latino-communities>; Heather Cherone, *Chicago Still Using 'Deeply Flawed' Gang Databases: Watchdog*, WTTW News (Mar. 31, 2021), <https://news.wttw.com/2021/03/31/chicago-still-using-deeply-flawed-gang-databases-watchdog>; Eileen Grench, *NYPD Gang Database Targeted By City Council Member*, CITY (Sept. 15, 2021), <https://www.thecity.nyc/2021/9/15/22674782/nypd-gang-database-targeted-city-council>; *see generally* Joshua D. Wright, *The Constitutional Failure of Gang Databases*, 2 STAN. J. C.R. & C.L. 115 (2005).

⁷⁹ Nitkin, *supra* note 66.

⁸⁰ *See, e.g., id.*; Josmar Trujillo, *Probe NYPD Gang Tactics*, AM N.Y. (Sept. 17, 2018), <https://www.amny.com/opinion/probe-nypd-gang-tactics-1-21008637>; Maria Ines Zamudio, *Federal Immigration Agencies Used Chicago Gang Database Thousands Of Times*, NPR (Apr. 12, 2019), <https://www.npr.org/local/309/2019/04/12/712788497/federal-immigration-agencies-used-chicago-gang-database-thousands-of-times>; *see also*, ALEXANDER, *supra* note 28, at 136.

disproportionately negative impact on, low-income urban communities of color, especially young Black and Brown men in those communities; they embolden law enforcement officers to rely on racist stereotypes and profiling as they plan and execute mass arrests of young men of color on RICO charges.

C. Law Enforcement Officials Rely on Flawed Gang Databases for RICO Prosecutions

Gang database inclusion serves as a predicate for surveillance and incorporation into broad RICO conspiracy cases.⁸¹ Indeed, once someone is added to a gang database, they become subject to social media monitoring, as described earlier in this Part, and other forms of surveillance. Law enforcement can then add the social media contacts of that person (e.g., “friends” or “followers”) to the same database and commence construction of criminal cases using that information.⁸²

Journalist Max Rivlin-Nadler described the practical consequences of gang-database-informed social media surveillance by law enforcement in his 2017 article entitled *A Year After NYC’s Biggest “Gang Raids,” Families Say It’s Just Stop And Frisk By Another Name:*

[L]ooking at a New York County indictment filed as part of the 2014 raids in Harlem’s Manhattanville and General Ulysses S. Grant Houses, which resulted in the arrest of 103 men and was the

⁸¹ Stephan, *supra* note 10, at 1020 (citing Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J.L. & TECH. 315, 320–23 (2015); then citing Meredith Broussard, *When Cops Check Facebook*, ATLANTIC (Apr. 19, 2015), <https://www.theatlantic.com/politics/archive/2015/04/when-cops-check-facebook/390882>; then citing Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 AM. CRIM. L. REV. 101, 109–10 (2002); then citing David R. Truman, *The Jets and Sharks Are Dead: State Statutory Responses to Criminal Street Gangs*, 73 WASH. U.L.Q. 683, 720–28 (1995); and then citing Alice Sperti, *In New York Gang Sweeps, Prosecutors Use Conspiracy Laws to Score Easy Convictions*, INTERCEPT (July 12, 2016, 1:25 PM), <https://theintercept.com/2016/07/12/in-new-york-gang-sweeps-prosecutors-use-conspiracy-laws-to-score-easy-convictions>); COALITION: INVESTIGATE NYPD’S “INHERENTLY UNRELIABLE” GANG DATABASE, FILTER (Sept. 24, 2020), <https://filtermag.org/nypd-gang-database/>. For more on the history and current status of gang databases, see Lauren M. Pittman, *Constructing A Compromise: The Current State of Gang Database Legislation and How to Effectuate Nationwide Reform*, 106 IOWA L. REV. 1513 (2021); Rivlin-Nadler, *supra* note 21.

⁸² Stephan, *supra* note 10, at 1021 (citing Megan Behrman, *When Gangs Go Viral: Using Social Media and Surveillance Cameras to Enhance Gang Databases*, 29 HARV. J. L. TECH. 315, 320–23 (2015); Broussard, *supra* note 81; Jake Offenhartz, *supra* note 68; Dermot Shea, *Criminal Group Database is Vital Tool to Controlling Gang Violence*, N.Y. DAILY NEWS (June 12, 2018), <https://www.nydailynews.com/opinion/>).

city's largest raid until [the Bronx 120 raid in 2016], the NYPD and [D]istrict [A]ttorney built cases that heavily relied on Facebook status updates like "Fuck Grant" and "Money Ave Up." Much of the government's case was built around normal interactions between individuals who happen to be growing up close to one another, and are shouting out of the buildings they live in.⁸³

Thus, prosecutors use gang database information to obtain indictments, usually without alerting the people being investigated and indicted, and these indictments result in militarized gang raids about which the press is notified in advance.⁸⁴

D. Bias in the Gang Policing and Prosecution Apparatus Calls Into Question the Legitimacy of RICO as Applied to Alleged Street Gangs

Ultimately, the overrepresentation of young Black and Brown men in flawed gang databases, and law enforcement reliance on those databases, drives the racial disparities in RICO "street gang" cases. If gang databases are flawed and are also infused with bias, then it is appropriate to question whether the raids and prosecutions that are based on those databases are also flawed and infused with bias. Given the influence of flawed gang databases on the use and impact of RICO, we must examine the legitimacy of RICO as applied to alleged street gangs. The stop-and-frisk initiative in New York City provides a useful analogy for doing so.

E. Additional Consequences of Inaccurate and Biased Gang Policing and Prosecution

Although beyond the scope of this paper, it is worth observing that the damaging results of gang stereotyping, especially within the context of RICO prosecutions, extend beyond low-income communities of color—racial bias in gang labeling and this inappropriate expansion of RICO also distract law enforcement and the general public from the

⁸³ Rivlin-Nadler, *supra* note 21.

⁸⁴ Stephan, *supra* note 10, at 1022; *see* Speri, *supra* note 6 ("More than half of the 120 indicted in the 'largest gang takedown' in New York City history were never actually alleged by prosecutors to be gang members at all."); *see also id.* ("Why on earth would they bring mass gang indictments, have a press conference saying that this is the largest takedown of two violent gangs in history, and actually be taking down dozens of people who are not gang members, and 80 individuals who are not violent?" . . . "It's because these prosecutions are politically advantageous. These cases make for easy wins, high-profile, good press coverage, . . . a platform to appear tough on crime.") (quoting Professor and Bronx 120 expert Babe Howell).

threats posed by extremist groups, such as white supremacists; this practice absorbs resources⁸⁵ that could be more usefully employed against other—active—threats facing the U.S. today.⁸⁶

Furthermore, gang experts agree that law enforcement gang suppression tactics will not eliminate gangs.⁸⁷ Massive gang raids often waste resources on mass arrests, after which several of the individuals arrested are released without charges or turn out not to have been affiliated with the group at issue. Sometimes these sensationalized raids also distract law enforcement from holding its own officers accountable for misconduct. For example, several of the Los Angeles officers involved in the 1987 Operation Hammer raid, after which many young people were released without charges, displayed similar behavior to that which they ascribed to gangs:

[T]hey wore special tattoos and pledged their loyalty to the anti-gang unit with a code of silence. They protected their turf by intimidating [alleged] Rampart-area gang members with unprovoked beatings and threats. Rafael Perez, an officer in the Rampart Division who was arrested in 1998 for stealing cocaine from a police warehouse, provided testimony for [his fellow] officers' arrests when he implicated 70 officers in a variety of illegal activities: planting evidence, intimidating witnesses, beating suspects, giving false testimony, selling drugs, and covering up unjustified shootings.⁸⁸

⁸⁵ Anita Abedian, *Gang Takedown of New York Part Two: Bigger and Badder!*, VILL. VOICE (Apr. 29, 2016), <https://www.villagevoice.com/2016/04/29/gang-takedown-of-new-york-part-two-bigger-and-badder/> (“About seven hundred feds and NYPD officers were involved [in the Bronx 120 raid], as opposed to some four hundred law enforcement officials in the [2014] Harlem bust.”).

⁸⁶ This claim presumes the effectiveness of such measures, which is also a subject of controversy; see, e.g., SIMON HALLSWORTH & TARA YOUNG, WORKING WITH GANGS AND OTHER DELINQUENCY GROUPS, PRACTICAL INTERVENTIONS FOR YOUNG PEOPLE AT RISK, 81–89 (Kathryn Geldard ed., 2009) (cautioning, “[w]hile the evaluation literature on gang intervention programmes is principally concerned with the relative success or failure of various individual projects in suppressing or preventing gangs from forming, it also pays to consider the wider social impact of the anti-gang crusade on the [targeted] communities . . . considering instead the social costs attendant on such repression by the state. . . . [A]mong which must be included: the mass criminalization of young people . . .”).

⁸⁷ See, e.g., HOWELL & GRIFFITHS, *supra* note 68, at 45 (describing the sensationalized Operation Hammer gang sweep in Los Angeles, after which most of the young people arrested were released without charges, as inefficient and ineffective).

⁸⁸ HOWELL & GRIFFITHS, *supra* note 68, at 46. See also Jimmy Jenkins, *Arizona Department of Corrections orders removal of patch with ‘disturbing imagery’ after Republic investigation*, ARIZ. REPUBLIC (Dec. 9, 2021), <https://www.azcentral.com/story/news/local/arizona-breaking/2021/12/09/corrections-officials-order-removal-patch-disturbing-imagery/6452547001/>; Cerise Castle, A

Gang experts have long emphasized that gangs serve many purposes besides engaging in allegedly criminal activity and they are more likely to form in low-income communities.⁸⁹ Gang affiliation tends to correlate with poverty, marginalization, inadequate schooling, and limited access to jobs; gangs can offer a sense of belonging, protection, and credibility. In the absence of legitimate employment opportunities, gangs can also provide critical, albeit illegal, means of income through jobs in the illicit drug market.⁹⁰

F. *Floyd v. City Of New York*:⁹¹ A Potential Tool With Which to Challenge the Constitutionality of Racially Biased Gang Databases

Contemporary laws are unlikely to include *prima facie* racial classifications, and that lack of clear discriminatory intent makes it difficult for affected parties to prevail on equal protection claims. Therefore, successful equal protection claims of racially disproportionate law enforcement practices are rare.⁹² In *City of Chicago v. Morales*,⁹³ the Supreme Court concluded that a criminal law violates the Due Process

Tradition of Violence: The History of Deputy Gangs in the Los Angeles Sheriff's Department, KNOCK LA, <https://knock-la.com/tradition-of-violence-lasd-gang-history/> (last visited Dec. 27, 2021); Cerise Castle, *LASD Gangs: A Database of Known Associates of Deputy Gangs in the Los Angeles Sheriff's Department*, KNOCK LA, <https://lasdgangs.knock-la.com/> (last visited Dec. 27, 2021).

⁸⁹ See, e.g., JAMES DIEGO VIGIL, GANGS, POVERTY, AND THE FUTURE, URBAN LIFE: READINGS IN THE ANTHROPOLOGY OF THE CITY 245–46 (George Gmelch & Petra Kuppinger eds., 6th ed. 2018) (“Poverty is the central reason for the rise of street gangs throughout the contemporary world The children of the poor are put at risk by factors over which they have no control: their family’s living conditions, work situations, health problems, and educational limitations. Especially damaging are the social structural breakdowns that occur when family resources are strained [and] school systems overwhelmed The effects of poverty in children’s lives are clear, and what children learn in the streets shapes and molds them in powerful ways. . . . [S]treet gangs are the offspring of marginalization. In hierarchical societies, certain groups become relegated to the fringes, where social and economic conditions result in the destabilization and fragmentation of people’s lives.”).

⁹⁰ See JOHN M. HAGEDORN, A WORLD OF GANGS: ARMED YOUNG MEN AND GANGSTA CULTURE (2008); IRVING A. SPERTEL, THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH 161 (1995); JAMES DIEGO VIGIL, A RAINBOW OF GANGS: STREET CULTURES IN THE MEGA-CITY 7 (2002); see generally Nancy Ritter et al., *Changing Course: Keeping Kids Out of Gangs*, 273 NIJ J. 16 (2014).

⁹¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

⁹² See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (establishing that suspicion of gang involvement is race-neutral and therefore sufficient grounds for targeting an individual for non-gang-related drug enforcement).

⁹³ *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

Clause on vagueness grounds if it either fails to give notice of the prohibited conduct or permits arbitrary and discriminatory law enforcement. Even though the Court held that the statute at issue in *Morales* violated both prongs of the vagueness doctrine, the opinion made clear that violation of only one of the two prongs is necessary to find a criminal statute void for vagueness.⁹⁴

The *Morales* decision opened the door to reconceptualizing the vagueness doctrine as a possible defense against arbitrary or discriminatory law enforcement in gang policing.⁹⁵ Prior to *Morales*, statutes only violated the vagueness doctrine if they conflicted with *both* vagueness prongs, but the *Morales* opinion changed that.⁹⁶ This conceptual shift was especially significant given the often-insuperable discriminatory purpose requirement for equal protection claims.⁹⁷ In other words, the *Morales* decision made it possible to infer that a violation of the discretion prong of the vagueness doctrine could, on its own, be used to address practices that ordinarily would not meet the exceedingly high discriminatory intent threshold required to prove that a facially neutral policy or custom violates the Equal Protection Clause.⁹⁸

Viewing RICO prosecutions that are based on gang databases through the lens the Supreme Court applied to the loitering statute in *Morales*, the act of establishing gang databases and relying entirely on those databases could, in theory, align with the view that a statute might be constitutional if applied only to probable gang member suspects.⁹⁹ But

⁹⁴ See Kim Strosnider, *supra* note 81, at 112–27.

⁹⁵ See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (holding that a statute governing gang policing violated the vagueness doctrine).

⁹⁶ Strosnider, *supra* note 81, at 113–14.

⁹⁷ *Washington v. Davis*, and *Village of Arlington Heights* created a very high bar for proving equal protection violations by requiring a showing of intentional discrimination. *Washington v. Davis*, 426 U.S. 229 (1976); *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁹⁸ Stephan, *supra* note 10, at 996; see also *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (Marshall, J., anticipating the potential of the vagueness doctrine to combat instances of discriminatory enforcement).

⁹⁹ See *City of Chicago v. Morales*, 527 U.S. 41, 62–63 (1999) (“It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members. It applies to everyone in the city who may remain in one place with one suspected gang member as

gang databases are notoriously filled with people who are not probable gang members at all.¹⁰⁰ Monitoring and charging suspected gang members with established crimes, rather than discretionary crimes by tenuous association, might satisfy Justice O'Connor's concurring criterion that statutes must address conduct that is clearly harmful in its own right.¹⁰¹ Nonetheless, gang databases do not give people notice when they are labeled as "gang members"; indeed, people who are added to gang databases rarely know about their inclusion, not to mention the rationale behind that decision. In most cases, law enforcement officers have historically compiled gang databases using highly discretionary criteria, and people added to gang databases lack any promising means of ascertaining or contesting their status.

The successful 2013 claim in *Floyd v. City of New York* might have clarified this landscape.¹⁰² In *Floyd*, the Southern District of New York (S.D.N.Y.) held that the stop-and-frisk initiative violated the Equal Protection Clause due to racial discrimination, and the way the plaintiffs demonstrated discriminatory intent shows promise for challenging gang policing and prosecution practices such as gang databases and the overbroad application of the RICO Act. During the major stop-and-frisk years, the approximate demographic makeup of New York City residents was 23% Black, 29% Latino/x,¹⁰³ and 33% white; however, 83% percent

long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.") (internal citations omitted).

¹⁰⁰ See Dumke, *supra* note 62.

¹⁰¹ *Morales*, 527 U.S. at 67.

¹⁰² *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (appeal dismissed by Second Circuit Court of Appeals pursuant to joint stipulation of parties).

¹⁰³ The terms "Latino" and "Latinx" are used in some of the quoted materials throughout this Article. There is ongoing debate among people who identify as Latino/x about the most appropriate identifier. Similar to the reasoning in *supra* note 4 about the terms "Black" and "Brown," I use "Latino/x" here in recognition of the diversity of preferences among Latino/x people and because I cannot capture the individual preferences of every person to whom this Article might apply. It is also worth noting that additional identifiers, beyond Latino/x, are also part of this conversation (e.g., Chicana/o, Latina/x, and Hispanic—each of which has a different history and varies in popularity). For more on this topic, see Harmeet Kaur, *Why People are Split on Using 'Latinx'*, CNN (Aug. 12, 2020), <https://www.cnn.com/2020/08/12/us/latinx-term-usage-hispanics-trnd/index.html>. On a separate note, many New Yorkers assert that the stop-and-frisk initiative persists still today. See Alice Speri, *The NYPD Is Still Stopping and Frisking Black People at Disproportionate Rates*, INTERCEPT (June 10, 2021), <https://theintercept.com/2021/06/10/stop-and-frisk-new-york-police-racial-disparity/>.

of those stopped and frisked were Black or Latino/x.¹⁰⁴ Stop-and-frisk policy merely instructed officers to apprehend “the right people,” and officers relied on criminal suspect data that was predominantly comprised of Black and Latino/x people to determine who “the right people” were.¹⁰⁵ Furthermore, officers did not use any factors related to criminal activity when deciding whom to stop, and the factors they did consider were both vague and prone to racial bias.¹⁰⁶ Ultimately, the Southern District of New York held that the facially-neutral NYPD stop-and-frisk policies violated the Equal Protection Clause: race-based suspicions transposed onto stop-and-frisk practices violated the Equal Protection Clause because the criteria law enforcement used were too vague and indicated that officers had excessive discretion (especially considering that the program already had a *de facto* disproportionate impact on people of color). This decision was novel because, rather than challenging a statute, it instead involved a constitutional challenge to a policy that had the force of law,¹⁰⁷ a concept first introduced in *Monell v. New York City Department of Social Services*.¹⁰⁸ Gang databases have had effects similar to those ascribed to the stop-and-frisk program. Given that RICO prosecutions rely on gang databases, *Floyd* might offer a means for articulating the problem of their disproportionate racial impact in constitutional terms.

IV. THE ALLEGED STREET GANGS ARE NOT COMPLEX CRIMINAL CONSPIRACIES

The question of whether RICO is inappropriately applied to alleged street gangs turns on whether the people being charged as alleged gang members are, in fact, members of the kinds of complex criminal conspiracies for which the statute is designed. A clearer picture of the individuals I am writing about is necessary to understand this distinction. In this Part, I will provide an overview of gangs and discuss the important distinction between the young Black and Brown men who are inappropriately and disproportionately the targets of RICO street gang prosecutions and the members of organized crime groups Congress had in mind when it enacted the RICO statute.

¹⁰⁴ *Floyd*, 959 F. Supp. 2d at 559.

¹⁰⁵ *Id.* at 561.

¹⁰⁶ *Id.* at 578 (discussing how perceived “furtive movements” are subjective and prone to racial bias by officers).

¹⁰⁷ *Id.* at 564, 659–60.

¹⁰⁸ 436 U.S. 658 (1978); see Stephan, *supra* note 10, at 1011–12 (citing *Monell* to explain the requirements for establishing a policy or custom that carries the force of law).

A. Gangs: An Overview

While scholars can articulate some catalysts for gang formation and membership, defining a gang is much more complicated. Gang experts have struggled to define the term, and they have not settled on a single definition.¹⁰⁹ The U.S. government similarly lacks a single comprehensive definition. The lack of a clear and consistent definition of gangs renders questionable the legitimacy of imposing harsh, life-altering RICO sentences on young Black and Brown men based on their alleged gang involvement. The DOJ defines “gangs” as follows:

- (1) [A]n association of three or more individuals;
- (2) whose members collectively identify themselves by adopting a group identity which they use to create an atmosphere of fear or intimidation frequently by employing one or more of the following: a common name, slogan, identifying sign, symbol, tattoo or other physical marking, style or color of clothing, hairstyle, hand sign or graffiti;
- (3) the association’s purpose, in part, is to engage in criminal activity and the association uses violence or intimidation to further its criminal objectives;
- (4) its members engage in criminal activity, or acts of juvenile delinquency that if committed by an adult would be crimes;
- (5) with the intent to enhance or preserve the association’s power, reputation, or economic resources;
- (6) the association may also possess some of the following characteristics:
 - (a) the members employ rules for joining and operating within the association;
 - (b) the members meet on a recurring basis;
 - (c) the association provides physical protection of its members from other criminals and gangs;
 - (d) the association seeks to exercise control over a particular location or region, or it may simply defend its perceived interests against rivals; or
 - (e) the association has an identifiable structure.
- (7) this definition is not intended to include traditional organized crime groups such as La Cosa Nostra, groups that fall within the Department’s definition of “international organized crime,” drug trafficking organizations or terrorist organizations.¹¹⁰

¹⁰⁹ See, e.g., HOWELL & GRIFFITHS, *supra* note 68, at 51–80, for an entire chapter about challenges and considerations associated with attempts to define “gangs” and “gang members.”

¹¹⁰ *About Violent Gangs*, U.S. DEP’T OF JUST., (Apr. 30, 2021)

The DOJ's definition is notably different from the definition of "criminal street gangs" in 18 U.S.C. § 521:

- (a) Definitions. . . . "criminal street gang" means an ongoing group, club, organization, or association of 5 or more persons—
- (A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);
 - (B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and
 - (C) the activities of which affect interstate or foreign commerce.

. . . .

- (c) Offenses.
- (1) a Federal felony involving a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which the maximum penalty is not less than 5 years;
 - (2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another;
 - (3) a Federal offense involving human trafficking, sexual abuse, sexual exploitation, or transportation for prostitution or any illegal sexual activity; and
 - (4) a conspiracy to commit an offense described in paragraph (1), (2), or (3).¹¹¹

This difference between the DOJ and federal statutory definitions is important for two reasons: (1) the DOJ does not account for impact on interstate or foreign commerce in its definition of gangs, while that is a central criterion in 18 U.S.C. § 521; and (2) unlike 18 U.S.C. § 521,¹¹² the DOJ distinguishes between its definitions of gangs and other organized crime groups: "Through their use of open intimidation and identifiable insignia, gangs may be distinguished from other organized criminal groups such as La Cosa Nostra and transnational criminal organizations who rely on secrecy and clandestine control of legitimate businesses and

<https://www.justice.gov/criminal-ocgs/about-violent-gangs>.

¹¹¹ 18 U.S.C. § 521.

¹¹² Although beyond the scope of this paper, the distinction between "gangs" and "transnational" organized crime, including drug trafficking organizations and groups labeled "Foreign Terrorist Organizations," creates ambiguity within which racial bias, equal protection, and due process questions arise; the importance attached to impact on interstate commerce, as articulated in 18 U.S.C. § 521, is similarly controversial.

governments to advance their criminal aims.”¹¹³ Neither the RICO nor VICAR statute contains an explicit definition of criminal street gangs, so they presumably rely on at least one of the definitions above. The lack of clarity about the definition of a gang undermines the fundamental principles of fairness and consistency that are supposed to underlie the American “justice” system.

B. Alleged Gang Member Categories and Misconceptions

Children join “crews” for several reasons—especially in areas with densely-populated low-income housing. When kids grow up together, live in the same buildings, attend the same schools, play in the same recreational areas, and have families facing some of the same challenges, they are likely to form bonds. Young people also look up to their older peers, such as older siblings, without the developmental maturity to objectively assess every possible consequence of the actions taken by those idolized older peers. These ties sometimes become real or imagined “crews.”

Criminology scholars J. Mitchell Miller and Richard A. Wright include a contribution from Dr. Dana M. Nurge (an associate professor of criminal justice in the School of Public Affairs at San Diego State University) in their 2005 *Encyclopedia of Criminology*, in which Nurge highlights an important distinction for understanding the concept of a youth gang¹¹⁴:

[T]here are some commonly identified features of gangs, and characteristics that distinguish youth gangs from other types of groups, such as organized crime groups, hate groups (e.g., skinheads), and drug gangs or crews. Some of the primary distinctions between organized crime (such as the Mafia) and youth gangs are age differences (organized crime being comprised largely of adults), the group’s purpose or function (whereas organized crime groups are created specifically for criminal purposes, youth gangs fulfill many other functions, and crime may or may not be a primary activity); and structure or organization (whereas organized crime is highly structured, youth gangs are typically loosely and informally organized). Differences are also usually evident when comparing hate groups

¹¹³ *About Violent Gangs*, U.S. DEP’T OF JUST., *supra* note 110.

¹¹⁴ To reiterate, my use of the term “youth gang” is only to align my argument with terms used in existing scholarship; it is not meant as a determination as to the appropriate application of the term “gang” to any group of people. I prefer to entirely avoid labeling young people as “gang members” because it can lead to such drastic consequences and perpetuates the sweeping, inaccurate approach to labeling young people that is foundational to the issues I address in this Article.

and youth gangs. Whereas hate groups—such as skinheads—are organized with a specific purpose (to spread their message through literature and actions that reflect their beliefs) and are driven by a specific ideology (racism being at its core), youth gangs typically lack any specific ideology or agenda and are generally less purposive (in terms of activities). . . . Generally speaking . . . drug gangs tend to be smaller, more cohesive and structured groups that are specifically organized around drug sales. Youth gangs, on the other hand . . . may have individual members who are involved in drug sales, [but] it is usually not a group function. Most youth gangs are simply not organized enough to operate a drug business successfully.¹¹⁵

In terms of the purposes youth gangs have been found to serve for the individuals who associate with them, Dr. Nurge continues: “youth gangs have been found to fulfill similar functions for their members, providing protection or security, a sense of family or belonging, status or prestige, recreational opportunities or something to do, and in some cases economic rewards (e.g., money earned through illicit activities).”¹¹⁶ Gang

¹¹⁵ ENCYCLOPEDIA OF CRIMINOLOGY 613, (J. Mitchell Miller & Richard A. Wright eds., 2005); see also HOWELL & GRIFFITHS, *supra* note 68, at 38 (debunking the misconception that gang-involved adults pressure young people to join gangs); *id.* at 34–35 (explaining that while gang members might be involved in some level of drug sales, street gangs rarely control entire drug operations. Howell and Griffiths elaborate that gang studies demonstrate notable differences between youth gangs and drug gangs or cartels. In Baltimore, for example, one study showed that there were over 300 drug-trafficking entities, almost none of which were comprised of youth gang members. If anything, young people who might be gang-affiliated enter the drug distribution process at the street level, but even that role rarely proves lucrative for the youth gang as a whole. Another distinction between youth and drug gangs is that violence among youth gangs more often arises from non-drug-related conflicts; that is not true of drug gangs. Even if drugs play a role in the conflict, youth gangs rarely fight about control over the drug market itself.); *id.* at 247 (“Law enforcement officers themselves recognize the tangential and infrequent involvement of gangs in drug distribution. From the 1996 [National Youth Gang Survey] onward, Howell, Egley, and Gleason (2002) found that only a minority of gang-problem jurisdictions report that gangs controlled a majority of the drug distribution in their jurisdiction. The bulk of the evidence from law enforcement, field studies, and youth surveys finds that most gangs lack key organizational characteristics to effectively manage drug distribution operations. Decker (2007) outlines specific criteria required for large-scale operations . . . and few street gangs meet these criteria.”) (internal citations omitted); James Densley, David Pyrooz & Scott Decker, *Op-Ed: The Real Cultural Significance of ‘West Side Story’? It Spread Powerful Myths about Gangs*, L.A. TIMES (Dec. 10, 2021), <https://www.latimes.com/opinion/story/2021-12-10/west-side-story-gang-myths-spielberg>.

¹¹⁶ ENCYCLOPEDIA OF CRIMINOLOGY, *supra* note 115, at 614; see also Brenda C. Coughlin & Sudhir Alladi Venkatesh, *The Urban Street Gang after 1970*, 29 ANN. REV. SOCIO. 41, 44 (2003) (“The consensus appears to be that drug trafficking is usually a secondary interest compared to identity construction, protecting neighborhood territory, and

experts James C. Howell and Elizabeth Griffiths further observe that most members of youth gangs do not remain involved with these groups for more than a few years.¹¹⁷ These descriptions suggest that in organized crime groups, even low-level crime contributes to the enterprise, benefiting fellow members throughout some sort of large-scale enterprise; that does not seem to apply in the youth gang context.

With this explanation in mind, I believe it will be helpful for readers of this Article to conceptualize federal criminal RICO gang prosecutions as they pertain to three different categories: (1) complex and prevalent organizations that engage in illicit activities, including violence, to benefit the collective enterprise, often also exert control over a significant geographical area or aspect of commerce, and can manage substantial distribution operations¹¹⁸ (e.g., the Mafia, and its infiltration of unions nationwide;¹¹⁹ in some cases, MS-13, with its control over MacArthur Park in Los Angeles;¹²⁰ and the Sinaloa Cartel, which is considered one of the largest and most influential drug trafficking organizations in the world¹²¹); (2) youth street gangs (“youth gangs”) as described above (to the extent that so-called “members” of groups in this category are consistent, and with the acknowledgment that “youth gangs”

recreation.”). For personal accounts of young people arrested as part of the 2016 Bronx gang raid, see Mirela Iverac, *An Oral History of New York’s Largest Gang Bust*, N.Y. MAG. (Aug. 2018), <https://nymag.com/intelligencer/2018/08/an-oral-history-of-new-yorks-largest-gang-bust.html>.

¹¹⁷ HOWELL & GRIFFITHS, *supra* note 68, at 38–40.

¹¹⁸ To clarify, I am not expressing an opinion about the culpability or proper treatment of any group in this category—that is beyond the scope of this Article. I merely mention them to better illustrate my broader points about the other two groups I describe here.

¹¹⁹ See James B. Jacobs & Ellen Peters, *Labor Racketeering: The Mafia and the Unions*, 31 CRIME & JUST. 229–82, (2003), https://www.researchgate.net/profile/James-Jacobs-14/publication/288438924_Labor_Racketeering_The_Mafia_and_the_Unions/links/591c615ba6fdcc3f521e9d4a/Labor-Racketeering-The-Mafia-and-the-Unions.pdf; see generally OXFORD HANDBOOK OF ORGANIZED CRIME (Letizia Paoli ed., Oxford Univ. Press 2014).

¹²⁰ See, e.g., Matthew Ormseth & Melissa Hernandez, *Attacks on transgender women expose MS-13 gang’s grip on MacArthur Park*, L.A. TIMES (Aug. 26, 2021), <https://www.latimes.com/california/story/2021-08-26/ms-13-gang-targets-transgender-women-macarthur-park>; Timothy Michael, *MS-13’s Stronghold on MacArthur Park And Transphobia*, PRIDE LA (Sept. 15, 2021), <https://thepridela.com/2021/09/ms-13s-stronghold-on-macarthur-park-and-transphobia/>.

¹²¹ See, e.g., Kate Linthicum, *Did Jailing ‘El Chapo’ Matter? In Seizing a City, the Sinaloa Cartel Shows it’s Still Strong*, L.A. TIMES (Oct. 19, 2019), <https://www.latimes.com/world-nation/story/2019-10-19/el-chapo-sinaloa-cartel-culiacan>; OXFORD HANDBOOK OF ORGANIZED CRIME, *supra* note 119, at 208–11.

constantly splinter, dismantle, and change;¹²² examples in this category might include Reckless Fam, Very Crispy Gangsters,¹²³ Money Avenue, Make It Happen Boys,¹²⁴ or Young Bosses¹²⁵); and (3) people who are in some way acquainted with individuals who might have ties to a gang or who are entirely unacquainted with gangs but are erroneously perceived as having ties to “gang members.”

Drawing these distinctions is not intended as a comment about the definitiveness of the first category, nor is it meant as a judgment about how to address the activities of those who fall within the first category. Rather, the purpose is to highlight the different characteristics of youth gangs and fringe acquaintances relative to groups in the first category, which is a significant distinction when assessing the inappropriateness of RICO Act prosecutions of people in the second and third categories.

The flawed and biased gang policing and RICO prosecution apparatus and the inappropriate designation of alleged youth street gangs as complex criminal organizations enable inaccurate and biased dragnets to ensnare many young men of color who are neither involved in the targeted organizations, nor contributing members of criminal conspiracies, complex or otherwise.

V. BROAD RICO AND VICAR INTERPRETATIONS: THE VIOLENCE-ENTERPRISE-COMMERCE CONTINUUM

As described, once alleged gang members are charged in a RICO case, courts that tend to interpret RICO and VICAR broadly create a low hurdle for prosecutors and a nearly insurmountable one for defendants. The RICO and VICAR statutes bear all the hallmarks of the flawed approach Congress often has taken when confronted with domestic activities that appear to jeopardize public safety: imposing excessive charges and sentences on an overbroad and vulnerable category of people, exacerbating inequities, and testing or exceeding the limits of the Constitution. In this Part, I will turn my attention to three central components¹²⁶ of the broadly applied RICO and VICAR statutes:

¹²² See HOWELL & GRIFFITHS, *supra* note 68, at 39.

¹²³ See GANGS AND CREWS OF NEW YORK, INTERCEPT (June 11, 2018), <https://theintercept.com/document/2018/06/11/gangs-and-crews-of-new-york/>.

¹²⁴ See Anita Abedian, *Taylorn Murphy Trial Reveals Overreaching Prosecution Tactics*, VILL. VOICE (Apr. 20, 2016), <https://www.villagevoice.com/2016/04/20/taylorn-murphy-trial-reveals-overreaching-prosecution-tactics/>.

¹²⁵ See Abedian, *supra* note 85.

¹²⁶ Further analysis is warranted regarding whether the RICO statute encroaches on the Sixth Amendment right to counsel of defendants in “street gang” prosecutions. Some

violence, enterprise, and commerce. These three components are significant in the analysis of the inappropriate, largely ineffective, and disproportionately negative impact of the RICO and VICAR statutes on young Black and Brown men. First, states promulgate and enforce their own violent crime statutes, and most violent crime is prosecuted in state courts; state procedural and evidentiary rules are generally more protective than their federal counterparts, in part because they account for the severity of consequences associated with violent crime convictions. Federal prosecutors in RICO cases are required to prove at least two predicate acts¹²⁷ as articulated by the statutes of the state in which an alleged (sometimes violent) offense occurred, but without affording defendants the greater state-level protections. Second, RICO enterprises need not be particularly consistent, organized, or planned in their decision-making;¹²⁸ this amorphous description enables RICO (and its

experts have suggested that the most qualified attorneys (who have the most extensive experience with these kinds of cases) are only allowed to represent one person in each case (leaving all remaining defendants to rely on other attorneys who may have less or no RICO street gang case experience). Experts also caution that the ethical rules governing attorney conflicts of interest might make it more difficult for defendants to obtain the best possible, or even adequate, counsel given the large numbers of defendants who often know and live in close proximity to one another; *see, e.g.*, Max Rivlin-Nadler, *How A Group Policing Model Is Criminalizing Whole Communities*, NATION (Jan. 12, 2018), <https://www.thenation.com/article/archive/how-a-group-policing-model-is-criminalizing-whole-communities> (“The indictments also create huge problems for the indigent defense system, because defendants in these cases are almost always poor. Public-defense offices can defend only one of the indicted individuals because of conflicts, leaving the rest to be represented by court-appointed attorneys.”).

¹²⁷ The VICAR statute requires the government to show that the defendant committed (or attempted or conspired to commit) a *violent* crime. Due to its requirement of a *violent* predicate act, in particular, the VICAR statute applies to a defendant who committed, attempted, or conspired to commit: “murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against” an individual in violation of state or federal law. 18 U.S.C. § 1959(a).

¹²⁸ *Boyle v. United States*, 556 U.S. 938, 947–48 (2009) (“The crux of petitioner’s argument is that a RICO enterprise must have structural features in addition to those that we think can be fairly inferred from the language of the statute. Although petitioner concedes that an association-in-fact enterprise may be an ‘informal’ group and that ‘not “much” structure is needed . . . he contends that such an enterprise must have at least some additional structural attributes, such as a structural ‘hierarchy,’ ‘role differentiation,’ a ‘unique *modus operandi*,’ a ‘chain of command,’ ‘professionalism and sophistication of organization,’ ‘diversity and complexity of crimes,’ ‘membership dues, rules and regulations,’ ‘uncharged or additional crimes aside from predicate acts,’ an ‘internal discipline mechanism,’ ‘regular meetings regarding enterprise affairs,’ [a name,] and ‘induction or initiation ceremonies and rituals[.]’ We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in

potential for resulting in draconian sentences) applicable to groups that do not resemble those for which the statute was designed and do not pose the same scale of threat to the public. Third, an enterprise, for both RICO and VICAR purposes, must affect interstate or foreign commerce, but that effect need only be *de minimis*;¹²⁹ this, too, leads to the statute being construed overbroadly and thus misapplied in ways that are especially harmful young Black and Brown men.

A. Violence

When Congress passed VICAR, it provided federal prosecutors in racketeering-related proceedings with several substantial exceptions from otherwise applicable protections available to defendants. Thus, prosecutors are directed to look to state laws to define the violent act in question, but not to all otherwise relevant state procedural and evidentiary protections.¹³⁰ In other words, “Congress did not intend to incorporate the various states’ procedural and evidentiary rules into the RICO statute. The statute is meant to define, in a more generic sense, the wrongful conduct that constitutes the predicates for a federal racketeering

[United States v. Turkette, 452 U.S. 576, 583 (1981)], an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a hierarchical structure or a ‘chain of command’; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique . . .”).

¹²⁹ See United States v. DeLeon, No. CR 15-4268 JB, 2020 WL 353856, at *101 (D.N.M. Jan. 21, 2020) (“The Court agrees that the United States ‘need not show a nexus to interstate commerce for each predicate act underlying’ a VICAR conviction. Accordingly, all the United States must show is: (i) a connection between [the syndicate] and the Defendants’ acts of violence; and (ii) that [syndicate’s] activities have a de minimis impact on interstate commerce.”) (internal citations omitted).

¹³⁰ See, e.g., *id.* at *127 (“References to state law in federal racketeering statutes like VICAR—‘in violation of the laws of any State,’ 18 U.S.C. § 1959(a)—and RICO—‘which is chargeable under State law,’ 18 U.S.C. § 1961(1)(A)—define the conduct that violates federal law; those references do not incorporate state procedural or evidentiary rules. See United States v. Crenshaw, 359 F.3d 977, 988 n.4 (8th Cir. 2004) (commenting that a state procedural rule providing that ‘a conviction cannot be based upon uncorroborated accomplice testimony’ does not apply in a VICAR prosecution”).

charge.”¹³¹ This means that although a federal prosecutor must prove all elements of the violent offense as articulated by the state in which the offense occurred,¹³² that prosecutor is not constrained by the procedural and evidentiary protections of that state, such as statutes of limitations¹³³ or accomplice-corroboration requirements.¹³⁴ Among the many factors that make successfully defending people charged under RICO and VICAR especially difficult, two notable ones are that (1) some of the defendants will already have been convicted of the predicate state-law offense(s); and (2) each defendant can be charged with the offenses of all other “members” of the “enterprise” over the course of time the RICO case spans—even if a defendant had no knowledge of the acts, did not participate, and had not been involved with the enterprise or offenses for years.¹³⁵

¹³¹ *United States v. Paone*, 782 F.2d 386, 393 (2d Cir. 1986).

¹³² *See DeLeon*, 2020 WL 353856, at *127 (citing *Carrillo*, 229 F.3d at 183) (“[T]he United States still must prove the elements of the predicate state-law offense. . . . ‘[T]he proposition that the indictment need not recite all elements of the state-law offense constituting a racketeering act does not, without further explanation, lead to the conclusion that the government is excused from proving those elements.’”); *see also* U.S. DEP’T OF JUST., *VIOLENT CRIMES IN AID OF RACKETEERING*, *supra* note 33, at 25.

¹³³ *See DeLeon*, 2020 WL 353856, at *130 (citing *United States v. Licavoli*, 725 F.2d 1040, 1046–47 (6th Cir. 1984)) (“State statutes of limitations are among the procedural rules that federal racketeering statutes do not incorporate.”); *see also* *United States v. Revel*, 493 F.2d 1, 3 (5th Cir. 1974).

¹³⁴ *See DeLeon*, 2020 WL 353856, at *127 (quoting *United States v. Crenshaw*, 359 F.3d 977, 988 n.4 (8th Cir. 2004)) (“[A state procedural rule that] ‘a conviction cannot be based upon uncorroborated accomplice testimony’ does not apply in a VICAR prosecution.”); *see also* *United States v. Shryock*, 342 F.3d 948, 987 (9th Cir. 2003) (citing *United States v. Erwin*, 793 F.2d 656, 669 (5th Cir. 1989)) (“[In a VICAR prosecution, a] state accomplice-corroboration rule does not apply with respect to predicate acts for RICO prosecutions because the accomplice-corroboration rule is procedural, rather than an element of the offense.”).

¹³⁵ Telephone interview with a defense attorney who worked on *United States v. Parrish*, 755 F. App’x 59 (2d Cir. 2018) (Oct. 7, 2020); *see, e.g.,* Speri, *supra* note 6 (“‘The fundamental problem with putting 120 people on an indictment is that there’s almost no way to defend that case,’ said Melissa Geller, a lawyer who represented one of the [Bronx] 120 and specializes in white-collar RICO cases. ‘It’s a due process issue.’”); Speri, *supra* note 20 (“‘Threatened with draconian sentences, almost all defendants in these situations agree to plea deals . . . scoring prosecutors dozens of easy convictions. ‘The government doesn’t have to do a lot of heavy lifting to prove that there was an alleged agreement between two people,’ said Anthony Posada, supervising attorney with the Community Justice Unit at Legal Aid Society ‘By using a statute that has very severe penalties, you sort of do this thing where you overcharge. . . . Large amounts of bail are set on people . . . [the people charged] are more likely to plead guilty’”); *see also*, Abedian, *supra* note 124 (quoting Ian Weinstein, a professor at Fordham University School of Law: “The least involved person in the conspiracy is as guilty of

VICAR thus strips, from what would otherwise be a state-level case, defendants' state procedural and evidentiary protections, simply because the defendant is prosecuted in federal court on a RICO/VICAR charge. This is especially concerning given that the federal system, unlike the state systems, arguably is not designed for most violent offenders.¹³⁶ States, which have jurisdiction over most violent crimes, promulgate and enforce their own violent crime statutes within a system that has heightened procedural and evidentiary protections for defendants, and afford the prosecutors much less discretion, than is the case for federal prosecutors in the federal criminal justice system.¹³⁷ People incarcerated for violent offenses are in the minority in federal prisons as well, further indicating that violent offenses are generally left to the states, rather than the federal criminal legal system.¹³⁸ That VICAR and RICO serve to

conspiracy as the most involved person.”).

¹³⁶ See, e.g., Judge John Gleeson, Complex Federal Investigations lecture at Harvard Law School (Sept. 16, 2020) (“More than anything else, we see that the grand jury process is what accounts for state prosecutors wanting to team up with the Feds, rather than using the cumbersome features of state law.”); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that a witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusing to answer questions relating to evidence obtained in violation of the Fourth Amendment); *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991) (holding that a court may not quash a grand jury subpoena *duces tecum* in response to a relevancy challenge unless it can determine that there is no possibility the materials sought will produce evidence relevant to the subject of the grand jury investigation).

¹³⁷ See *infra* Parts V and VI for further discussion of the weaker procedural and evidentiary protections in federal criminal RICO cases; see also Simon Davis-Cohen, *The Appeal Presents: Raided*, APPEAL (Apr. 18, 2019), <https://theappeal.org/the-appeal-presents-raided/> (“The federal government can also link someone to a criminal conspiracy with the testimony of just one cooperating witness. ‘There are just very loose evidentiary standards when it comes to federal conspiracy cases,’ explained David Patton, executive director of Federal Defenders of New York. ‘The prosecutors are allowed to bring in hearsay that they otherwise, in a normal case, wouldn’t be able to use.’ Court records show this loose burden of proof may have led the prosecution to make tangible errors. One example is the case of a defendant, whom the government initially tried to charge with conspiracy to commit a shooting, based solely on the account of one anonymous cooperating witness (Witness 1). The witness said they were told by another anonymous cooperating witness (Witness 2) that the defendant spoke to the shooter about a rivalry a year and a half before the shooting took place. But when the government was asked to verify this, the story unraveled: Both witnesses said the defendant was not involved and the government admitted its mistake.”); John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1098 (1995).

¹³⁸ THE SENTENCING PROJECT, TRENDS IN U.S. CORRECTIONS (Aug. 2020), <https://www.sentencingproject.org/wp-content/uploads/2020/08/Trends-in-US-Corrections.pdf>.

transfer state violent offenses into the federal system adds to the existing power imbalance in an already harsh statutory and sentencing regime.

B. Enterprise

RICO broadly defines an enterprise as “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹³⁹ The Supreme Court attempted to clarify the RICO definition of an enterprise in its 1981 decision, *United States v. Turkette*. Justice White wrote the opinion for the majority, holding that the term “enterprise” under the RICO statute does not exclusively apply to legitimate business contexts; instead, the statute applies equally to racketeering activity in both *entirely illegal* criminal organizations *and legitimate* ones.¹⁴⁰ This “clarification” resulted in “an explosion in the application of the criminal RICO statute to alleged street gangs.”¹⁴¹

Unfortunately, *Turkette* said what a RICO enterprise is *not*, but it did not provide much guidance about what the requisite organization or structure of a RICO enterprise *is*. The circuit courts were left to resolve this lingering ambiguity among themselves,¹⁴² which resulted in a circuit split.¹⁴³ The majority view (adopted by the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits) was that a RICO associated-in-fact enterprise should have an organization that is independent from the commission of the predicate racketeering offenses.¹⁴⁴ Courts subscribing to this view attempted to narrow the “enterprise” concept by attaching indicators such as “continuity of . . . personality,”¹⁴⁵ “hierarch[y],”¹⁴⁶

¹³⁹ 18 U.S.C. § 1961(4).

¹⁴⁰ *United States v. Turkette*, 452 U.S. 576, 583 (1981) (defining a RICO enterprise as “a group of persons associated together for a common purpose of engaging in a course of conduct. . . . [Which] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit”).

¹⁴¹ Judge John Gleeson, Complex Federal Investigations lecture at Harvard Law School (Sept. 23, 2020).

¹⁴² See Woods, *supra* note 15, at 313 (citing Corey P. Argust et al., *Racketeer Influenced and Corrupt Organizations*, 47 AM. CRIM. L. REV. 961, 976 (2010)).

¹⁴³ *Id.*

¹⁴⁴ See *id.* (Citing Michael Morrissey, *Structural Strength: Resolving a Circuit Split in Boyle v. United States with a Pragmatic Proof Requirement for RICO Associated-in-Fact Enterprises*, 77 FORDHAM L. REV. 1939, 1967 (2009)).

¹⁴⁵ *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985) (citing *United States v. Lemm*, 680 F.2d 1193 (8th Cir. 1982)).

¹⁴⁶ *Calcasieu Marine Nat'l Bank v. Grant*, 943 F.2d 1453, 1461 (5th Cir. 1991) (quoting *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988)).

“consensual decision-making,”¹⁴⁷ “joined in purpose,”¹⁴⁸ and “distinct organizational structure.”¹⁴⁹ The circuits in the minority (the Second, Ninth, and Eleventh) held that evidence of the predicate racketeering crimes was sufficient to prove an enterprise, and that an independent organization was not necessary under this RICO interpretation.¹⁵⁰ The Supreme Court subsequently addressed this contentious ambiguity in *Boyle v. United States*, in which the Court required RICO enterprises to have a structure of some sort, but aligned with the minority view that the predicate racketeering offenses provide sufficient evidence to satisfy this requirement.¹⁵¹ *Boyle* established that RICO enterprises need not be particularly planned in their decision-making, consistent, or organized—creating another exceedingly broad category that can easily absorb alleged “criminal street gangs.”¹⁵²

¹⁴⁷ *United States v. Rogers*, 89 F.3d 1326, 1377 (7th Cir. 1996) (citing *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 644 (7th Cir. 1995)).

¹⁴⁸ *Id.*

¹⁴⁹ See *Freedom Med. Inc. v. Gillespie*, 634 F. Supp. 2d 490 (E.D. Pa. 2007); see, e.g., *United States v. Abed*, 203 F.3d 822, 15 (4th Cir. 2000); *United States v. Riccobene*, 709 F.2d 214, 224 (3d Cir. 1983); *United States v. Johnson* 440 F.3d 832, 840 (6th Cir. 2006); *United States v. Kragness*, 830 F.2d 842, 855 (8th Cir. 1987); *United States v. Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005); see also *Price v. Amerus Annuity Grp. Co.* (In re Am. Inv’rs Life Ins. Co. Annuity Mktg. & Sales Practices Litig.), 2006 U.S. Dist. LEXIS 35980, at *22 (E.D. Pa. June 2, 2006) (“Several Courts of Appeals have rejected association in fact enterprise pleadings where the plaintiffs failed to allege any organizational structure for the enterprise. See *Vandenbroeck v. CommonPoint Mortg. Co.*, 210 F.3d 696, 700 (6th Cir. 2000) (alleged enterprise ‘too unstable and fluid an entity to constitute a RICO enterprise’); *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 676 (7th Cir. 2000) (refusing to accept ‘vague allegations of a RICO enterprise made up of a string of participants . . . lacking any distinct existence and structure’); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073, 1083 (9th Cir. 2000) (affirming dismissal where plaintiff ‘never alleged the existence of a system of authority that guided the operation of the enterprise’). See also *Feinstein v. Resol. Tr. Corp.*, 942 F.2d 34, 42 n.7 (1st Cir. 1991) (approving dismissal where complaint contained ‘no allegations articulating how any of the [defendants] may have comprised part of an ‘ongoing organization’”).

¹⁵⁰ See generally *Woods*, *supra* note 15, at 314.

¹⁵¹ *Boyle v. United States*, 556 U.S. 938 (2009).

¹⁵² *Id.* at 948 (excerpted quotation, which includes the language at 948, is included, *supra* note 130); see, e.g., *United States v. Palacios*, 677 F.3d 234, 248 (4th Cir. 2012) (“RICO makes it ‘unlawful for any person . . . 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.’ 18 U.S.C. § 1962(c). It also criminalizes conspiracy to engage in such activity. . . . [I]n *Boyle v. United States* . . . [the Supreme Court] cautioned . . . against reading the term ‘enterprise’ too narrowly . . .”); see also *United States v. McClaren*, 998 F.3d 203, 217 (5th Cir. 2021); *United States v. Brown*, 973 F.3d 667, 682

C. Commerce

An enterprise, for both RICO and VICAR purposes, must affect interstate or foreign commerce, but that effect need only be *de minimis*.¹⁵³ Congress regulates interstate commerce via the Commerce Clause, and it does so, *inter alia*, by regulating particular kinds of participation in commerce for policy reasons.¹⁵⁴ The Supreme Court has rarely limited Congress' Commerce Clause authority.¹⁵⁵ Consequently, given the

(7th Cir. 2020).

¹⁵³ See, e.g., Matthew H. Blumenstein, *RICO Overreach: How the Federal Government's Escalating Offensive Against Gangs Has Run Afoul of the Constitution*, 62 VAND. L. REV. 211, 214 (2019) (examining the history of conflict between the First and Sixth Circuits regarding the constitutionality of federally prosecuting alleged noneconomic street gang members accused of *intrastate* violence under the RICO statute: "In *Waucaush v. United States*, [380 F.3d 251, 255–56 (6th Cir. 2004),] the Sixth Circuit held that a member of a noneconomic street gang could not be convicted under RICO unless the gang substantially affected interstate commerce. [However], [i]n *United States v. Nascimento*, [491 F.3d 25, 37 (1st Cir. 2007),] the First Circuit held that gangs need only have a *de minimis* effect on interstate commerce to be properly subjected to prosecutions of this sort.") (internal citations omitted).

¹⁵⁴ See *United States v. DeLeon*, No. CR 15-4268 JB, 2020 WL 353856, at *68 (D.N.M. Jan. 21, 2020) ("[A]ccording to Chief Justice John Marshall, the 'power to regulate' an activity is the power 'to prescribe the rule by which' the activity 'is to be governed.' *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 196 (1824) (Marshall, C.J.). Under that broad definition, many laws qualify as regulations, including laws: (i) prohibiting shipment of goods made under certain labor conditions, see *United States v. Darby*, 312 U.S. 100, 113 (1941); (ii) imposing production limitations, see *Wickard v. Filburn*, 317 U.S. 111 (1942); (iii) affirmatively authorizing navigation and trade, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat) at 12–13; (iv) proscribing racial discrimination in particular industries, see *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258, 261 (1964) (hotels); *Katzenbach v. McClung*, 379 U.S. 294, 304–05 (1964) (restaurants); and (v) prohibiting extortionate lending practices, *Perez v. United States*, 402 U.S. 146, 156–57 (1971).") (cleaned up); *DeLeon*, 2020 WL 353856, at *70 (quoting *Gonzales v. Raich*, 545 U.S. 1, 40 (2005) (Scalia, J., concurring in judgment) ("That simple possession is a noneconomic activity is immaterial to whether it can be prohibited as a necessary part of a larger regulation. Rather, Congress's authority . . . depends only upon whether they are appropriate means of achieving the legitimate end"; elaborating, "Congress, could not have prohibited felons from possessing firearms . . . if it enacted those prohibitions . . . without tying [them] to a regulation of [multistate] commerce . . . because the Necessary and Proper Clause presupposes an exercise of another congressional power [to create federal crimes].").

¹⁵⁵ *DeLeon*, at *99 ("The Court concludes that VICAR is facially constitutional Unlike the statutes in *United States v. Lopez* and *United States v. Morrison*, VICAR contains an express jurisdictional element, confining its scope In *United States v. Bolton*, 68 F.3d 396 (10th Cir. 1995), the Tenth Circuit analyzed 18 U.S.C. [§] 922(g), which prohibits a convicted felon from 'possess[ing] in or affecting commerce, any firearm or ammunition.' 18 U.S.C. [§] 922(g). The Tenth Circuit reasoned that, unlike 18 U.S.C. [§] 922(q), which the Supreme Court invalidated in *United States v. Lopez*, 18

expansive concept of congressional regulatory power under the Commerce Clause, even a very nebulous enterprise can easily satisfy the “interstate commerce” element of a RICO or VICAR charge. In fact, courts have held that telephones, mobile phones, the U.S. Postal Service, the internet, and even supplying condoms manufactured in another state can be “instrumentalities of interstate commerce” under RICO.¹⁵⁶

U.S.C. [§] 922(g) contains a jurisdictional element . . . that the firearm [was], at some time, in interstate commerce is sufficient to establish its constitutionality under the Commerce Clause.”) (second and third brackets not in original).

¹⁵⁶ See *United States v. Velasquez*, 881 F.3d 314, 329 (5th Cir. 2018) (“Use of instrumentalities of interstate commerce such as telephones, the U.S. Postal Service, and pagers to communicate in furtherance of the enterprise’s criminal purposes can also constitute the enterprise affecting interstate commerce.”); see, e.g., *United States v. Doherty*, 867 F.2d 47, 68 (1st Cir. 1989) (“We agree with [appellant] DOHERTY that the government showed only minimal effects on interstate commerce, but RICO requires no more than a slight effect upon interstate commerce.”); *United States v. Robinson*, 763 F.2d 778, 781 (6th Cir. 1985) (“In the present case, the parties stipulated that the alcohol sold by the appellants to Ann’s Liquors was manufactured out of state. In our view, this is a sufficient impact upon interstate commerce for purposes of Section 1962(c).”); *United States v. Allen*, 656 F.2d 964, 964 (4th Cir. 1981) (“[T]he supplies used in Allen’s bookmaking operations which originated outside of Maryland provided a sufficient nexus between the enterprise and interstate commerce to invoke RICO.”); *United States v. Altomare*, 625 F.2d 5, 7–8 (4th Cir. 1980) (citing *Perez v. United States*, 402 U.S. 146 (1971)) (“Altomare next asserts that the County Prosecuting Attorney’s office did not have the requisite nexus with interstate commerce to be within the jurisdiction of RICO. Because of the very nature of the powers and duties conferred upon it, however, that office necessarily is an institution ‘engaged in, or the activities of which affect, interstate or foreign commerce.’ 18 U.S.C. [§] 1962(c). The record reveals that interstate telephone calls regularly were placed from the prosecutor’s office, that certain of the supplies and materials purchased and used by the prosecutor’s office had their origins outside of West Virginia, and that persons who were not citizens or residents of the State were involved in investigations and litigation conducted by the prosecutor’s office. These contacts provide a sufficient basis for invoking RICO’s jurisdiction over the prosecuting attorney’s office.”); *United States v. Campanala*, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976); *United States v. Millán-Machuca*, 991 F.3d 7, 18 (1st Cir. 2021) (citing *United States v. Rodríguez-Torres*, 939 F.3d 16, 27 (1st Cir. 2019)); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350, 1353 (5th Cir. 1985) (citing *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979)) (“The nexus with interstate commerce required by RICO is ‘minimal.’”), *abrogated on other grounds in H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 235 (1989); *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005) (“[E]vidence presented at trial showed that TMM used Western Union, telephones, the U.S. Postal Service, and pagers to transfer money and communicate with each other in furtherance of TMM’s criminal purposes. . . . Thus, TMM was engaged in and affected interstate commerce.”); *United States v. Pipkins*, 378 F.3d 1281, 1295 (11th Cir. 2004) (“[T]he pimps and their prostitutes used instrumentalities of interstate commerce—pagers, telephones, and mobile phones—to communicate with each other while conducting business. Pipkins used the Internet to promote his online escort service which

The nexus connecting the commerce element of VICAR and the violence and enterprise elements is strikingly minimal. In *United States v. DeLeon*, the court explained that the VICAR interstate nexus requirement applies only to the RICO enterprise. The VICAR violent offense need be tied to the enterprise only in some minimal way: if the RICO enterprise has a *de minimis* interaction with interstate commerce, then the VICAR interstate nexus requirement is satisfied.¹⁵⁷ The violent act and interstate commerce elements do not require their own nexus—the nexus connecting violence to the RICO enterprise automatically connects the violence and commerce elements so long as the enterprise and commerce elements are somehow linked.¹⁵⁸ Thus, prosecutors need to meet only a very low standard in order to connect these three VICAR elements, providing yet another prosecutorial advantage in VICAR and RICO prosecutions.

VI. EVIDENTIARY AND PROCEDURAL IMBALANCES IN RICO PROSECUTIONS OF ALLEGED NEIGHBORHOOD GANGS¹⁵⁹

As with the loose violence-enterprise-commerce interpretation described above, once alleged gang members are charged in a RICO case, courts also tilt the playing field toward prosecutors and against defendants through evidentiary and procedural imbalances. In this Part, I will detail ways in which procedural and evidentiary imbalances during RICO gang prosecutions disregard critical components of fairness in the criminal

advertised . . . prostitutes. . . . Finally, the pimps furnished their prostitutes with condoms manufactured out of state, purchased from Atlanta gas stations.”).

¹⁵⁷ See *DeLeon*, at *101.

¹⁵⁸ *Id.* (quoting *United States v. Dally*, No. 07-748, 2009 WL 10708281, at *5 (D.N.M. Apr. 2, 2009)) (“[VICAR’s] interstate nexus requirement is satisfied by establishing a connection between the § 1959 act of violence and a RICO enterprise which has a *de minimis* interstate commerce connection. . . . The interstate-nexus requirement applies to the activities of the enterprise as a whole; there is no requirement that the violent crimes in aid of that enterprise have their own specific connection to interstate or foreign commerce apart from the enterprise.”); *id.* (“The Court agrees that the United States ‘need not show a nexus to interstate commerce for each predicate act underlying’ a VICAR conviction. *United States v. Fernandez*, 338 F.3d at 1250. Accordingly, all the United States must show is: (i) a connection between [the enterprise] and the Defendants’ acts of violence; and (ii) that [the enterprise’s] activities have a *de minimis* impact on interstate commerce.”).

¹⁵⁹ For critiques of plea bargaining, gang experts, bail, militarized gang raids, the prejudicial effect of social media posts and music lyrics on jurors, and additional law enforcement and prosecutorial tactics that create additional barriers for defendants in RICO gang cases, see generally HOWELL & BUSTAMANTE, *supra* note 3; HOWELL, *supra* note 78, at 177–93.

legal system and leave alleged gang members exceedingly vulnerable. First, I illustrate these imbalances through a case study of the 2016 “Bronx 120” raid: for instance, in gang raids, police can arrest people whom the prosecution has affirmatively identified as not being “gang members”; in addition, some defendants in the Bronx 120 case faced new conspiracy charges linked to state crimes for which they had already served their sentences. Second, I will highlight additional procedural imbalances, including how state court protections do not transfer into federal courts when federal prosecutors prove predicate crimes as defined by the statutes of the states in which the alleged incident(s) occurred. In the final two Sections, I will discuss ways in which federal criminal RICO gang prosecutions even deprive defendants of the many protections afforded by the Federal Rules of Evidence, for example, through reliance on social media and hearsay, and through a lack of indictment specificity.

A. The Bronx 120 Raid as a Procedural Imbalance Case Study

In April of 2016, the U.S. Attorney for the Southern District of New York, the Commissioner of the NYPD, the Special Agent-in-Charge of the New York Field Office of the U.S. Immigration and Customs Enforcement’s Homeland Security Investigations (“HSI”), the Special Agent-in-Charge of the New York Field Division of the Drug Enforcement Administration (“DEA”), and the Special Agent-in-Charge of the New York Field Division of the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) announced that a federal grand jury indicted 120 alleged members and associates of two so-called “rival street gangs” in the Bronx. The operation that resulted in the arrests of those individuals later became known as the largest “gang raid” in New York City history. The two indictments, formally entitled *United States v. Parrish*, No. S1 16-CR-212 (S.D.N.Y. 2016) and *United States v. Burrell*, S2 15-CR-95 (S.D.N.Y. 2016) alleged racketeering conspiracy, narcotics conspiracy, narcotics distribution, and firearms charges. According to the U.S. Attorney’s Office for the S.D.N.Y., “[t]he Indictments [stemmed] from a joint investigation by the NYPD’s Bronx Gang Squad, HSI’s Violent Gang Unit, the New York Field Division of the DEA, and the ATF’s Joint Firearms Task Force.”¹⁶⁰ Oddly, although

¹⁶⁰ U.S. ATT’Y’S OFF., S.D.N.Y., *120 Members and Associates Of Two Rival Street Gangs In The Bronx Charged In Federal Court With Racketeering, Narcotics, And Firearms Offenses* (Apr. 27, 2016), <https://www.justice.gov/usao-sdny/pr/120-members-and-associates-two-rival-street-gangs-bronx-charged-federal-court>. It is worth noting that, according to the Immigration and Customs Enforcement website, “HSI’s mission is to

most of the defendants were U.S. citizens, HSI (which purports to focus on criminal organizations that threaten or seek to exploit the customs and immigration laws of the United States) conducted the thousands of wiretaps. Professor Babe Howell and her research partner Priscilla Bustamante studied the Bronx 120 prosecution and ultimately confirmed that dozens of young people who weren't actually in gangs were arrested during the raid; several of the arrests were based on who the individuals knew, rather than what they actually did,¹⁶¹ i.e., guilt by association:

One of the most startling revelations of the review of the Bronx 120 prosecutions is that half of those swept up in the largest gang raid in the history of New York were not affirmatively alleged to be members of either of the two rival gangs allegedly targeted by the mass indictments. The prosecutor's sentencing submissions and statements affirmatively state that 34 of those subjected to the raid and arrested as part of the RICO case were not gang members. An additional 17 individuals are characterized as "associates of" or "associated with" the two rival gangs. . . . Thus, 51 of the defendants swept up in "the largest gang takedown in New York City history" were affirmatively not alleged to be gang members. For another 13 there is no clear allegation relating to gang membership. Their dispositions suggest they were not gang members.¹⁶²

Details of the case were kept confidential by a strict federal protective order after the raid, but parents of defendants were allowed to view discovery materials confidentially. An anonymous group of defendants' mothers revealed that multiple defendants were facing conspiracy charges linked to state crimes for which they had already served their sentences. According to journalist Simon Davis-Cohen, "[a]t

investigate, disrupt and dismantle terrorist, transnational and other criminal organizations that threaten or seek to exploit the customs and immigration laws of the United States." U.S. IMMIGR. AND CUSTOMS ENF'T, HOMELAND SECURITY INVESTIGATIONS, <https://www.ice.gov/about-ice/homeland-security-investigations> (last visited Jan. 5, 2022).

¹⁶¹ HOWELL & BUSTAMANTE, *supra* note 3, at 18 ("The broad range of sentences in these mass indictments provides strong support for the conclusion that the raids and indictments were overbroad, sweeping in defendants that not even the prosecution believed to be 'the worst of the worst.' 22 defendants received sentences of time served (average time served was 5.9 months) and 3 received *nolle prosequis* (declined prosecutions). Another 18 received a sentence of less than two years. . . . 35 of the defendants were convicted based on their role selling marijuana.") (At the time this data was collected, it excluded outcomes for two pending cases and three cooperators). As I will discuss in Part VIII, these outcomes might be more indicative of plea deals negotiated out of fear than of actual guilt.

¹⁶² *Id.* at 9–10 (internal citations omitted).

least 113 of the [Bronx 120] defendants have now pleaded guilty, others made separate agreements with the government, and two went to trial, resulting in convictions. Among the guilty pleas . . . 53 [were sentenced to] three to 10 years, and 14 [were sentenced] to over 10 years.”¹⁶³

B. Double Jeopardy, Previous Offenses, and Statutes of Limitations

The RICO Act relies on past crimes, but the Fifth Amendment of the U.S. Constitution prohibits multiple prosecutions for the same crime (this rule is known as the Double Jeopardy Clause or “double jeopardy”). The constitutional prohibition against double jeopardy, absent congressional assertion of intent to impose multiple punishments for the same offense,¹⁶⁴ would conceivably bar the practice of basing RICO charges on crimes for which an accused individual was previously tried.¹⁶⁵ It demonstrably does not; instead, courts presume that Congress intended to permit the imposition of separate sentences for RICO offenses and any predicate acts under state law.¹⁶⁶ Similarly, courts have concluded that

¹⁶³ Davis-Cohen, *supra* note 137.

¹⁶⁴ *See, e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) (“With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.”); *United States v. Ayala*, 601 F.3d 256, 264–65 (4th Cir. 2010) (“The Double Jeopardy Clause states that no person shall ‘be subject for the same offence to be twice put in jeopardy of life or limb.’ In the context of a single criminal prosecution, the clause ‘protects against multiple punishments for the same offense.’ . . . It does not, however, prohibit the legislature from punishing the same act or course of conduct under different statutes.”) (internal citations omitted).

¹⁶⁵ *See generally* CONG. RSCH. SERV., *supra* note 1, at 30 (Ex post facto concerns are beyond the scope of this paper because the cases of the young people who are the focus of this paper arose after the RICO and VICAR statutes were finalized; nonetheless, it is noteworthy that, “[b]y the same token, ex post facto might appear to bar a RICO charge built upon a predicate offense committed before RICO was enacted or before the crime was added to the list of RICO predicates.”).

¹⁶⁶ *See United States v. Garcia*, 754 F.3d 460, 474 (7th Cir. 2014) (citing *United States v. Morgano*, 39 F.3d 1358, 1366 (7th Cir. 1994)) (“The only question before us is thus ‘whether Congress, in making the predicate RICO acts relevant to sentence determination via the Sentencing Guidelines, intended to allow defendants to receive consecutive sentences for both the predicate acts and the RICO offense.’ We held in *Morgano* that Congress intended exactly this, and every other circuit to consider the question has agreed with this view.”); *see also*, HOWELL & BUSTAMANTE, *supra* note 3, at 7–8 (“[B]ecause conspiracy or RICO conspiracy charges have elements that are different from the target crime, double jeopardy does not preclude trial for a conspiracy to commit an offense to which an individual has already pleaded guilty (or for that matter been acquitted or granted some form of leniency). Many of the defendants in the federal mass gang prosecutions face conspiracy charges relating to conduct for which they have already

Congress intended separate sentences for both the RICO conspiracy to commit a substantive RICO offense and the substantive offense itself.¹⁶⁷

pleaded guilty and served time, or even for cases that were resolved without criminal convictions.”); Hayat, *Killing Due Process*, *supra* note 9, at 20–21 (“[T]he Supreme Court has relegated the multiple punishment doctrine to a tool of statutory interpretation rather than a constitutional protection for criminal defendants. The dismantling of the Fifth Amendment double jeopardy protection is the product of white supremacy, couched in a legislative intent narrative . . .”) (internal citations omitted); *id.* at 26–27 (explaining the four forms of double jeopardy and providing an overview of double jeopardy caselaw).

¹⁶⁷ See *United States v. Pratt*, 728 F.3d 463, 477 (5th Cir. 2013) (“Pratt was charged under 18 U.S.C. § 1962(d) with conspiring to violate a substantive RICO provision, § 1962(c). The elements of a conspiracy under § 1962(d) are simply ‘(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.’ The defendant need not be one of the people who agreed to commit the substantive offense. Section 1962(c) makes it ‘unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity.’”) (internal citations omitted); *Pratt*, 728 F.3d at 478 n.59 (Citing *United States v. Martino*, 648 F.2d 367, 383 (5th Cir.1981) and *United States v. Dixon*, 509 U.S. 688, 705, (1995)) (“To the extent Pratt’s argument contemplates a future prosecution for a charge other than § 1962(d), it is unlikely she would be protected by double jeopardy in any event. We have held that separate prosecutions for conspiracy to violate RICO and for substantive RICO violations based on the same underlying racketeering activities do not violate the Double Jeopardy Clause. Nor is successive prosecution in different proceedings for separate crimes based on the same conduct prohibited as a general matter.”) (internal citations omitted); see, e.g., *Ayala*, 601 F.3d at 265–66 (“If anything, we think that the available evidence suggests that Congress did indeed intend to impose multiple punishments. For one thing, it placed the [RICO and VICAR] offenses in different chapters and provided each with its own penalties. . . . For another, Congress was clearly aware of the RICO statute when it enacted the VICAR statute, given that the latter defines ‘racketeering activity’ by reference to a provision of RICO. . . . Had it wanted to impose a single punishment when a defendant violated both statutes during the same course of conduct, Congress easily could have said so Our conclusion is bolstered by the fact that these statutes are directed at two different but related problems. . . . While the RICO statute addresses participation in racketeering enterprises generally, the VICAR statute addresses the particular danger posed by those . . . who are willing to commit violent crimes in order to bolster their positions within such enterprises. In this sense, the VICAR statute ‘complements’ the RICO act by allowing the government to address these interrelated problems. . . . We find additional support in the case law of other circuits. The Second Circuit, for instance, has held that a defendant may be punished in a single prosecution for substantive violations of both the RICO and VICAR statutes. . . . Likewise, the First Circuit has held that a defendant may be punished for both a VICAR conspiracy and a substantive RICO offense. . . . In the related context of successive prosecutions, the Third Circuit has rejected a double jeopardy challenge where the first prosecution included a RICO conspiracy charge and the second included a VICAR conspiracy charge. . . . [W]e conclude that there is no Double Jeopardy bar to punishing a defendant for both a murder conspiracy under §

Moreover, in *Gamble v. United States*, the Supreme Court ruled that successive state and federal prosecutions are not precluded by the Double Jeopardy Clause.¹⁶⁸

These doctrinal features enabled significant procedural imbalances in the context of the Bronx 120 raid. For example, consistent with applicable law, the Bronx 120 prosecutors presented past conduct that had not resulted in convictions to support new federal charges against defendants.¹⁶⁹ In fact, any contact a defendant might have had with the courts was available to federal prosecutors, who then used that information to advocate for pre-trial detention and harsher sentencing. Experts Babe Howell and Priscilla Bustamante described the disastrousness of this practice for defendants:

The extent to which conduct that had not resulted in convictions was used to support the new charges and to argue for harsher sentences was surprising. Defense attorneys routinely accept ‘adjournments in contemplation of dismissal’ and pleas to violations for minor misconduct, assuring those arrested that they will not have a criminal record. When helping young people who are on the wrong path, the New York State courts provide second chances in the form of programming and youthful offender treatment which results in a sealed record and is not a criminal conviction. A great deal of advocacy on the part of defense counsel, well-considered exercises of discretion by courts or prosecutors, and lack of reliable evidence may all justify non-prosecution or non-criminal charges. Still, the Bronx 120 indictments show us that any contact with the criminal justice system, any charges levied against a defendant, can be later offered in bail appeals or sentencing submissions. These contacts and charges will be used by the prosecution to argue for detention and higher sentences, even in the absence of a criminal conviction.¹⁷⁰

1959(a)(5) and a racketeering conspiracy under § 1962(d) when the offenses arise out of the same course of conduct.”) (internal citations omitted); *see also* CONG. RSCH. SERV., *supra* note 1, at 30 (citing *United States v. Schiro*, 679 F.3d 521, 525–28 (7th Cir. 2012); *United States v. DeCologero*, 530 F.3d 36, 71 (1st Cir. 2008); *United States v. Jones*, 482 F.3d 60, 71–72 (2d Cir. 2006); *United States v. Wheeler*, 535 F.3d 446, 450 (6th Cir. 2008); and *United States v. Dean*, 647 F.2d 779, 788 (8th Cir. 1981) (“In the RICO context, the courts have held that the Double Jeopardy Clause does not bar successive RICO prosecutions of the same defendants on charges of involving different predicate offenses, enterprises, or patterns. They have been more receptive to double jeopardy concerns in the case of successive prosecutions of the same enterprise. There, they have invoked a totality of the circumstances test.”).

¹⁶⁸ *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019).

¹⁶⁹ *See* HOWELL & BUSTAMANTE, *supra* note 3, at 21.

¹⁷⁰ *Id.*

In addition to past court involvement, crimes for which the statutes of limitations would have expired in other kinds of cases are available to prosecutors for an extended period during RICO gang prosecutions; the statute of limitations does not commence until the conspiracy indictment begins or the conspiracy itself culminates.¹⁷¹

C. Social Media

The Federal Rules of Evidence prohibit the use of hearsay evidence in court. Social media posts are typically considered hearsay evidence, but they are nonetheless allowed as evidence in RICO prosecutions.¹⁷² Prosecutors in RICO cases have latitude to expand “evidentiary rules [to] permit statements of any co-conspirator made in furtherance of the conspiracy to be offered for the truth of the matter asserted”; and allowance of social media posts permits “statements of alleged ‘co-conspirators’ to be used without the benefit of cross-examination,” as well as “to prove affiliation, association, enterprise and guilt,” all without the benefit of traditional due process or any substantiation of veracity with respect to the truth of the matter asserted.¹⁷³

Due process rights can vary depending upon particular circumstances (e.g., due process rights might diverge from those in most misdemeanor or felony cases in the context of the “special needs” exception to the Fourth Amendment for Transportation Security Administration agents; when officers stop someone at the U.S.-Mexico border; in capital punishment cases; or pursuant to the state secrets exception in the U.S. Foreign Intelligence Surveillance Court). Based on this reality, some might posit that due process rights are justifiably restricted in RICO cases. The fluidity of due process is beyond the scope of this paper, but the fact that so many individuals are inappropriately charged under RICO and VICAR indicates that the rights of defendants in these cases should not change before courts determine whether the federal statute even applies. Moreover, the fact that these cases rarely reach courts, because the majority of defendants opt for plea deals, renders early and stricter adherence to traditional due process rights especially important.

¹⁷¹ *Id.*

¹⁷² *See* FED. R. EVID. 801–03; *see, e.g.*, Abedian, *supra* note 124.

¹⁷³ HOWELL & BUSTAMANTE, *supra* note 3, at 8, 27.

D. Lack of Indictment Specificity

Finally, courts have permitted as lawful RICO gang prosecution indictments that are notably general and broad; they often lack specific information tying individual defendants to times, locations, or alleged conduct. Indictments that do not provide specific details deny defense attorneys the individualized information they need to defend their clients. Generalized indictments also prevent individuals who might not have committed a violent offense, or be members of an alleged gang, from obtaining pre-trial releases, or even case dismissals, because these individuals lack necessary information to contest charges or the terms of their pre-trial restrictions.¹⁷⁴

VII. RACIAL DISPARITIES AND PROFILING IN GANG CLASSIFICATION AND RICO PROSECUTIONS

RICO was enacted in response to approximately two decades of concern about organized, violent crime overtaking major U.S. cities and industries.¹⁷⁵ The Mafia posed a threat to white America and its legitimate business enterprises, and alarms about it were sounding for legislators nationwide. Still, such organized and violent crime was not new to America: white supremacist gangs such as the Ku Klux Klan (“KKK”) had infiltrated U.S. politics and the economy for decades.¹⁷⁶ The KKK had also developed collective, organized plans to commit violence against formerly enslaved Black people and their descendants and supporters. Congress did not enact RICO for application to white supremacist gangs;

¹⁷⁴ *Id.* at 26.

¹⁷⁵ THIRD INTERIM REP. OF THE SPEC. COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMM., S. REP. NO. 82-307, at 170 (1951).

¹⁷⁶ *See, e.g.*, Woods, *supra* note 15, at 319; *see generally* S. POVERTY L. CTR., *Ku Klux Klan: A History of Racism* (Mar. 2011), <https://www.splcenter.org/20110228/ku-klux-klan-history-racism>; S. POVERTY L. CTR., *Whose Heritage? Public Symbols of the Confederacy* (Feb. 2019), <https://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy>. Congress passed The Ku Klux Klan Act of 1871 as a partial response to this issue, but that legislation did not end white supremacy; indeed, white supremacy persists to this day in various explicit, political, economic, and cultural forms. *See, e.g.*, Hayat, *Killing Due Process*, *supra* note 9, at 21 n.7–8 (discussing and defining racism and white supremacy); *id.* at 31–32 (“When not affirmatively advocating for white supremacy, the Supreme Court has been either oblivious to or wholly dismissive of its existence as a reality in our country, even though this is widely accepted among social scientists, historians, and scholars in countless fields. Yet, on a few notable occasions, the Court has revealed its consciousness of structural, systemic racism in our legal and criminal justice system. . . . *Loving v. Virginia* [and] *Ramos v. Louisiana*.”) (citing Peggy Cooper Davis, *Loving v. Virginia and White Supremacy*, 92 N.Y.U. L. REV. ONLINE 48 (2017)) (citing *Ramos v. Louisiana*, 140 S. Ct. 1390, 1393 (2020)).

although the statute could conceivably also be used for that purpose, white (non-Italian) organized crime was never the target—in fact, some of the legislators participated in white supremacist organizations themselves.¹⁷⁷

As noted, in the 1950s, 1960s, and 1970s, Italians were not necessarily considered white by all;¹⁷⁸ indeed, Italians faced some of the harshest anti-immigrant discrimination in America at that time.¹⁷⁹ As Italian organized crime became more widespread, white legislators perceived a threat that, while informed by violence and corruption, was thus also racially biased. And just as RICO had racist undertones at its time of enactment, the racial and ethnic makeup of the groups the DOJ has subsequently identified as the most prominent criminal street gangs¹⁸⁰ continues to result in law enforcement, including prosecutors, leveraging RICO to target people of color who are today similarly deemed to be threatening to white “mainstream” U.S. society.

Many of the factors that promote “gang” formation (e.g., poverty, lack of employment opportunities, and safety concerns) are over-represented in low-income communities. Today, low-income urban communities predominantly consist of people of color, especially Black, Latino/x, and indigenous people, as a result of the history of systemic racism in the United States.¹⁸¹ However, these persistent inequities do not

¹⁷⁷ See, e.g., DAVID CUNNINGHAM, *KLANSVILLE U.S.A.: THE RISE AND FALL OF THE CIVIL RIGHTS-ERA KU KLUX KLAN* 113 (2013); see generally MICHAEL WOODIWISS, *ORGANIZED CRIME AND AMERICAN POWER* 73 (2001).

¹⁷⁸ See BENCIVENNI, *supra* note 25 (describing late nineteenth and early twentieth century perceptions of Italians as non-white and the negative stereotypes with which Italian immigrants to America were often associated); see generally ROEDIGER, *supra* note 25; Woods, *supra* note 15, at 311.

¹⁷⁹ See WOODIWISS, *supra* note 177; see, e.g., Anita Christina Butera, *Assimilation, Pluralism and Multiculturalism: The Policy of Racial/Ethnic Identity in America*, 7 *BUFF. HUM. RTS. L. REV.* 11 (2001); Rachel Rossoni Munafò, *National Origin Discrimination Against Americans of Southern and Eastern European Ancestry: A Review of the Legal History and Judicial Interpretations*, 25 *CATH. L.* 50, 52 (1979) (citing Salvatore J. LaGumina, *WOP!: A Documentary History of Anti-Italian Discrimination in the United States* (1973)).

¹⁸⁰ *Criminal Street Gangs*, U.S. DEP’T OF JUST., (Apr. 19, 2021) <https://www.justice.gov/criminal-ocgs/gallery/criminal-street-gangs>.

¹⁸¹ See NEIGHBORHOOD POVERTY, NATIONAL EQUITY ATLAS (last visited Dec. 3, 2021), https://nationalequityatlas.org/indicators/Neighborhood_poverty#/; TRACY HADDEN LOH ET AL., BROOKINGS INSTITUTION, *THE GREAT REAL ESTATE RESET* (Dec. 6, 2020), <https://www.brookings.edu/essay/trend-1-separate-and-unequal-neighborhoods-are-sustaining-racial-and-economic-injustice-in-the-us/>; JENNY ROWLAND-SHEA ET AL., HISP. ACCESS FOUND. & CTR FOR AM. PROGRESS, *THE NATURE GAP: CONFRONTING RACIAL AND ECONOMIC DISPARITIES IN THE DESTRUCTION AND PROTECTION OF NATURE IN AMERICA* (July 2020), <https://www.hispanicaccess.org/news-resources/research->

reflect some sort of heightened, innate proclivity for gang involvement among Black and Brown people; the assumption that innate proclivity or socioeconomic marginalization inevitably causes the racial disparities in RICO prosecutions distracts from the substantial role of racially biased *law enforcement* in creating and perpetrating those disparities.¹⁸²

Professor Babe Howell’s analysis of the NYPD Gang Database is emblematic of *de facto* racial profiling by law enforcement:

Fewer than 1% of the individuals in the NYPD’s Gang Database (officially named the Criminal Group Database) are white. . . . Over 98% of the gang database is Black or Latinx, nearly 8% were added to the gang database prior to their 18th birthday, and about 3% of the individuals in the gang database were females. . . . The

library/item/978-the-nature-gap-confronting-racial-and-economic-disparities-in-the-destruction-and-protection-of-nature-in-america; *see generally* JORJA LEAP, JUMPED IN: WHAT GANGS TAUGHT ME ABOUT VIOLENCE, DRUGS, LOVE, AND REDEMPTION (2012); JORJA LEAP, PROJECT FATHERHOOD (2016); CELESTE FREMON & TOM BROKAW, G-DOG AND THE HOMEBOYS: FATHER GREG BOYLE AND THE GANGS OF EAST LOS ANGELES (2008).

¹⁸² Racist gang labeling, policing, and prosecution has occurred throughout the U.S. for decades. Several scholars, especially sociologists and anthropologists, have written about gangs and the ways in which problematic “gang policing” and “gang control” practices play out in specific geographic areas, such as in Los Angeles (e.g., Jorja Leap; Jorje David Mancillas; Xuan Santos) or Chicago (e.g., Roberto R. Aspholm; John M. Hagedorn). For an example of how Professor Babe Howell describes this phenomenon in New York City, *see* HOWELL, *supra* note 78, at 177 (“The recent trend in gang policing and prosecution of ‘gangs’ in New York City makes little to no sense without an understanding that the exaggerated gang narrative is used to insulate policing from critique and to generate support for oppressive race-based profiling. Like loitering laws, the war on drugs, ‘Broken Windows’ policing, and stop-and-frisk policing, gang policing allows for aggressive surveillance, policing, prosecutions, and control of people of color based on discretionary enforcement and non-enforcement of the law. Discretion in enforcing each of these policing strategies has hinged primarily on appearance and geography. Unlike previous iterations of oppressive, race-based policing, ‘gang policing’ has yet to fall into disrepute because the gang label triggers fear. . . . [T]he exaggeration of gang problems to create moral panic and shore up support for police is not new and has precedents across the country. . . . In short, gang policing allows law enforcement to engage in intensive surveillance and policing of suspect racial groups with no oversight. It also leads to conspiracy cases that are so difficult to defend that there is virtually no check on gang policing and prosecutions in the form of trials.”). *See also* JOSMAR TRUJILLO & ALEX S. VITALE, *Misguided strategy: New York City’s Decision to Criminalize Gangs*, in ROUTLEDGE INT’L HANDBOOK OF CRITICAL GANG STUD. 225–42 (David C. Brotherton & Rafael Jose Gude, eds., 2021). For additional scholarship on gang databases, policing, and prosecution, *see* Stephan, *supra* note 10; Rebecca J. Marston, *Guilt by Alt-Association: A Review of Enhanced Punishment for Suspected Gang Members*, 52 U. MICH. J.L. REFORM 923 (2018); Robin Petering, *The Potential Costs of Police Databases: Exploring the Performance of California’s Gang Database (CalGang)*, 5.1-3 J. FORENSIC SOC. WORK 67 (2015).

database has been insulated from review thus far because, unlike stop-and-frisks and quality-of-life arrests, the database and related data-gathering are largely unknown to the public and are not subject to judicial review.¹⁸³

Jordan Blair Woods, in *Systemic Racial Bias and RICO's Application to Criminal Street and Prison Gangs*, reported that, as of 2012, the DOJ generally excluded white-affiliated gangs from its list of prominent criminal street gangs. Gangs affiliated with white identity only appeared in lists of prison and motorcycle gangs, and they were fewer in number than those associated with people of color.¹⁸⁴ The “Criminal Street Gangs” section of the DOJ’s “About Violent Gangs” website remains unchanged in this respect.¹⁸⁵ Indeed, studies show that law enforcement officers have underestimated the number of white gang members for many years, and this tendency persists. For example, criminologists conducting a multistate survey across nearly fifty schools spanning over ten cities throughout the United States found that more than 25% of participants who considered themselves “gang members” identified as white or some other white-perceived, European, ethnicity.¹⁸⁶ The limited empirical research that does exist on racial disparities in federal RICO prosecutions and indictments paints a picture unreflective of even that reality: as Professor Woods explained his findings, “a facially neutral law (RICO) and a facially neutral concept (‘criminal street gang’) are being applied to prosecute criminal groups that are predominantly affiliated with racial minorities.”¹⁸⁷

Racist stereotypes, reinforced by the media, politics, and socialization in the U.S., can have the result of predisposing the general public to perceive young Black and Brown men as dangerous, gang-involved criminals, and law enforcement officers to perceive any young Black or Brown man they arrest as likely to have been involved in gang activity, whether or not the individual acted as part of a group or in fact has any ties to a gang. Gang databases or terminology indicative of gang involvement on police reports can influence prosecutors’ decisions to pursue RICO charges when determining how to prosecute young Black

¹⁸³ HOWELL, *supra* note 78; *see also* Ashley Southall, *As Shootings Increased, N.Y.C Returned to Disputed Tactic: Gang Takedowns*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/26/nyregion/nypd-shootings-gang-arrests.html>.

¹⁸⁴ Woods, *supra* note 15, at 336.

¹⁸⁵ *See About Violent Gangs*, U.S. DEP’T OF JUST., *supra* note 110; *Criminal Street Gangs*, U.S. DEP’T OF JUST., *supra* note 180.

¹⁸⁶ *See* Woods, *supra* note 15, at 308; *see also* Esbensen & Winfree, *supra* note 58.

¹⁸⁷ Woods, *supra* note 15, at 335.

and Brown men.¹⁸⁸ Racial bias in policing and prosecution thus becomes a self-fulfilling prophecy in which law enforcement personnel at all levels increasingly risk “organizing” young Black and Brown men into “organized crime” groups to which they do not actually belong.¹⁸⁹

VIII. RICO “STREET GANG” CONVICTIONS CIRCUMVENT COURTS AND DO NOT MAKE COMMUNITIES SAFER

It could be argued that RICO, while imperfectly applied to young Black and Brown men from gang databases, still allows law enforcement to reduce crime because some young men who do not ultimately receive RICO convictions are nonetheless convicted for lesser offenses. This theory (compounded by erroneous gang databases and, as I will discuss, high rates of largely unsupervised plea bargaining) undermines the legitimacy of law enforcement and the criminal legal system writ large. The RICO statute only requires a few individuals (“targets”) to be tied to predicate charges for RICO to sweep up additional people (“affiliates”) who are in any way associated with those targets; so-called affiliates do not even necessarily have to have committed lesser predicate offenses. Thus, law enforcement officers can arrest the acquaintances of RICO targets and can then proceed to charge them for whatever non-RICO, non-predicate violations they might have committed. This is the opposite of the foundational values on which our justice system is constructed, and which law enforcement purports to uphold: the friends of RICO targets suffer a presumption of guilt by association and are only investigated *ex post facto* and without the benefit of a presumption of innocence.

A skeptic might further reject the analysis put forth thus far and instead maintain that the ends justify the means—essentially, that the current practice of charging young Black and Brown men as street gang members under the RICO Act must be justified because the courts are ultimately convicting many of the people charged, whether for RICO or

¹⁸⁸ See Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 332–45 (2019) (discussing extensive analysis of racism, including discussion of *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 869 (2017), and subsequent cases, in addition to analysis of social science and legal scholarship on the complexity of racism in both American culture and the U.S. criminal legal system); see generally Emily Badger et al., *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html> (quoting Berkeley Law Professor Dr. Khiara Bridges: “Simply because you’re in an area that is more affluent, it’s still hard for black boys to present themselves as independent from the stereotype of black criminality[.]”).

¹⁸⁹ Interview with an Assistant Federal Defender, Federal Defenders of New York, Inc., in the Eastern District (Oct. 24, 2020); see generally Woods, *supra* note 15, at 338.

other offenses. This theory stems from an illusory notion of courts actively *validating* that (1) alleged street crews are complex criminal conspiracies, and (2) gang databases provide a reliable and lawful¹⁹⁰ basis for prosecuting alleged street crews under RICO. Indeed, the conclusion is reminiscent of (now-refuted) post-9/11 justifications for torture¹⁹¹ or the controversial arguments in favor of the designation of “suspected terrorists” under the International Emergency Economic Powers Act¹⁹²

¹⁹⁰ Courts have not yet found gang databases to be unlawful, but the 2013 S.D.N.Y. decision in *Floyd v. City of New York* suggests that such a conclusion might be possible.

¹⁹¹ AM. C.L. UNION, BRADBURY AND BYBEE MEMOS ARE RELEASED IN RESPONSE TO LONG-RUNNING ACLU LAWSUITS (Apr. 16, 2009), <https://www.aclu.org/press-releases/justice-department-releases-bush-administration-torture-memos>. For more on the subject from Professor Jack Goldsmith, who withdrew the memos, see JACK GOLDSMITH, THE TERROR PRESIDENCY (W. W. NORTON & COMPANY 2007) at 141–76. Professor Goldsmith also reflects on this experience within the context of the ability of the U.S. government to operate outside of the law in pursuit of so-called “enemies” throughout history. See, e.g., JACK GOLDSMITH, IN HOFFA’S SHADOW (PICADOR 2019) at 109 (“The attorney general is the chief prosecutor and thus the fulcrum of American justice. ‘The prosecutor has more control over life, liberty, and reputation than any other person in America,’ Attorney General Robert Jackson said in a famous [1940] speech With the snap of his finger, the prosecutor can start a financially ruinous investigation and then can secure a grand jury indictment based on a ‘one-sided presentation of the facts.’”), 122–24 (“[John] Ashcroft deployed the [Robert] Kennedy model aggressively to find and incapacitate the 9/11 enemy. The Justice Department he led took hundreds of undocumented immigrants from the Middle East and South Asia off the streets for immigration violations. It deployed criminal laws to jail or hold “material witnesses,” usually with little proof of terrorist ties. It approved aggressive interrogations bordering on torture. And it signed off on the legality of Stellarwind, President George W. Bush’s post-9/11 surveillance program that intercepted the telephone calls and email messages of Americans and collected metadata in bulk. President George W. Bush secretly approved Stellarwind in the Oval Office on the morning of October 4, 2001. According to an official government report, a few hours later the legal authorization for the program was ‘pushed in front of’ Ashcroft by an unnamed person ‘and he was told to sign it.’ Ashcroft had not been ‘read in’ to the classified program before October 4, and he had done no research on its legality.’ . . . Ashcroft’s signature on the authorization was critically important as well. The intelligence bureaucracy charged with executing Stellarwind had good reason to worry that it violated criminal restrictions on domestic surveillance. Ashcroft’s sign-off solved that problem. As a practical matter, Justice Department approval of an intelligence operation precludes the Department from prosecuting anyone involved in implementing it, even if the program is later deemed to violate the law. It’s an extraordinary power. It’s also an example of . . . the government’s ability, in secret, to determine the limits on its actions and thus to skirt legal rules that bind everyone else For the six decades prior to 9/11, presidents and attorneys general, under pressure to find and defeat various ‘enemies’ in American society, had secretly blessed surveillance practices that would be declared illegal when they came to light years later.”).

¹⁹² The International Emergency Economic Powers Act, Title II of Pub.L. 95–223, 91

(IEEPA) and its more recent expansion by Executive Order (E.O.) 13224.¹⁹³ To illustrate this comparison, journalist Elizabeth Goitein's description of E.O. 13224 and its practical effects provides a useful example:

Executive Order 13224 [issued by George W. Bush in the wake of 9/11] prohibited transactions not just with any suspected foreign terrorists, but with any foreigner or any U.S. citizen suspected of providing them with support. Once a person is "designated" under the order, no American can legally give him a job, rent him an apartment, provide him with medical services, or even sell him a loaf of bread unless the government grants a license to allow the transaction. The Patriot Act gave the order more muscle, allowing the government to trigger these consequences merely by opening an investigation into whether a person or group should be designated.

Designations under Executive Order 13224 are opaque and extremely difficult to challenge. The government needs only a "reasonable basis" for believing that someone is involved with or supports terrorism in order to designate him. The target is generally given no advance notice and no hearing. He may request reconsideration and submit evidence on his behalf, but the government faces no deadline to respond. Moreover, the evidence against the target is typically classified, which means he is not allowed to see it. He can try to challenge the action in court, but his chances of success are minimal, as most judges defer to the government's assessment of its own evidence.

. . . .

Americans were significantly harmed by designations that later proved to be mistakes. For instance, two months after 9/11, the Treasury Department designated Garad Jama . . . based on an erroneous determination that his money-wiring business was part of a terror-financing network. Jama's office was shut down and his bank account frozen. News outlets described him as a suspected terrorist. For months, Jama tried to gain a hearing with the government to establish his innocence and, in the meantime, obtain the government's permission to get a job and pay his lawyer. Only after he filed a lawsuit did the government allow him to work as a grocery-store cashier and pay his living expenses. It was several more months before the government reversed his designation and unfroze his assets. By then he had

Stat. 1626 (enacted Oct. 28, 1977), <https://uscode.house.gov/view.xhtml?path=/prelim@title50/chapter35&edition=prelim>.
¹⁹³ Exec. Order No. 13,224, 3 C.F.R. 13,224 (signed on Sept. 23, 2001), <https://www.state.gov/executive-order-13224>.

lost his business, and the stigma of having been publicly labeled a terrorist supporter continued to follow him and his family.¹⁹⁴

The U.S. government leveraged E.O. 13224 to shut down organizations, even including charities, “without ever having to prove its charges in court.”¹⁹⁵ The parallels between E.O. 13224 and the development and use of gang databases are staggering: “When police add people to gang databases based on non-criminal criteria and inclusion is often erroneous [and] racially biased . . . the consequences are profound. [Inclusion] can immediately make people ineligible for jobs and housing, subject to increased bail and enhanced charges, and more likely to get deported.”¹⁹⁶ As with gang databases, lack of oversight and overwhelming information imbalance can create a breeding ground for bias and inaccurate, but life-altering, designations. We must learn from our mistakes.

Another possible refutation of the arguments put forth in this Article could rely on the premise that convictions indicate judicial oversight and approval of the outcomes of RICO street gang prosecutions. That is largely not the case, however, as convictions are not necessarily indicative of guilt.¹⁹⁷ People have been convicted of crimes they did not commit, and the fault in this logic extends beyond America’s history of wrongful convictions (especially convictions of innocent men of color).¹⁹⁸ The severity of the charges alleged gang members face under the RICO Act forces those charged to choose between two bad options: (1) risk an extreme sentence by going to trial,¹⁹⁹ or (2) plead guilty and reduce the likely sentence. The majority of defendants choose the second option,²⁰⁰

¹⁹⁴ Elizabeth Goitein, *The Alarming Scope of The President’s Emergency Powers*, ATLANTIC (Jan/Feb 2019 issue), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/>.

¹⁹⁵ *Id.*

¹⁹⁶ Stephan, *supra* note 10, at 1018–19 (internal citations omitted).

¹⁹⁷ See SUBRAMANIAN ET AL., *supra* note 71, at 3–4 (“In whatever form it takes, plea bargaining remains a low-visibility, off-the-record, and informal process that usually occurs in conference rooms and courtroom hallways—or through private telephone calls or e-mails—far away from the prying eyes and ears of open court. Bargains are usually struck with no witnesses present and made without investigation, testimony, impartial fact-finding, or adherence to the required burden of proof.”) (internal citations omitted).

¹⁹⁸ See SELBY, *supra* note 72; GROSS ET AL., *supra* note 72.

¹⁹⁹ See, e.g., Carissa Byrne Hessick, *The Constitutional Right We Have Bargained Away*, ATLANTIC (Dec. 24, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/right-to-jury-trial-penalty/621074/>.

²⁰⁰ See SUBRAMANIAN ET AL., *supra* note 71, at iii (“Only 2 percent of federal criminal cases—and a similar number of state cases—are brought to trial. More than 90 percent

even if they are innocent or at least not part of criminal conspiracies.²⁰¹ Once someone accepts a plea deal, their case does not go before a judge or a jury—plea bargains circumvent critical checks on law enforcement. Therefore, most street gang convictions of young Black and Brown men under RICO do not indicate that courts have found the convicted people

of convictions, at both federal and state levels, are the result of guilty pleas. Plea bargaining is so fundamental to the system that even in 1970, Chief Justice Warren Burger of the U.S. Supreme Court estimated that a 10 percent reduction in guilty pleas would require doubling the amount of judicial capacity in the system.”).

²⁰¹ See, e.g., Abedian, *supra* note 124. For more about factors that influence Black and Brown people to accept plea deals, as opposed to going to trial (e.g., Black people are more likely to be held in pretrial detention than white people), see generally SUBRAMANIAN ET AL., *supra* note 71; SAWYER, *supra* note 71; SENTENCING PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/>; Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sep. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>; Speri, *supra* note 6 (“Kraig Lewis was living in Connecticut and was nine credits away from his MBA when the neighborhood he had spent his life trying to get away from came back to haunt him. Growing up in a mostly poor and at times violent section of the Bronx, Lewis had seen his share of illegal activity. Some of those behind the criminality—mostly low-level drug dealing—were his friends. Lewis hung out with them while also keeping focused on school. Education was his ticket to a different life, his mother always said, and no one could take that away from him. She was wrong. Three years ago . . . helicopters and armored vehicles swarmed Lewis’s old neighborhood, and SWAT teams and some 700 officers with the NYPD and a host of federal law enforcement agencies knocked down doors at the Eastchester Gardens public housing project and nearby homes. At the same time, 40 miles and a world away, police showed up at the loft apartment Lewis shared with his girlfriend in the seaside city of Bridgeport. Lewis, who had no criminal record and had never been arrested before, was taken away in handcuffs while his 6-year-old son was asleep in his bed. Police drove Lewis to the local station and then back to the Bronx, to a police precinct where he saw dozens of his childhood friends, some for the first time in years. Lewis was one of 120 people, almost all young black and Latino men, who were indicted following that pre-dawn raid . . . For Kraig Lewis, the toll of the raid is still unfathomable. He lost two years of his son’s childhood, his life in Connecticut, and the chance at a degree he had worked so hard to earn. Perhaps worst of all, he lost his dreams and his self-confidence. ‘Everything I imagined for myself . . .’ he said, ‘I have nothing.’ His probation conditions require him to stay in New York—which means at his mother’s place in the Bronx—but they also require him not to interact with his co-defendants, the only friends he has around here. ‘I’m not supposed to be around them because they violate my probation,’ he told me recently, growing frustrated. ‘Like how? They put me back in the neighborhood. I spent two years in prison with them every day. And then you put us back and tell us we are not supposed to be around each other. These are the only people I know who are left.’ Mostly, Lewis stays at home, reliving his days at the Metropolitan Detention Center in his head. ‘I’m hurt,’ he said. ‘I’m not going to lie, it takes a lot sometimes to just move. . . . I feel like society did me wrong, I didn’t deserve that,’ he added. Then, pointing to the floor, he said, ‘My soul is still down here and I’m trying to pick it up.’”).

guilty—rather, they occur outside of the traditional justice process. U.S. District Judge Jed Rakoff has expressed concern about this trend:

Anyone who is arrested and charged in a criminal case is facing the same dilemma. Do I put the system to the test? In the old days, if you put the system to the test, and you still were convicted, you would face a sentence that was probably no more than 10 percent higher than what you would face if you pled guilty. Now you face a sentence that may be 500 percent higher than if you pled guilty. The result is that people, including unfortunately many innocent people but also many guilty people who nevertheless would have put their case to a jury, because they felt there were extenuating circumstances, no longer choose to go to trial After the mandatory minimums and other laws were passed, that percentage [of people who chose to go to trial] went down dramatically. . . . It's very bad for the system because a trial is the one place where the system as a whole gets tested and where you find out what the truth is. And instead what we have is a system where everything is negotiated in secret in a prosecutor's office, and you never find out what the truth is or whether the system was working.²⁰²

Moreover, many people who accept plea deals still spend time in custody to serve their shortened sentences;²⁰³ *the number of young Black and Brown men who end up in prison for RICO street gang charges does not necessarily indicate that courts found that number of them guilty under the statute* or that law enforcement reduced crime as a result of RICO prosecutions.

Communities suffer from the improper, ineffective, and biased use of the RICO statute against alleged gang members who are targeted based on flawed gang databases. Members of some communities have reported that the use of gang databases to inform gang raids and subsequent conspiracy convictions has had a silencing effect—people are afraid to report crime for fear of the possible unintended consequence that they or someone they know will be added to a gang database. Concerns about how ICE uses gang databases to spur deportation proceedings²⁰⁴ and erosion of trust in the law enforcement system²⁰⁵ exacerbate this

²⁰² Iverac, *supra* note 116.

²⁰³ See SUBRAMANIAN ET AL., *supra* note 71, at 26–27 (“The odds of receiving a plea offer that includes incarceration are almost 70 percent greater for Black people than white people.”).

²⁰⁴ See, e.g., Blitzer, *supra* note 63; TRUJULLO & VITALE, *supra* note 60, at 20–21; Stephan, *supra* note 10, at 1020–21.

²⁰⁵ For more on reasons why Black and Brown people might distrust the system, see CRIMINAL JUSTICE FACTSHEET, NAACP, <https://naacp.org/resources/criminal-justice-fact-sheet> (last visited Dec. 3, 2021).

phenomenon. Moreover, raiding an entire neighborhood and removing over 100 young men inevitably harms any community; as Taylorn Murphy explained in reference to the 2014 raid in his community, “[w]hen you take 103 individuals out of any community . . . you absolutely and positively take away a generation. You’re weakening our community. You’re losing all these resources[.]”²⁰⁶ As Professor and Associate Dean Fareed Nassor Hayat emphasized in his critique of multiple punishments (or “double jeopardy”) for singular crimes in gang prosecutions:

[I]f we believe that ‘no one is free until everyone is free’ and that ‘injustice anywhere is a threat to justice everywhere,’ we must object to, intervene in, and correct for constitutional violations, even where the criminal defendant is the most despised and, in the eyes of the court, the most dangerous among us. Much like the objection, rejection, and protest of the extension of the Patriot Act, the negligent spreading of coronavirus among the incarcerated, and the countless killings of unarmed Black people, the same treatment is required in response to anti-gang statutes. The same Constitution . . . must be equally applied to actual or accused gang members.²⁰⁷

Competing narratives persist about the two largest “gang raids” in New York City, but one thing is clear: these “takedowns” do not change the low-performing local public schools and high unemployment rates (e.g., 60 percent unemployment in Eastchester Gardens—one area affected by the raids).²⁰⁸ Arresting over 100 young men in an already strained community is not a preventative measure—it is a sweeping reaction that tears families apart. Some of those young men might be the only people who walk their younger siblings to school each day, others might take care of ailing or elderly relatives, and still others might be making strides with mentors in their lives in ways that have not yet fully materialized.

IX. PROPOSED REFORMS²⁰⁹

Several proposals could serve as a foundation from which to

²⁰⁶ Rivlin-Nadler, *supra* note 21.

²⁰⁷ Hayat, *Killing Due Process*, *supra* note 9, at 22–24 (internal citations omitted).

²⁰⁸ See Iverac, *supra* note 116.

²⁰⁹ My use of this term should not be construed to undermine the work of abolitionists. Some activists argue that reforms simply mask the severity of fundamental problems at the core of the American criminal legal system, thereby stalling radical change. My proposals are meant to address the crisis facing the young men who are at risk of being targeted as alleged gang members *right now*; however, they do not resolve the systemic injustices that facilitated and enable the inappropriate, ineffective, and disproportionately

address the harm caused, and risks created by, misapplication of the RICO Act to young Black and Brown men in the so-called “gang policing” and prosecution context:²¹⁰

(1) Government agencies with access to demographic information about defendants in RICO gang prosecutions must prioritize collecting

harmful application of the RICO and VICAR statutes to young Black and Brown men. *See, e.g., Akbar, supra* note 13, at 1787–88 (“Reform is one strategy toward the transformation abolition seeks. Rather than aiming to improve police through better regulation and more resources, reform rooted in an abolitionist horizon aims to contest and then to shrink the role of police, ultimately seeking to transform our political, economic, and social order to achieve broader social provision for human needs. But abolitionist organizers understand that demands on the state are insufficient to undo the carceral state. So, as they run campaigns to divest from, dismantle, and delegitimize the police, they run experiments in accountability and collective care. . . . Abolition challenges reform frameworks in two fundamental ways. First, it advances reform as a strategy or tactic toward transformation, rather than an end in itself. And second, it supplants state and society for police as the object of transformation. In turn, it indicates the need for a range of tactics, experiments, and projects for decarceration and depolicing, and ultimately the need to rethink the state. Reform alone will not be enough. Abolition requires that we become more comfortable with the disruption and delegitimization of prevailing political, economic, and social relations that hold in place brutal inequality. It connects us to grassroots movements that are necessary sources of political power for decarceration and depolicing. Abolitionist demands speak to the fundamental crises of our times, challenge our siloed expertise as legal scholars, and invite us to reconsider our commitments to the status quo. Why have decades of police reform failed to mitigate police violence? Agendas focused on reforming and relegitimizing the police have failed to consider the footprint, power, resources, and legitimacy of police as the heart of the problem. By contending with abolitionist critique and organizing, we deepen our understanding of policing and cogenerate strategies that have the potential for political, economic, and social transformation. Such reorientations can create space for scholars to think about meaningful reform projects that transform the structures and relations of power that undergird policing and the country.”) (internal citations omitted).

²¹⁰ Some experts suggest that targeted policing of only those individuals suspected of violence, especially gun violence, could help reduce shootings while also preventing unnecessarily sweeping gang “takedowns.” I do not include that proposal here because court-involvement and incarceration cause trauma for everyone involved and often further entrench the challenges that lead to gang involvement in the first place; *see, e.g., Southall, supra* note 183 (“Officials say their focus has narrowed to the gang leadership and members who have been involved in shootings. For example, out of the 37 defendants named earlier this year in a set of Brooklyn indictments targeting the Hoolies crew and the 900 gang—both based in Bedford-Stuyvesant—24 were identified as gunmen. Prosecutors said the remaining defendants drove them to hits, procured guns and plotted attacks. [Eric Gonzalez, the Brooklyn district attorney,] said he believe[s] the indictments have helped to bring down shootings in Brooklyn, pointing to maps that showed incidents falling recently in the public housing developments where the gangs battled. ‘It just stops cold,’ he said. ‘We believe the guys we took out in our gang investigation are the shooters.’”).

correct and complete data and making it publicly available (or, at the very least, available to defendants and their counsel). Such data should include information about individuals who accept plea bargains, and the terms thereof, as well as about defendants who go to trial. For example, the DOJ and Federal Bureau of Prisons (BOP) should collect and make publicly available anonymized demographic data about individuals convicted on RICO charges, as well as those serving sentences for RICO convictions.²¹¹ Importantly, increased transparency and improved data collection by government agencies alone is insufficient; legislators, progressive prosecutors, scholars, and organizers must advocate for, and subsequently use, such data to inform efforts to address the statute's disproportionately negative impact.

(2) Gang labeling and gang databases should be eliminated.²¹² Even if these databases offer some limited value in efforts to combat organized crime, they lack oversight, are highly subjective, and they do not reflect the distribution of self-reported gang members described earlier in this Article. Therefore, gang databases are not tracking the "right" people (to the extent that "appropriate" targets for policing and prosecution of this nature exist at all). If some obscure justification enables gang databases to remain in use, they should be constantly monitored for bias, ideally by independent monitors or invested civilian oversight bodies.²¹³ State and local law enforcement agency budgets

²¹¹ In addition to the DOJ data limitations described earlier in this paper, anyone researching this issue will likely be limited to reliance on surnames, sentencing documents, court observations, and the Bureau of Prisons lookup database when attempting to ascertain the race or ethnicity of defendants in gang-related RICO cases; see, e.g., HOWELL & BUSTAMANTE, *supra* note 3, at 13.

²¹² For an example of advocacy around this issue in New York City, see WHO WE ARE, G.A.N.G.S. COALITION, <https://gangscoalition.org/> ("The . . . Coalition is made up of organizers, experts, legal advocates, and directly impacted community members that seek to abolish surveillance and criminalization tools predicated on association, including gang or crew labels. The Coalition's goal is to dismantle systems that increase surveillance, and/or police contact, or enhance punishment based on law enforcement profiling of Black, Latinx and immigrant communities as gang or crew members. Central to eliminating the use of these tools is the redirecting of resources away from the police department and prosecutors and towards harm-reducing, community-based programs that are proven to make neighborhoods safer.").

²¹³ For instructive and comprehensive discussions of effective independent oversight in the corrections context, see generally Michael B. Mushlin & Michele Deitch, *Opening Up a Closed World: What Constitutes Effective Prison Oversight*, 30 PACE L. REV. 1383 (2010); Michele Deitch, *Special Populations and the Importance of Prison Oversight*, 37 AM. J. CRIM. L. 291 (2009). For resources on the basics of civilian oversight, see National Association for Civilian Oversight of Law Enforcement, *Civilian Oversight Basics 2016*, https://www.nacole.org/civilian_oversight_basics. But see Akbar, *supra* note 13, at

should include dedicated resources for screening gang database information, training officers, and eradicating racially biased gang classification methods. Federal law enforcement agencies could also benefit from replicating state-level screening, training, and troubleshooting measures. The results of such resource allocations should ultimately prove to be cost-effective insofar as they lead to jurisdictions spending less money and fewer resources on costly incarceration, reentry facilitation, and support services. Most importantly, any decision about the future of gang databases should be the result of genuine collaboration between community groups, such as the Grassroots Advocates for Neighborhood Groups & Solutions (G.A.N.G.S.) Coalition in NYC, and other stakeholders. The communities which law enforcement claims to protect through gang databases should lead the process of identifying the priorities and tools that will promote their collective safety and wellbeing.

(3) State and federal governments must create and maintain safeguards against misusing “gang prevention” measures as a justification for racial profiling; such safeguards might require coaching law enforcement officials and the legislators who fund them, independent

1804–05 (“Calls for community policing and civilian review overlook critiques and inconclusive evidence over whether either curbs police violence or power. Many accounts—in disciplines like sociology, history, political science, and American and Black studies—frame community policing as central to government attempts to relegitimize police amidst the rebellions of the 1960s. Rather than directly address concerns about police violence and economic inequality, the state invested in community policing in an attempt to reestablish control. Indeed, community policing started as a reform, and is now seen as central to the growth of policing. Fundamentally, [this] ‘more democracy’ frame [that proposes civilian review] fails to account for the antidemocratic nature of the carceral state. Police and prisons lock people out of formal political channels. Incarceration removes a person from their family and community and undermines their ability to engage in civic and social life. Governments deploy arrests and criminal records to deny people the right to vote, to participate in a jury, to find legal work, or to receive government benefits; arrests and criminal records can further create grounds for eviction, deportation, license suspension, and the loss of custodial rights. Mass criminalization creates such ‘extraordinary rates of contact’ between criminal legal institutions and the citizenry that prisons and police become central in shaping notions of citizenship and expectations of the state among ‘custodial citizens.’ For so many people, contact with the criminal system is a demobilizing force that leads to their ‘absence, rather than their presence, in mainstream political life.’ To call for the democratization of policing without grappling with the carceral state’s central role in denying primarily Black, brown, and poor people participation in formal democratic channels and civic and community life—let alone determining the conditions of their lives and engagement with their communities—is a contradiction in terms. And of course, this is just the tip of the iceberg, given the central role of money in politics, and central role of criminalization in maintaining economic stratification.”) (internal citations omitted).

oversight mechanisms—both government-funded oversight that is housed and funded independently from law enforcement, as well as some form of civilian oversight—and broader community input. Federal prosecutors and judges, ideally with the assistance of Congress, should also enact procedural safeguards to this end, as detailed below.

(4) Conviction integrity units²¹⁴ should receive additional support to conduct thorough reviews of all allegedly gang-related RICO conspiracy convictions. Ideally, this change could be effected without increased funding for prosecutors; the combination of additional pressure and scrutiny without corresponding additional resources might serve to incentivize prosecutors to shift their priorities away from gang-related RICO cases.

(5) Congress should ban militarized raids of the nature employed in RICO-related gang “takedowns.” As was the case with the Bronx 120, targets of gang takedowns are rarely all charged with violent crimes. Prosecutors generally build these cases over the course of months or years and by the time of the arrests, they know enough about their targets to arrest them in a manner that is less publicly traumatic for the targeted individuals, their loved ones, and their communities, especially when law enforcement can conclude that individuals do not pose a threat of violence or a flight risk.²¹⁵ These targets have not been found guilty at the time of their arrest, and they might never be: they deserve to be treated accordingly. Indeed, they should be treated humanely regardless of outcome.

(6) As scholars Babe Howell and Priscilla Bustamante have suggested, Congress should amend the RICO statute “to require a jurisdictional minimum for the impact on interstate commerce exceeding \$10 million per year to prevent [prosecutors from using] RICO to bring

²¹⁴ See, e.g., THE NATIONAL REGISTRY OF EXONERATIONS, CONVICTION INTEGRITY UNITS, <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx> (“A Conviction Integrity Unit (CIU) is a division of a prosecutorial office that works to prevent, identify, and remedy false convictions. They are sometimes called Conviction Review Units (CRUs).”).

²¹⁵ See HOWELL & BUSTAMANTE, *supra* note 3, at 23 (“A recent two-part series in the New York Times reports that 81 civilians and 13 law enforcement officers died in SWAT operations between 2010 and 2016. The city of Houston has decided to stop using ‘No-Knock’ warrants altogether due to the outsized risks. In the case of the Bronx 120 raids, a man plunged to his death in the Bronx on April 27, 2016[,] when he climbed out the window to evade police. Risk of death is not the only unnecessary harm related to militarized raids inflict. Each defendant was part of a family and part of a community. The fear and trauma inflicted on family members and communities by a military-style pre-dawn raid is not justified by the charges.”) (internal citations omitted).

ordinary street crimes into federal court.”²¹⁶

(7) Congress—and the Supreme Court, if presented with a relevant case—should eliminate the RICO practice of re-prosecuting predicate acts that have already been adjudicated. Double jeopardy in RICO cases, especially in alleged gang prosecutions of people from low-income communities, warrants greater scrutiny, as do RICO-related exceptions to evidentiary rules, especially those relating to hearsay, social media, and past crimes.²¹⁷

(8) In light of the previous proposal, defense attorneys, judges, and prosecutors at the state court level should adjust their approach to plea deals, case dismissals, and other forms of resolution to counteract the tendency of prosecutors to leverage past charges against defendants in federal RICO indictments.

(9) Legislators should “revise sealing provisions in relation to arrests that do not result in prosecution and prosecutions that do not result in criminal convictions.”²¹⁸ Stricter sealing provisions could disrupt the practice of leveraging this kind of information against RICO conspiracy defendants.

(10) State and local elected officials should reallocate law enforcement resources away from RICO “gang” prosecutions to violence intervention experts, such as those at Save Our Streets, Cure Violence, Urban Peace Academy, the Los Angeles Mayor’s Office of Gang Reduction and Youth Development, 696 Build Queens Bridge, and We Care Outreach. These experts can intervene if gang activity or violence is alleged to have occurred and prevent unnecessary law enforcement contact in the first instance.²¹⁹ Resources should also go to related grassroots organizations, such as G.A.N.G.S. Coalition. Additionally, elected officials “should spend more effort and money to alleviate the conditions attending violence, like unemployment, homelessness and the

²¹⁶ *Id.* at 30.

²¹⁷ For proposals of this nature with a focus on state-level gang statutes and prosecution, see Hayat, *Applying Monell Bifurcation*, *supra* note 28; Fareed Nassor Hayat, *Preserving Due Process: Require the Frye and Daubert Expert Standards in State Gang Cases*, 51 N.M. L. REV. 196 (2021); Hayat, *Killing Due Process*, *supra* note 9; Fareed Nassor Hayat, *Two Bites at the Apple: Requiring Double Jeopardy Protection in Gang Cases*, 73 RUTGERS L. REV. 1463 (2021).

²¹⁸ HOWELL & BUSTAMANTE, *supra* note 3, at 21.

²¹⁹ See LEAP, ABOUT VIOLENCE, *supra* note 181; LEAP, PROJECT FATHERHOOD, *supra* note 181. While many of these programs are inherently imperfect, and they can take time to reach their maximum effectiveness, they nonetheless could provide valuable interventions by respected, trained community members who, most importantly, are not law enforcement officers.

flow of illegal guns from other states.”²²⁰

(11) Advocates should urge Congress to establish a higher bar for enterprise involvement, and the bar for RICO conspiracy prosecutions should be especially high for individuals found to be mere affiliates of, or entirely uninvolved in, the alleged gang at the heart of any given RICO case. Despite their lack of gang involvement, these individuals are nonetheless being dragged into RICO gang prosecutions, with high sentencing exposure and often extensive pre-trial detention.

(12) As I discussed in Part III, the 2013 S.D.N.Y. decision in *Floyd v. City of New York*²²¹ could serve as a means for challenging the constitutionality of RICO prosecutions based on flawed gang databases in court, given the disproportionately negative impact of the practice on young Black and Brown men.

The New York City G.A.N.G.S. Coalition has also released recommendations informed by proven, evidence-based methods of violence reduction, some of which overlap with the proposals described above. These proposals include (1) “Social Inclusion;” (2) “Credible Messengers;” and (3) “Community Investments.” According to the

²²⁰ Southall, *supra* note 183; *see also* DERECKA PURNELL, BECOMING ABOLITIONISTS: POLICE, PROTESTS, AND THE PURSUIT OF FREEDOM 134–36 (Astra Publ’g House 2021) (“Currently, to deter gun violence, prosecutors will charge Black people though the federal system instead of the state system ‘Project EJECT’ provides an example. The federal government works with the police department in Jackson, Mississippi to ‘cut off the flow of young people to Jackson’s street gangs’ by using federal funding to ‘purchase software, equipment and technology to ‘improve their knowledge of the gang structure in our community and target the ‘worst of the worst’ gang members in Jackson.’ Jackson is 82 percent Black and has a per capita income of twenty-two thousand dollars. A quarter of the residents live in poverty, more than double the national rate. Rather than proactive, community-based investments in employment, education, housing, and conflict mediation that [prevents] people from surviving in ways that are criminalized, governments invest in reactive policing and prosecution that imprison poor and working-class people.”); JONATHAN RAPPING, GIDEON’S PROMISE 16–17 (2020) (“Roughly 80 percent of people accused of crimes cannot afford a lawyer, increasing the likelihood that they will end up convicted. A boy raised by a family in the bottom 10 percent of the income distribution is twenty times more likely to be incarcerated as an adult than is a boy raised by a family in the top 10 percent. One study found that less than half of all incarcerated people were employed for two full years before being incarcerated. It also found that of those who were, the median income was only \$6,250. . . . African Americans are nearly six times as likely to be incarcerated as are their white counterparts. For African American men in their thirties, one in every ten is in prison or jail at any given time [A] black male born today has a one-in-three chance of being incarcerated at some time in his life.”) (internal citations omitted).

²²¹ *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

Coalition:

Social Inclusion [e]mpower[s] youth and young adults . . . to take part in community-based work, access quality employment and participate in decision-making processes[, which] can reduce violence. . . . The work of credible messengers and violence interrupters has been demonstrably proven to reduce shootings and violence. . . . [Finally,] increase[d] funding for programs that . . . support [rather than] criminalize people would work to address the root causes of violence, and not simply attempt to arrest our way to safety. These include: [e]mployment development; [s]ustainable housing; [c]onflict transformation; [m]ental health initiatives; [and r]estorative justice.²²²

The twelve reform proposals described in this Part and the three additional recommendations presented by the New York City G.A.N.G.S. Coalition, even taken as a whole, provide only partial solutions.²²³ Alternatively, amending RICO (and VICAR) to expressly exclude federal criminal RICO prosecutions of “gangs” would immediately achieve significant and much-needed reform.

CONCLUSIONS

Application of the RICO Act to alleged neighborhood gangs is both fueled by and continues to perpetuate systemic racism in the United States. The RICO statute is harsh and has devastating consequences as applied in modern-day prosecutions of gangs (and alleged gangs) in low-income communities. State and federal law enforcement’s pretextual use of “gang prevention” to justify racial profiling perpetuates inequity and racism by disproportionately and inappropriately labeling young Black and Brown men as gang members for RICO prosecution. Such neighborhood gangs do not wield a fraction of the power and influence of the statute’s true original target: the Mafia. These “gangs” are often groups of friends that are rarely “organized,”²²⁴ and they demonstrably do not threaten legitimate businesses. Their leaders, if any exist, are neither as insulated nor as powerful as were the Mafia bosses of the early-to-mid twentieth century, rendering RICO far less necessary for “turning” low-

²²² ALTERNATIVES TO GANG POLICING, G.A.N.G.S. COALITION, <https://gangscoalition.org/alternatives/> (last visited Dec. 27, 2021); *see also* COALITION DEMANDS, G.A.N.G.S. COALITION, <https://gangscoalition.org/coalition-demands/> (last visited Dec. 27, 2021).

²²³ For additional, relevant policy recommendations to address racism and racial profiling by law enforcement, *see generally* Justin Hansford, *The Whole System is Guilty as Hell*, HARV. J. AFR. AMER. PUB. POL’Y (Apr. 26, 2015), <https://hjaap.hkspublications.org/2015/04/26/the-whole-system-is-guilty-as-hell/>.

²²⁴ Interview with attorney from the Federal Defenders of New York, *supra* note 189.

level alleged gang members to gain access to their suspected leaders. Most²²⁵ of these alleged neighborhood gangs hardly even resemble the Bloods and Crips of the 1970s, 1980s and 1990s, which had national name recognition and notorious nationwide rivalries, even though they, too, were in a category easily distinguishable from the Mafia.²²⁶

This Article is not intended to discount the very real safety concerns of neighborhood residents who live in proximity to violence, and, potentially, neighborhood gangs. As the New York City G.A.N.G.S. Coalition has articulated: “[V]iolence is unfortunately still a reality in some communities of color, alternatives to gang policing tactics are crucial to helping keep neighborhoods safe without criminalizing or incarcerating its residents.”²²⁷ Claims that incarceration in the U.S. has rehabilitative effects are largely disproven.²²⁸ It is unlikely that many people benefit from the decades of incarceration resulting from inappropriate application of RICO to the members of these alleged gangs—not communities, not families, and certainly not the incarcerated individuals.²²⁹ In some cases, mass arrests based on RICO indictments

²²⁵ As I noted earlier in this Article, the nature of MS-13, 18th Street, or similarly recognized groups is beyond the scope of this paper.

²²⁶ See generally HERBERT C. COVEY, CRIPS AND BLOODS: A GUIDE TO AN AMERICAN SUBCULTURE (2015); ENCYCLOPEDIA OF GANGS, (Louis Kontos & David C. Brotherton eds., Praeger Publishers 2008).

²²⁷ ALTERNATIVES TO GANG POLICING, G.A.N.G.S. COALITION, <https://gangscoalition.org/alternatives/> (last visited Dec. 27, 2021). The coalition observes that “[t]here are proven, evidence-based methods that have worked in the past and are working today to drive down violence.” See discussion *supra* Part IX.

²²⁸ Experts have explained this in myriad ways (e.g., prisons are more punitive in the U.S. than in countries like Denmark, Germany, or the Netherlands, which are intentionally structured to provide skills training and treat incarcerated people with dignity and respect; incarceration in the U.S. does not address many of the root problems that make marginalized people more likely to feel compelled to engage in activities that violate the law in order to survive). See, e.g., MARIEL ALPER, MATTHEW R. DUROSE & JOSHUA MARKMAN, BUREAU OF JUSTICE STATISTICS, 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005-2014) (May 2018), <https://bjs.ojp.gov/library/publications/2018-update-prisoner-recidivism-9-year-follow-up-period-2005-2014> (showing that 68% of recently released individuals were re-arrested within three years, 79% were re-arrested within six years, and 83% were re-arrested within nine years); Sara Tsompanidi, *Does Prison Rehabilitate?*, MEDIUM (Sep. 19, 2019), <https://medium.com/@saratsompanidi/does-prison-rehabilitate-545c94e4d5c2>; RAM SUBRAMANIAN & ALISON SHAMES, VERA INSTITUTE OF JUSTICE, SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES (Oct. 2013), <https://www.prisonpolicy.org/scans/vera/european-american-prison-report-v3.pdf>.

²²⁹ Even if one accepts the premise of retributionists that incarceration need not benefit people who are found guilty of committing crimes, incarceration decreases the wellbeing

can, themselves, actually have the effect of making community members feel less safe. For example, Taylornn Murphy Sr. expressed the disconnect between the articulated justification for the 2014 raid and his reality:

I think the narrative they were trying to spin was that we did these raids because these two individuals got killed. And you know my daughter was one of the individuals that got killed. And I found that to be very troubling because you know you're trying to pin a whole neighborhood against me and my family. Saying that you're the reason for 400 police officers coming [into] our neighborhood and kidnapping individuals or arresting individuals or detaining individuals and I had to immediately speak out about that. I had to immediately say 'hey listen, the two individuals that killed my daughter were already arrested.' You can't be vilifying a whole neighborhood saying they had something to do with my daughter's death because that's not true.²³⁰

Overbroad RICO gang prosecutions call into question the very legitimacy of our justice system and its proclaimed orderly, and fair, administration of justice.²³¹ Beyond the obvious interest of defendants in

of families (e.g., children lose consistent interaction with, and support from, an important adult in their lives; intimate partners experience strain on their relationships and possibly their living and economic situations; criminal records frequently lead to difficulty gaining employment upon release; exposure to trauma inside detention facilities, besides being inhumane in itself, can cause issues for family members who worry about their incarcerated loved ones or feel unequipped to provide the support needed upon release; people held in federal custody to serve their sentences are placed in Federal Bureau of Prisons facilities *throughout the U.S.*, rather than facilities within their state—making visitation with loved ones extremely difficult if not impossible). *See also* SHARON DOLOVICH & ALEXANDRA NATAPOFF, *THE NEW CRIMINAL JUSTICE THINKING* 87 (N.Y. UNI. PRESS 2019) (“[M]any punitive aspects of the criminal process flow simply from passing through the process itself, captured by [Malcolm] Feeley’s famous phrase ‘the process is the punishment.’ Defendants incur arrests records, undergo pre-trial incarceration, lose time from work, and may even lose their jobs in connection with the mere fact of having been brought into the criminal system. As Issa Kohler-Hausmann has described, even when cases are dismissed . . . defendants are often still marked, controlled, surveilled, and burdened in lasting ways. In sum, many of the punitive features of the criminal process are simply beyond counsel’s reach.”).

²³⁰ TRUJILLO & VITALE, *supra* note 60, at 4.

²³¹ Broad discussion of the history, purpose, and impact of the American law enforcement and criminal legal systems is beyond the scope of this paper; however, a number of scholars and abolitionists have argued that these systems have never worked for marginalized people or communities and never will. For examples of this position, critical discussion of the relationship between law and systemic injustice, and analysis of various psychological perspectives on legitimacy and legitimation, *see generally* *POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT*, (Angela J. Davis ed., Pantheon Books 2017); KABA & MURAKAWA, *supra* note 13; Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and*

swift disposition of criminal cases, transparent procedures, fair and equitable discovery, and specific charging documents, their interests are also aligned with those of other stakeholders: taxpayers who fund the legal and incarceration systems, as well as overloaded law enforcement, court, and prison personnel share some of those same interests. Indeed, the very legitimacy of the judiciary depends upon a shared perception of fair and consistent administration of justice. Even when charged individuals succumb to pressure to accept plea deals for potentially shorter sentences, any amount of incarceration, and supervision upon release, comes at a significant financial, socioeconomic, opportunity, and psychological cost to the individuals charged and to society.

Moreover, modern application of the RICO Act to young Black and Brown men in alleged neighborhood gangs runs the risk of law enforcement imposing inaccurate “gang member” labels that could result in the prosecution and incarceration of innocent young men who lack gang ties entirely.²³² When innocent young people become enmeshed in the criminal legal system, they miss important opportunities such as education in a more traditional school setting, healthy socialization with

Corporate Law, 103 MICH. L. REV. 1 (2004); Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, 57 ANN. REV. PSYCHOL. 375 (2006); KIMBERLÉ CRENSHAW ET AL., CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (1995); DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Inés Valdez, Mat Coleman & Amna Akbar, *Law, Police Violence, and Race: Grounding and Embodying the State of Exception*, PROJECT MUSE: THEORY & EVENT 23 (2020) 902, muse.jhu.edu/article/767874; Hansford, *supra* note 223; Hayat, *Applying Monell Bifurcation*, *supra* note 28; Hayat, *Require the Frye and Daubert Expert Standard*, *supra* note 217; Hayat, *Two Bites at the Apple*, *supra* note 217; Hayat, *Killing Due Process*, *supra* note 9; Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1 (2021).

²³² See, e.g., Ariel Louise Gibbs, *A Pre-Conviction List: Exploring Gang Documentation Through the Voices of Those Impacted* (Summer 2019) (M.A. dissertation, San Diego State University) (ProQuest), <https://www.proquest.com/dissertations-theses/pre-conviction-list-exploring-gang-documentation/docview/2314065454/se-2?accountid=14496>; see generally Josmar Trujillo, *New York City has a gang policing problem*, N.Y. AMSTERDAM NEWS (Mar. 29, 2018), www.amsterdamnews.com/news/2018/mar/29/new-york-gang-policing; HOWELL & BUSTAMANTE, *supra* note 3, at 30 (“The fact that many swept up in the [Bronx 120] raids and prosecution were neither gang members, nor charged with violence, raises questions about the criteria that gang units and prosecutors were using to levy accusations against individuals. Across the country, gang units have been responsible for some of the largest scandals in policing history, including the Rampart scandals in Los Angeles. In New York City, gang unit officers have more misconduct complaints (and settlements) than patrol officers.”) (internal citations omitted).

peers and adults, exposure to career possibilities, and relationships with family and partners—not to mention the effect that forcibly removing so many young people from a community at once can have on that community. As part of an oral history of the 2016 Bronx gang raid, Pastor Timothy English, chairman of the nonprofit Bronx Clergy Criminal Justice Roundtable, illustrated this effect:

The life of the community is young people. You want to hear laughter, you want to hear kids on the streets. You want to see them playing basketball in front of the fire hydrant. It's . . . I can't describe it. You feel something is missing. It's almost like after a major storm or catastrophe, where valued aspects of the community are missing. The houses are blown down. It feels like that, like something really happened.²³³

The extreme and dire consequences RICO prosecutions pose for defendants and the country are a call to action.

APPENDIX A

The data included in this Appendix is meant to be illustrative only.²³⁴ This Article is not written for social science or statistical purposes, and the available data is limited. The information summarized below indicates that young Black and Brown men are convicted for federal racketeering offenses at younger ages and lower levels of educational attainment, overall, and in greater numbers proportionately, than their white peers. These disparities support the premise that RICO is destroying the lives of already vulnerable, marginalized, young men at an alarming rate. If so, its use in this context is an undeniable abuse of power that must be addressed.

RICO and VICAR ought to be used only as a last resort. If RICO were an effective response to the challenges young Black and Brown men are deemed to present (and face), then the activities that threaten the safety of their communities would presumably have diminished, resembling the decrease in Mafia activity over the past few decades.²³⁵ They

²³³ Iverac, *supra* note 116. This oral history also includes informative reflections of those targeted in the raid, their loved ones, and some law enforcement officers.

²³⁴ The data included in this Appendix was obtained using the tools made available by the United States Sentencing Commission: *Interactive Data Analyzer*, U.S. SENTENCING COMM'N, <https://ida.uscc.gov/analytics/saw.dll?Dashboard> (last visited 12/4/2020). The “crime type” was “Extortion/Racketeering,” so further information and extraction would be necessary to fully understand this cohort of federal offenders.

²³⁵ See, e.g., Blumenstein, *supra* note 153, at 215 (citing Lesley Suzanne Bonney, Comment, *The Prosecution of Sophisticated Urban Street Gangs: A Proper Application of RICO*, 42 CATH U. L. REV. 579, 580 (1993)) (describing the effectiveness of RICO

demonstrably have not diminished. Such sweeping use of these statutes can destroy lives, and, accordingly, these laws should be limited in their use as the lethal weapons that they are.

SNAPSHOT OF 2018

2018 Not Controlling for Gender:

- There were 288 federal RICO²³⁶ offenders in total
 - 146 were Black and Latino/x²³⁷ (50%)²³⁸
 - 120 were white (41%)
 - The remaining individuals identified as “Other”
- 30 federal RICO offenders were 25 years old and younger
 - 24 were Black and Latino/x (80%)
 - 5 were white (16%)
 - The remaining individual identified as “Other”

2018 Male Offenders Only:

- Of the 250 of the 288 federal RICO offenders who were male
 - 122 were Black and Latino/x (48%)
 - 107 were white (42%)
 - The remaining individuals identified as “Other”
- 27 of the male federal RICO offenders were 25 years old and younger
 - 23 were Black and Latino/x (85%)
 - 3 were white (11%)
 - The remaining individual identified as “Other”
- 61 male federal RICO offenders had not completed high school
 - 31 were Black and Latino/x (50%)

prosecutions against the Mafia in major U.S. cities throughout the late eighties and early nineties).

²³⁶ Use of the term “offender” is not meant to suggest that all people accounted for in this data set were guilty, and it is not meant as a statement about character. The website uses the term “offender,” so that is the language employed here for consistency.

²³⁷ I combined Black and Latino categories into one group in order to illustrate the thesis of this Article and how stark the racial disparity is when viewing the combined Black and Latino data in relation to the other categories.

²³⁸ Percentages are rounded down to the closest whole number and are, therefore, merely approximations.

- 22 were white (36%)
- The remaining individuals identified as “Other”
- 160 male federal RICO offenders had completed, but not exceeded, high school
 - 91 were Black and Latino/x (56%)
 - 57 were white (35%)
 - The remaining individuals identified as “Other”
- 19 male federal RICO offenders had completed college or more
 - 2 were Black and Latino/x (10%)
 - 14 were white (73%)
 - The remaining individuals identified as “Other”

SNAPSHOT OF 2015–2019²³⁹

2015–2019 Male Offenders Only:

- 982 male federal RICO offenders
 - 416 were Black and Latino/x (42%)
 - 472 were white (48%)
- 135 male federal RICO offenders were 25 years old and younger
 - 109 were Black and Latino/x (80%)
 - 22 were white (16%)
- 235 male federal RICO offenders had not completed high school
 - 128 were Black and Latino/x (54%)
 - 72 were white (30%)
- 217 male federal RICO offenders had started college
 - 66 were Black and Latino/x (30%)
 - 129 were white (59%)
- 95 male federal RICO offenders had completed college or more
 - 11 were Black and Latino/x (11%)
 - 69 were white (72%)

²³⁹ These numbers are calculated from the combined totals (not including the “Other” identity category), based on all available information for 2015-2019.

2015–2019 Not Controlling for Gender:

- 1104 federal RICO offenders total
 - 485 were Black and Latino/x (43%)
 - 512 were white (46%)
- 121 federal RICO offenders were 25-years-old and younger
 - 97 were Black and Latino/x (80%)
 - 19 were white (15%)
- 264 federal RICO offenders had not completed high school
 - 143 were Black and Latino/x (54%)
 - 81 were white (30%)
- 243 federal RICO offenders had started college
 - 84 were Black and Latino/x (34%)
 - 133 were white (54%)
- 110 federal RICO offenders had completed college or more
 - 16 were Black and Latino/x (14%)
 - 79 were white (71%)

2015–2019 Male Federal RICO Offenders by Age:

- 21 and under: total of 6 male federal RICO offenders
 - 5 were Black and Latino/x (83%)
 - 1 was white (16%)
- 21-25: total of 129 male federal RICO offenders
 - 104 were Black and Latino/x (80%)
 - 21 were white (16%)
- 26-30: total of 128 male federal RICO offenders
 - 87 were Black and Latino/x (67%)
 - 30 were white (23%)
- 31-35: total of 131 male federal RICO offenders
 - 71 were Black and Latino/x (54%)
 - 43 were white (32%)
- 36-40: total of 144 male federal RICO offenders
 - 67 were Black and Latino (46%)
 - 66 were white (45%)

- 41-50: total of 207 male federal RICO offenders
 - 49 were Black and Latino/x (23%)
 - 126 were white (60%)

- 51-60: total of 148 male federal RICO offenders
 - 27 were Black and Latino/x (18%)
 - 107 were white (72%)

- Over 60: total of 89 male federal RICO offenders
 - 6 were Black and Latino/x (6%)
 - 78 were white (87%)