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THE GAME OF RICO: A POWERFUL PROSECUTORIAL TOOL VERSUS STRICT LEGISLATIVE LIMITATIONS

INTRODUCTION

In the summer of 2018, six members of the Black Souls street gang were sentenced to natural life in prison after a single trial convicted them of violating Illinois' Street Gang and Racketeer Influenced and Corrupt Organizations Law (Illinois RICO).¹ These were the first, and to date only, convictions returned at trial under Illinois RICO, enacted in 2012.² This Comment will examine how Racketeer Influenced and Corrupt Organizations Act (RICO) statutes, often viewed as a powerful prosecutorial tool, can be strictly limited by legislative intent.

This Comment will provide a background on the federal RICO and its expansion and adoption by state governments. Part I looks specifically at New York's state level RICO statute. Part I also provides a background on the context of gang violence in Illinois and the introduction and passing of Illinois' RICO statute.

Part II examines Illinois' RICO statute through its legislative history and demonstrates how it was designed to be a stricter interpretation of the federal RICO Act. Next, Part II compares Illinois' RICO statute with the original federal RICO Act enacted on October 15, 1970, and a similar state enacted RICO statute, New York's Organized Crime Control Act (OCCA) enacted on November 1, 1986. This comparison focuses on key RICO elements and how the definitions of these elements alter the impact of RICO prosecutions.

Part III of this Comment suggests that Illinois trial courts should look to other state court interpretations of similarly enacted state RICO statutes that are more closely constructed to Illinois' RICO statute than the federal RICO Act. This Part further suggests that because Illinois' RICO statute is similar in structure, design, and legislative history and intent to New York's OCCA, it can be instructive to

1. Rosemary Sobol, *Life in Prison for Black Souls Gang Leaders Convicted in Cook County's First Test of State RICO Law*, CHICAGO TRIBUNE (June 1, 2018) <https://www.chicagotribune.com/news/local/breaking/ct-met-black-souls-gang-leaders-sentenced-20180601-story.html>.

2. *Id.*

look to the OCCA for possible persuasive guidance and what to expect from Illinois' RICO statute in the future.

I. BACKGROUND

This Part provides a background on the federal RICO Act and its expansion and adoption by state governments. Next, this Part looks specifically at New York's state level RICO statute. Finally, this Part provides a background on the context of gang violence in Illinois and the introduction and passing of Illinois' RICO statute.

A. *Federal RICO—The Racketeer Influenced and Corrupt Organizations Act*

By the 1950s the U.S. Government began to understand the impact the Italian Mafia had on the country, both financially and in terms of sheer criminality.³ Due to lack of legislation, for the next two decades the Department of Justice struggled to prosecute such complex criminal organizations.⁴ Federal prosecutors were forced to prosecute members of the mafia one by one, without the ability to dismantle such complex criminal organizations.⁵ As a result, highly sophisticated criminal organizations spread and weaved their way into American society and extracted billions of dollars annually from the country's economy.⁶

On October 15, 1970, RICO was signed into law with the intention to eradicate organized crime in the United States.⁷ RICO allowed the government to prosecute individuals who were involved in criminal enterprises, like the mafia or street gangs, which worked together as a unit.⁸ No longer being forced to prosecute members of organized crime one by one, RICO allowed the government to present a criminal enterprise's complete criminal history, even if those acts were committed by a variety of individuals. Robert Mueller, then Assistant Attorney General in charge of the Justice Department's Criminal Division, explained in 1991 that "RICO gives you the ability to pull to-

3. U.S. DEP'T OF JUSTICE, STAFF OF THE ORGANIZED CRIME AND GANG SECTION, CRIMINAL RICO: 18 U.S.C. §§ 1961–1968: A MANUAL FOR FEDERAL PROSECUTORS, at 4 (6th ed. 2016), <https://www.justice.gov/archives/usam/file/870856/download> [hereinafter CRIMINAL RICO MANUAL].

4. See A. Laxmidas Sawkar, *From the Mafia to Milking Cows: State RICO Act Expansion*, 41 ARIZ. L. REV. 1133, 1133 (1999).

5. *Id.*

6. CRIMINAL RICO MANUAL, *supra* note 3, at 4–5.

7. *Id.*; see also 18 U.S.C. §§ 1961–1968 (1970).

8. See 18 U.S.C. §§ 1962–1963 (§ 1962 describes the "prohibited activities" while § 1963 prescribes the criminal penalties enforceable for violations of § 1962).

gether the various criminal acts committed by various persons in an organization (and present them) in one courtroom—before one jury and one judge. . . . Both the jury and the judge understand the scope of criminal activity.”⁹

Under the federal RICO Act a person commits the crime of federal racketeering when he does or conspires to: (a) use income received from a pattern of racketeering activity to acquire an interest in an *enterprise*, (b) acquire an interest in an *enterprise* through a pattern of racketeering activity, or (c) conduct or participate in the affairs of an *enterprise* through a pattern of racketeering activity.¹⁰

The federal definition of enterprise is found in § 1961(4) of the federal RICO Act, stating that the term enterprise “includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹¹ This definition of enterprise is non-inclusive and has been left to the federal courts to interpret. Broad in scope, it includes any association of a group of individuals, legally recognized or not, involved in either legitimate or illegitimate businesses.¹²

The Supreme Court has held that an association-in-fact enterprise is “a group of persons associated together for a common purpose of engaging in a course of conduct” and “is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”¹³

After successful RICO prosecutions against the mafia, federal prosecutors began using RICO as a tool against street gangs. In *United States v. Andrews*, the United States District Court for the Northern District of Illinois found an enterprise to exist where the defendants were members of the El Rukn Street gang in Chicago and were engaged in illegal narcotics trafficking.¹⁴ Over time, federal case law has developed to require that the enterprise element be built around a group of members that demonstrate three characteristics: “(1) common or shared purpose; (2) some continuity of structure and person-

9. Ronald J. Ostrow, *COLUMN ONE: The Mob Against the Ropes: Prosecutors Using New Laws Are Cracking Omerta—the Code of Silence—to Jail Hoodlums. the Mafia Is Still an Ominous Criminal Force, but Has Lost Much Power*, L.A. TIMES (Feb. 9, 1991), http://articles.latimes.com/1991-02-09/news/mn-658_1_criminal-division.

10. 18 U.S.C.A. § 1962 (West, Westlaw through Pub. L. No. 116-130).

11. 18 U.S.C.A. § 1961(4) (West, Westlaw through Pub. L. No. 116-130).

12. *United States v. Turkette*, 452 U.S. 576, 581–82 (1981).

13. *Boyle v. United States*, 556 U.S. 938, 944–45 (2009) (citing *Turkette*, 452 U.S. at 580, 583).

14. Robert Blau & John O’Brian, *Rise And Fall Of El Rukn-Jeff Fort’s Evil Empire*, CHICAGO TRIBUNE (Sept. 8, 1991), <https://www.chicagotribune.com/news/ct-xpm-1991-09-08-9103070697-story.html>; *United States v. Andrews*, 749 F. Supp. 1517 (N.D. Ill. 1990).

nel; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering.”¹⁵ For example, in the case of the El Rukn gang, that common or shared purpose would be illegal narcotics trafficking.

An enterprise associated-in-fact has been held to mean, “simply a continuing unit that functions with a common purpose.”¹⁶ The structure of a formal enterprise is not required.¹⁷ In terms of street gangs, the Seventh Circuit has stated that, “in informal organizations such as criminal groups, there ‘must be some structure, to distinguish an enterprise from a mere conspiracy, but there need not be much.’”¹⁸

Controlling federal caselaw holds that “The enterprise is an entity . . . associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is . . . a series of criminal acts as defined by the statute The existence of an enterprise . . . remains a separate element”¹⁹ The common purpose of an enterprise does not have to be anything more or separate to committing a pattern of criminal activity.²⁰

The federal RICO Act states a “‘pattern of racketeering activity’ requires at least two acts of racketeering activity” within ten years.²¹ Additionally, the two acts of racketeering activity must be related, and “either constitute or threaten long-term criminal activity.”²²

The federal RICO Act has been used several times to prosecute violent street gangs in Chicago.²³ In 2017, a jury convicted six members of the Hobos street gang in Chicago of federal RICO violations.²⁴ The jury found the six Hobo gang members committed eight murders in the span of ten years, along with kidnappings, robberies, and attempted murders.²⁵ The amount of gang violence had not been alleged against a single gang since the El Rukn trial noted above.²⁶

15. *United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982).

16. *Boyle*, 556 U.S. at 948.

17. *United States v. Olson*, 450 F.3d 655, 664 (7th Cir. 2006).

18. *Id.*

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

20. *Id.*

21. 18 U.S.C.A. § 1961(5) (West, Westlaw through Pub. L. No. 116-130).

22. Sawkar, *supra* note 4, at 1151.

23. Ill. H. Transcription Deb., 97th Gen. Assemb., Reg. Sess. No. 33, at 14 (Mar. 31, 2011), <http://ilga.gov/house/transcripts/htrans97/09700033.pdf> [hereinafter Ill. H. Transcription Deb.].

24. Jason Meisner, *Jury convicts reputed leaders of Hobos ‘super gang’ for 8 killings*, CHICAGO TRIBUNE (Jan. 4, 2017), <https://www.chicagotribune.com/news/local/breaking/ct-hobos-gang-verdict-met-20170104-story.html>.

25. *Id.*

26. *Id.*

Recently, four members of the Goonie Boss faction were indicted for federal RICO charges alleging that the gang had carried out ten murders, six attempted murders, and two assaults during a “three-year reign of terror” in the Englewood neighborhood between 2014 and 2016.²⁷ In a troubling illustration of gang violence in Chicago, the four members were not charged with exerting violence to protect turf or a narcotics trade, but for using violence to “simply boost their social media brand.”²⁸

B. States Begin to Follow—The Expansion of RICO

Once the federal RICO Act was enacted in 1970, states quickly followed by enacting their own RICO statutes—with the first state RICO statute becoming effective in 1972.²⁹ By the late 1980s over twenty-eight states had their own RICO statutes, generally modeled after the federal version.³⁰ In constructing their statutes the majority of states expanded on the federal RICO Act and attempted to create statutes that were broader in “language, scope, and intended criminal targets.”³¹

However, a minority of states have enacted statutes that resemble the federal RICO Act at a quick glance but are actually much more limited in scope and designed to target a very specific type of criminal activity. Whether broad or narrow, proponents of state RICO legislation argue that state RICO statutes should be enacted by states, in addition to the federal RICO Act, for four main reasons.³²

First, federal RICO prosecutions of criminal entities are often reserved for larger and more sophisticated criminal enterprises.³³ When looking at curbing violence and implementing effective deterrence, it would be more beneficial for states to have the discretion to prosecute a higher number of smaller criminal entities rather than wait for fewer, but larger, organizations to be prosecuted by federal authorities.³⁴ Ideally, a state RICO statute should work cohesively with the federal RICO Act, with contribution from both local and federal au-

27. Jason Meisner & Annie Sweeney, ‘It was killing for the sake of killing’: Feds charge South Side gang faction in 10 killings in Englewood, CHICAGO TRIBUNE (Oct. 26, 2018), <https://www.chicagotribune.com/news/breaking/ct-met-englewood-gang-murders-20181024-story.html>.

28. *Id.*

29. Sawkar, *supra* note 4, at 1143.

30. *Id.* at 1143–44.

31. Jason D. Reichelt, *Stalking the Enterprise Criminal: State RICO and the Liberal Interpretation of the Enterprise Element*, 81 CORNELL L. REV. 224, 237 (1995).

32. *Id.* at 230–31.

33. *Id.* at 231.

34. *Id.*

thorities. This would allow federal authorities to focus on larger, more well-developed criminal entities, while at the same time state authorities can track and prosecute a larger number of smaller criminal entities.

Second, in states without RICO statutes, state agencies would be put in the position of turning their case over to federal authorities or simply charging the underlying individual criminal acts.³⁵ Steven Kessler, a former New York state prosecutor, noted that in states without RICO statutes, “state authorities were compelled to surrender their cases to federal authorities for prosecution under federal law.”³⁶ Additionally, it has been argued that federal authorities generally would not bring RICO charges if a criminal entity’s predicate acts consisted of only state offenses.³⁷ David Frohnmyer, Oregon’s former Attorney General, further explained that “[w]ithout state RICOs, the position taken by federal prosecutors with regard to use of the federal RICO would essentially leave criminals free from prosecution under federal RICO so long as they avoided commission of federal predicate offenses.”³⁸

Third, state agencies are typically more knowledgeable regarding local criminal entities.³⁹ Local law enforcement is generally better suited for investigations into local criminal entities given their ties to the community, continuity in information gathering, and the amount of officers and detectives at their disposal.⁴⁰ Most effective are task forces that pool together resources from federal authorities with local law enforcement. State prosecutors across the country have reported that one advantage to prosecuting under state RICO statutes is its potential for more severe sentencing.⁴¹ RICO allows prosecutors to combine a number of minor criminal offenses, which on their own would not allow such sentencing, but together, can warrant stiffer penalties. At least one prosecutor’s office has reported that its state RICO statute was successful in curbing street gang “turf wars.”⁴²

35. *Id.* at 232.

36. *Id.* at 233.

37. Reichelt, *supra* note 31, at 233.

38. *Id.*

39. *Id.* at 232.

40. *See id.*

41. Donald J. Rebovich, Kenneth R. Coyle & John C. Schaaf, *Local Prosecution of Organized Crime: The Use of State RICO Statutes*, U.S. DEP’T OF JUSTICE, at 9 (Oct. 1993), <https://www.ncjrs.gov/pdffiles1/Digitization/143502NCJRS.pdf> [hereinafter Rebovich et al.].

42. *Id.* at 12.

Finally, state RICO statutes are typically accompanied with evidentiary advantages.⁴³ For example, by consolidating several predicate acts, prosecutors can illustrate to a jury the larger picture of the criminal entity.⁴⁴ The jury can be shown the forest, and not simply presented tree by tree.

C. New York's Version

On November 1, 1986, New York enacted its version of the federal RICO Act as the Organized Crime Control Act (OCCA).⁴⁵ The Act was created in the context of New York's history with organized crime in the 1980s⁴⁶, similar to Chicago's struggle with gang violence today. However, New York's legislature was unwilling to enact a statute with the breadth of the federal RICO Act.⁴⁷ New York's OCCA was thus limited by strictly defining its terms and objectives to target the specific criminal activity it had in mind—organized crime—by creating the crime of enterprise corruption.⁴⁸ The legislature chose to focus on criminal enterprises “because their sophistication and organization make them more effective at their criminal purposes and because their structure and insulation protect their leadership from detection and prosecution.”⁴⁹ By creating the crime of enterprise corruption, New York's legislature aimed to “draft a narrower and more precise statute than RICO” and attempted to “avoid the wide scope and sweep of RICO.”⁵⁰ A person commits the crime of enterprise corruption when:

[1] that person is employed by or associated with a criminal enterprise, knowing of the criminal enterprise's existence and the nature of its activities, and [2] (a) that person intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity, or (b) intentionally acquires or maintains any interest in or control of an enterprise, by participating in a pattern of criminal activity, or (c) participates in a pattern of criminal activity and knowingly invests any of the proceeds of the criminal activity or of the investment of those proceeds, in an enterprise.⁵¹

43. Reichelt, *supra* note 31, at 232.

44. *Id.* at 232.

45. N.Y. PENAL LAW §§ 460.00–460.80 (McKinney 1986 & Supp. 2008); *see also* Sawkar, *supra* note 4, at 1150.

46. *See* Sawkar, *supra* note 4, at 1150.

47. *Id.* (citing *People v. Capaldo*, 572 N.Y.S.2d 989, 990 (Sup. Ct. 1991)).

48. Sawkar, *supra* note 4, at 1146 & n.95.

49. N.Y. PENAL LAW § 460.00 (McKinney 1986 & Supp. 2008).

50. Sawkar, *supra* note 4, at 1150 (citing N.Y. PENAL LAW § 460.00–460.80 and *People v. Capaldo*, 572 N.Y.S.2d 989, 990 (1991)).

51. N.Y. PENAL LAW § 460.20 (McKinney 1986 & Supp. 2008).

One of OCCA's authors, Assembly Member Melvin H. Miller, wrote that the severe penalties provided by OCCA, "should be reserved for those who not only commit crimes, but do so as part of an organized criminal enterprise."⁵² New York courts have explained that "the standard for proving enterprise corruption was higher than the federal statute's counterpart because the scope of New York's act was defined more rigorously."⁵³

New York defines a criminal enterprise as a "group of persons sharing a common purpose of engaging in criminal conduct associated in an ascertainable structure distinct from a pattern of criminal activity, and with a continuity of existence, structure and criminal purpose beyond the scope of individual criminal incidents."⁵⁴ A New York court explained:

A team of people who unite to carry out a single crime or a brief series of crimes may lack structure and criminal purpose beyond the criminal actions they carry out; such an ad hoc group is not a criminal enterprise. If a group persists, however, in the form of a 'structured, purposeful criminal organization', beyond the time required to commit individual crimes, the continuity element of criminal enterprise is met.⁵⁵

This narrowly tailored definition therefore requires that a defendant must knowingly belong to a criminal enterprise and have the intent to advance or participate in the furtherance of the criminal enterprise through a pattern of criminal activity. In other words, the law only applies to persons employed by or associated with criminal enterprises. "This significant modification from RICO represents an effort by the state legislatures 'to protect against abuse and undue prejudice to defendants.'"⁵⁶ In the approval of OCCA, the Governor's Memorandum stated:

The reach of the [law] is not limited to traditional organized crime families or crime syndicates; rather, it includes any group with a shared criminal purpose and a continuity of existence and structure. Crimes committed by individuals who engage in a brief series of criminal acts in a[n] *ad hoc* and unstructured group are not subject to prosecution under the Act. If, however, the group demonstrates a

52. Sawkar, *supra* note 4, at 1145-46 & n.92 (citing Letter from Melvin H. Miller, Chair, New York Committee on Codes, to Evan A. Davis, counsel to the Governor (July 16, 1986), *quoted in* *People v. Yarmy*, 171 Misc. 2d 13, 16 (N.Y. 1996).

53. *Id.* at 1146 & n.95 (citing *Yarmy*, 171 Misc. 2d. at 16).

54. N.Y. PENAL LAW § 460.10(3) (McKinney 1986 & Supp. 2008).

55. *People v. Keschner*, 25 N.Y.3d 704, 720 (2015).

56. Steven L. Kessler, *And a Little Child Shall Lead Them: New York's Organized Crime Control Act of 1986*, 64 ST. JOHN'S L. REV. 797, 802 (1990) (citing Governor's Memorandum on Approval of ch. 516, N.Y. Laws (McKinney) (July 24, 1986), *reprinted in* N.Y. Laws 3175 (McKinney) (1986)).

structure—such as the hierarchy of a ‘Cosa Nostra’ family, or the specialization of a narcotics, loansharking or gambling operation, the criminal enterprise requirement is satisfied.⁵⁷

Further separating itself from the federal RICO Act, New York’s OCCA requires three separate predicate acts that are not “isolated incidents nor so closely related and connected in point of time or circumstance of commission as to constitute a [single] criminal offense.”⁵⁸

D. Background in Illinois

Chicago is home to over seventy different gangs and over 150,000 gang members.⁵⁹ Gang violence in Illinois, especially within and around Chicago, is vastly disproportionate to other comparable states and cities. In 2017, Chicago had 650 homicides, more than New York City and Los Angeles combined, with a population three times smaller than New York City and almost twice as small as Los Angeles.⁶⁰ The vast majority of those homicides were gang related.⁶¹ Violence is a quick result of any perceived disrespect, which, due to gang members’ activity on social media platforms, can spread citywide in seconds.⁶² In 2018, one summer weekend in Chicago resulted in over seventy-four people being shot.⁶³

One reason for this violence is that within Illinois, gangs have splintered, creating smaller groups and increasing violence.⁶⁴ Between 2009 and 2012, there was a twenty-five percent increase in gang activity.⁶⁵ These smaller groups have been much harder to find responsible and to successfully prosecute.⁶⁶ Additionally, these smaller gangs have been less likely to be selected for prosecution by the federal govern-

57. *Id.* at 809 (citing Governor’s Memorandum on Approval of ch. 516, N.Y. Laws (McKinney) (July 24, 1986), reprinted in N.Y. Laws 3175 (McKinney) (1986)).

58. N.Y. PENAL LAW § 460.10(4)(b) (McKinney 1986 & Supp. 2008).

59. *Chicago Most Gang-Infested City in U.S., Officials Say*, NBC CHICAGO (Jan. 26, 2012), <https://www.nbcchicago.com/news/local/chicago-crime-commision-gang-book-138174334.html>.

60. Michael Tarm, *Social Media Altering Chicago Street-gang Culture, Fueling Violence*, CHICAGO SUN TIMES (June 11, 2018), <https://chicago.suntimes.com/news/social-media-street-chicago-gang-culture-fueling-violence/>.

61. *Id.*

62. *Id.*

63. Editorial Board, *Chicago’s Great Shame, Chicago’s Crisis: Blood on the Streets*, CHICAGO TRIBUNE (Aug. 6, 2019), <https://www.chicagotribune.com/news/opinion/editorials/ct-edit-violence-chicago-gangs-police-20180806-story.html>.

64. Ill. H. Transcription Deb., *supra* note 23, at 26.

65. Ma’ayan Rosenzweig, “Hidden America: Don’t Shoot I Want to Grow Up”: Statistics Surrounding Gang Violence in Chicago, ABC NEWS, <https://abcnews.go.com/Nightline/fullpage/chicago-gang-violence-numbers-17509042> (last visited Mar. 14, 2019).

66. Ill. H. Transcription Deb., *supra* note 23, at 26.

ment under its RICO Act.⁶⁷ The primary issue Illinois faced was its inability to tie gang leaders to the actual members of the gang who committed the crime. In other words, gang leaders were being acquitted because Illinois was unable to link the people who ordered the crimes to those who actually committed the crimes.⁶⁸

E. Illinois' Version of RICO

As a result of the devastating gang violence in Chicago, and Illinois as a whole, a RICO statute was proposed by several Illinois State's Attorneys with the desired purpose of fixing the missing links in the prosecution of street gangs.⁶⁹ It was argued that Illinois' lack of such law was one reason for the disproportionate amount of gang violence within Illinois, and such a law was "necessary to protect the citizens from crime."⁷⁰

With the local prosecutor's ability to bring these charges, as opposed to waiting for the federal government to decide whom and when it wanted to prosecute, such a statute would provide a place in state courts for these charges. Thus, the state prosecutor's ability to bring RICO charges, as opposed to waiting for the federal government to decide whom and when it wanted to prosecute, would serve as both a crime fighting tool and as a deterrent to future gang violence.⁷¹ Former Cook County State's Attorney Anita Alvarez, who helped author and support the statute, stated:

For the first time in the history of our state, this new law will give local prosecutors the tools to identify and address patterns in multiple gang-related offenses and join different offenses and offenders into a single court proceeding. . . . This new law will require fundamental changes in the way state prosecutors approach gang crimes because racketeering has not existed under Illinois law in any meaningful shape or form.⁷²

State's Attorney Alvarez further stated that "the goal is to attack the city's gang problem by going after 'the guys who are calling the shots'" and noted that, at the time, thirty-one other states had state

67. *Id.*

68. *Id.* at 25–26.

69. *See id.*

70. *Id.* at 25.

71. *Id.* at 26.

72. Matthew Lynch, *New Gang Law Blows into the Windy City, Causing a Backlash in Illinois*, HUFFPOST (June 30, 2012), https://www.huffpost.com/entry/chicago-gangs-rico-laws_b_1631584?utm_hp_ref=black-voices.

RICO statutes.⁷³ Fellow Illinois State’s Attorney for Sangamon County John Milhiser was quoted:

The intent is to allow law enforcement to go after leaders, those on the higher end who are calling the shots. . . . We’ll continue to prosecute lower-level drug dealers and other such criminals. But if we are able to identify an organization that’s involved, we’ll use this tool to go after those higher-level individuals.⁷⁴

In 2013, then Chicago Police Superintendent Garry McCarthy referenced New York’s OCCA, stating that during his tenure in New York, similar measures to the Illinois RICO statute were used and allowed the police to “penetrate the veil of secrecy” surrounding gang leaders insulation from prosecution.⁷⁵ Regarding Illinois’ RICO statute, McCarthy further stated, “We’re going to use this a lot.”⁷⁶ It was McCarthy’s opinion that once gang leaders realized that violence was bad for business, they would change their culture and resort to less violent means.⁷⁷

In 2012, then Illinois Governor Pat Quinn signed into law the Illinois RICO statute.⁷⁸ The Illinois RICO statute was enacted on June 11, 2012 and had a sunset clause for its repeal on June 11, 2017—five years after it became law.⁷⁹ In June 2017, the statute was renewed for another five years, with a repeal date of June 11, 2022.⁸⁰

Illinois’ RICO statute gave prosecutors more discretion and the new ability to prosecute gang leaders for the actions of their members.⁸¹ Numerous Chicago area gangs have been successfully prosecuted under the federal RICO Act.⁸² However, Illinois’ own police and prosecutors did not previously have access to this tool.⁸³

The Illinois RICO statute, for the first time, allowed state prosecutors to indict and prosecute gangs and their members as criminal en-

73. *Quinn Signs New State Law To Target Street Gangs*, CBS CHICAGO (June 11, 2012), <https://chicago.cbslocal.com/2012/06/11/quinn-signs-new-state-law-to-target-street-gangs/>.

74. Chris Dettro, *State RICO Law Unlikely to Be Used Much in Central Illinois*, THE STATE JOURNAL-REGISTER (June 17, 2012), <https://www.sj-r.com/article/20120617/NEWS/306179950>.

75. *New State ‘RICO’ Law Leads to Street Gang Arrests*, CBS CHICAGO (June 13, 2013), <https://chicago.cbslocal.com/2013/06/13/new-state-rico-law-leads-to-sreet-gang-arrests/>

76. *Busting criminal gangs through RICO*, CHICAGO TRIBUNE (June 22, 2013), <https://www.chicagotribune.com/opinion/ct-xpm-2013-06-22-ct-edit-rico-0622-20130622-story.html>.

77. *Id.*

78. 720 ILL. COMP. STAT. 5/33G (2012 & Supp. 2019); see also *Quinn Signs New State Law To Target Street Gangs*, *supra* note 73.

79. H.B. 2969, 100th Gen. Assemb., 1st Reg. Sess. (Ill. 2017).

80. *Id.*; see also 720 ILL. COMP. STAT. 5/33G-9 (2012 & Supp. 2019).

81. Ill. H. Transcription Deb., *supra* note 23, at 14–15.

82. *Id.*

83. *Id.*

terprises.⁸⁴ State prosecutors were able to combine a number of predicate offenses and prosecute the principals involved, not just the gang members who committed the underlying criminal acts.⁸⁵

Under the Illinois RICO statute, prosecutors must prove three things: (1) that the gang exists; (2) that there is gang activity, such as initiations or meetings; and (3) that the gang is involved in at least three types of crime, such as kidnapping, drug trafficking, or murder.⁸⁶

Illinois' RICO statute also affects sentencing for gang members. Even if a gang member was not involved in any specific criminal acts, they can be sentenced up to thirty years if they are found to have been a key player in the gang.⁸⁷ Sentences can reach to natural life if the criminal enterprise involves murders.⁸⁸

Because the Illinois RICO statute is a direct response to Chicago's gang violence and is designed to protect the public from the pervasive violence committed by street gangs and other criminal enterprises,⁸⁹ it excludes investigations into other types of organizations, such as white-collar crime, public corruption, and unions.⁹⁰

II. ANALYSIS

This Part first examines Illinois' RICO statute through its legislative history and demonstrates how it was designed to be a stricter interpretation of the federal RICO Act. Next, this Part compares Illinois' RICO statute with the original federal RICO Act and a similar state enacted RICO statute, New York's OCCA. This comparison focuses on key RICO elements and how the definitions of these elements alter the impact of RICO prosecutions.

84. *Id.* at 12.

85. *Id.*

86. Timothy Bella, *Will Illinois RICO Law 'with Teeth' Help Chicago?*, ALJAZEERA AMERICA (Aug. 22, 2013), <http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/8/22/chicago-s-gang-violencewillillinoisricolawwithteethhelp.html>.

87. Andy Grimm, *Black Souls Gang Members Head to Trial on RICO Charges*, CHICAGO SUN TIMES (Oct. 1, 2017), <https://chicago.suntimes.com/news/black-souls-gang-members-head-to-trial-on-rico-charges/>.

88. *Id.*

89. 720 ILL. COMP. STAT. 5/33G-2 (2012 & Supp. 2019).

90. Sophia Tareen, *Gov. Quinn Signs Street Gang RICO Act*, PANTAGRAPH (June 11, 2012), https://www.pantagraph.com/news/state-and-regional/illinois/gov-quinn-signs-street-gang-rico-act/article_4a65a04a-b400-11e1-9b26-001a4bcf887a.html; Ill. S. Transcript, 97th Gen. Assemb., Reg. Sess. No. 122, at 108 (May 25, 2012), <http://www.ilga.gov/senate/transcripts/strans97/09700122.pdf> [hereinafter Ill. S. Transcript].

A. Illinois' Legislative History

While the federal RICO Act was drafted by G. Robert Blakey in the late 1960s, Blakey's son Jack Blakey, along with then Cook County State's Attorney Anita Alvarez, drafted Illinois' RICO statute.⁹¹ While the authors of the two RICO statutes share familiar bloodlines, there are stark contrasts in the structure, design, and legislative history and intent between the two statutes.

Illinois belongs in the minority of states that have enacted statutes that may resemble the federal RICO Act at a quick glance, but in application are much more limited in scope, and are designed to target a very specific type of criminal activity. Illinois' RICO statute is narrower than those enacted by the majority of states in several ways and is "not a broad and overreaching Bill that historically has been associated with the term 'RICO.'"⁹²

Through Illinois' RICO statute, the Illinois legislature intended to target the leaders of violent street gangs.⁹³ These street gangs are viewed as a criminal enterprise.⁹⁴ In a departure from the federal RICO Act, the Illinois legislature required that an enterprise "have an ascertainable structure distinct from that inherent in the conduct of a pattern of predicate activity,"⁹⁵ meaning the enterprise must be distinct from the criminal activity itself. The criminal activity alone cannot create the enterprise.

Further distancing itself from the federal RICO Act, Illinois' RICO statute includes language that states a prosecutor must show a defendant intentionally participated in the operation or management of an enterprise.⁹⁶ The legislative intent is clear—that unlike the wide breadth of the federal RICO Act, Illinois' RICO statute was designed to give prosecutors "a tool to target criminal enterprises and specifically target the organizers and leaders of those criminal enterprises by proving that individuals within the enterprise have engaged in a pattern of criminal list of—predicate offenses."⁹⁷ The primary elements of an Illinois RICO violation are determined by the definitions of three key terms: operation or management, enterprise, and pattern of predicate activity.

91. Bella, *supra* note 86.

92. Ill. H. Transcription Deb., *supra* note 23, at 17.

93. Ill. S. Transcript, *supra* note 90, at 108.

94. *Id.*

95. 720 ILL. COMP. STAT. 5/33G-3(b)(2)(C) (2012 & Supp. 2019).

96. *Id.* 5/33G-4(a).

97. Ill. S. Transcript, *supra* note 90, at 108.

1. *The Requisite Elements*

(a) It is unlawful for any person, who intentionally participates in the operation or management of an enterprise, directly or indirectly, to:

- (1) knowingly do so, directly or indirectly, through a pattern of predicate activity;
- (2) knowingly cause another to violate this Article; or
- (3) knowingly conspire to violate this Article.

....

(b) It is unlawful for any person knowingly to acquire or maintain, directly or indirectly, through a pattern of predicate activity any interest in, or control of, to any degree, any enterprise, real property, or personal property of any character, including money.⁹⁸

a. Operation and Management

The Illinois legislature decided to depart from the federal RICO Act and create an operation and management test to limit the scope of Illinois' RICO statute due to fear of putting such a "broad tool in the hands of not just the Cook County State's Attorney's Office, but the other hundreds and one State's [A]ttorneys throughout the State who are not politically elected."⁹⁹

The Illinois legislature defines the terms operation or management as "directing or carrying out the enterprise's affairs and is limited to any person who knowingly serves as a leader, organizer, operator, manager, director, supervisor, financier, advisor, recruiter, supplier, or enforcer of an enterprise in violation of this Article."¹⁰⁰ The most notable difference in this language from that of the federal RICO Act is the added *mens rea* requirement of "knowingly." By adding this *mens rea* requirement, Illinois insured that only those who knowingly advance an enterprise through their pattern of predicate activity would be subject to criminal liability provided by Illinois' RICO statute.

b. Enterprise

Illinois' definition of enterprise includes: "(1) any partnership, corporation, association, business or charitable trust, or other legal entity; and (2) any group of individuals or other legal entities, or any combination thereof, associated in fact although not itself a legal entity."¹⁰¹ Both licit and illicit enterprises are included under Illinois' definition

98. 720 ILL. COMP. STAT. 5/33G-4(a)-(b) (2012 & Supp. 2019).

99. Ill. S. Transcript, *supra* note 90, at 111 (quoting Sen. Raoul).

100. 720 ILL. COMP. STAT. 5/33G-3(d) (2012 & Supp. 2019).

101. *Id.* 5/33G-3(b)(1)-(2).

of the term.¹⁰² The legislature further explained that “[a]n association in fact must be held together by a common purpose of engaging in a course of conduct, and it may be associated together for purposes that are both legal and illegal.”¹⁰³ The legislature included a three-part test to establish an association-in-fact, stating that:

An association in fact must:

- (A) have an ongoing organization or structure, either formal or informal;
- (B) the various members of the group must function as a continuing unit, even if the group changes membership by gaining or losing members over time; and
- (C) have an ascertainable structure distinct from that inherent in the conduct of a pattern of predicate activity.¹⁰⁴

The obvious legislative target of Illinois’ RICO statute, street gangs, are considered associations in fact. To establish that a street gang is an association in fact, prosecutors must prove three things: (A) that the gang exists; (B) that there is gang activity, such as initiations or meetings; and (C) that the gang is involved in at least three types of crime, such as kidnapping, drug trafficking, or murder.¹⁰⁵

c. Pattern of Predicate Activity

With the fear of a such a broad tool being misused by state prosecutors, the Illinois legislature again departed from the federal RICO Act through the requirement and definition of a “pattern of predicate activity.”¹⁰⁶ In 2012, while discussing House Bill 1907 (the Illinois RICO statute), then Senator Kwame Raoul, and now Attorney General of Illinois, stated:

We’ve limited the predicate activity to actual acts, actual acts, and deleted references to attempt, conspiracy, endeavor, and solicitation. We’ve raised the threshold of predicate activity to include Class 2 felonies or higher We require that the prosecutor prove three—the three predicate offenses, as opposed to two, and require that the predicate offenses take place within three years of each other, as opposed to ten years. So, we’re—it’s a—an extreme narrowing¹⁰⁷

Illinois defines a pattern of predicate activity as (1) “at least [three] occurrences of predicate activity that are in some way related to each other and that have continuity between them, and that are separate

102. *Id.*

103. *Id.* 5/33G-3(b)(2).

104. *Id.* 5/33G-3(b)(2)(A)–(C).

105. Bella, *supra* note 86.

106. 720 ILL. COMP. STAT. 5/33G-3(f) (2012 & Supp. 2019).

107. Ill. S. Transcript, *supra* note 90, at 111 (quoting Sen. Raoul).

acts . . . and (2) which occurs after the effective date of [Illinois' RICO statute], and the last of which falls within [three] years (excluding any period of imprisonment) after the first occurrence of predicate activity."¹⁰⁸ The statute states: "Acts are related to each other if they are not isolated events, including if they have similar purposes, or results, or participants, or victims, or are committed a similar way, or have other similar distinguishing characteristics, or are part of the affairs of the same enterprise."¹⁰⁹ The statute further states: "There is continuity between acts if they are ongoing over a substantial period, or if they are part of the regular way some entity does business or conducts its affairs."¹¹⁰

In contrast to the federal RICO Act which only requires two predicate acts and up to ten years between acts,¹¹¹ Illinois requires that three predicate acts occur after June 11, 2012 (the statute's enactment), and that the last predicate act occurs within three years of the first predicate act.¹¹²

d. Statutory Safeguards

In addition to the narrowed definitions and heightened level of requirements to warrant a prosecution under Illinois' RICO statute, the legislature built in additional statutory safeguards.¹¹³ The Illinois' RICO statute requires that the State's Attorney for a county, "or a person designated by law to act for him or her and to perform his or her duties during his or her absence or disability, may authorize a criminal prosecution under this Article."¹¹⁴ Therefore, a prosecutor must get the approval of the elected State's Attorney for her county before she files RICO charges against a defendant.

Before a State's Attorney can authorize a criminal RICO prosecution, she must "adopt rules and procedures governing the investigation and prosecution of any offense enumerated" by Illinois' RICO statute.¹¹⁵ Additionally, the rules and procedures adopted require any potential prosecution under the RICO statute "be subject to an internal approval process in which it is determined, in a written prosecution memorandum prepared by the State's Attorney's Office."¹¹⁶

108. 720 ILL. COMP. STAT. 5/33G-3(f)(1)-(2) (2012 & Supp. 2019).

109. *Id.* 5/33G-3(f)(1).

110. *Id.* 5/33G-3(f)(1).

111. 18 U.S.C.A. § 1961(5) (West, Westlaw through Pub. L. No. 116-130).

112. 720 ILL. COMP. STAT. 5/33G-3(f)(2) (2012 & Supp. 2019).

113. *Id.* 5/33G-4(f).

114. *Id.*

115. *Id.*

116. *Id.*

This memorandum must include that the prosecution “is necessary to ensure that the indictment adequately reflects the nature and extent of the criminal conduct involved in a way that prosecution only on the underlying predicate activity would not . . .”¹¹⁷ and “a prosecution under this Article would provide the basis for an appropriate sentence under all the circumstances of the case in a way that a prosecution only on the underlying predicate activity would not.”¹¹⁸

B. *Illinois’ RICO Statute in Action*

The restrictions set forth by the legislator have been effective in limiting the reach of the RICO statute. To date, the implementation of the Illinois RICO statute has not resulted in an overly broad attack on criminal liability in Illinois. While certain states have modeled their RICO statutes after the federal version, and often broaden its reach, Illinois has done the exact opposite, extremely limiting its applicability.

Illinois’ RICO statute is narrower than those enacted by other states in several ways. First, the statute is limited to street gangs, as evidenced by the title of the statute.¹¹⁹ Second, Illinois requires at least three predicate acts to establish a “pattern of predicate activity.”¹²⁰ Additionally, Illinois requires that these predicate acts occur after June 11, 2012 (the statute’s enactment), and that the last predicate act occurs within three years of the first predicate act.¹²¹ The federal RICO Act only requires two predicate acts and up to ten years between acts.¹²² Thirdly, Illinois requires all of these predicate acts to be Class 2 felonies or higher.¹²³

Illinois also included a definition for operation and management, unlike the federal RICO Act.¹²⁴ Under federal RICO Act, the federal court’s interpretation of operation and management has created issues as to how far down the chain of command the government may reach when using RICO.¹²⁵ Illinois defined operation and management as “directing or carrying out the enterprise’s affairs and is limited to any person who knowingly serves as a leader, organizer, operator, manager, director, supervisor, financier, advisor, recruiter, supplier, or en-

117. *Id.*

118. 720 ILL. COMP. STAT. 5/33G-4(f) (2012 & Supp. 2019).

119. *Id.* 5/33G-1.

120. *Id.* 5/33G-3(f)(1).

121. *Id.* 5/33G-3(f)(2).

122. See 18 U.S.C.A. § 1961(5) (West, Westlaw through Pub. L. No. 116-130).

123. 720 ILL. COMP. STAT. 5/33G-3(e) (2012 & Supp. 2019).

124. *Id.* 5/33G-3(d).

125. CRIMINAL RICO MANUAL, *supra* note 3, at 89, 98, 156.

forcer of an enterprise in violation of this Article.”¹²⁶ By adding the *mens rea* requirement of knowingly, the Illinois legislature limited the statute’s application to those higher up within the organization.

On December 2, 2017, approximately six years after its enactment, the first convictions were returned under the Illinois RICO statute.¹²⁷ A jury found six leaders of the Black Souls, a street gang located in the West Garfield Park neighborhood of Chicago, guilty of racketeering conspiracy and drug conspiracy.¹²⁸ These convictions were a culmination of an investigation that started months prior to June 13, 2013, when police arrested forty-one members of the Black Souls street gang.¹²⁹ Twenty of these members were subsequently charged with criminal enterprise as to the Black Souls street gang, murder, witness intimidation, drug trafficking, kidnapping, armed robbery, and illegal weapons offenses.¹³⁰ Of the twenty gang members originally charged, 14 pled guilty.¹³¹

Among the six brought to trial were Cornell Dawson, the leader of the Black Souls; Teron Odum, Dawson’s second-in command; Duavon Spears, a gang enforcer; and three additional trusted advisers and managers.¹³² These top members of the Black Souls terrorized and controlled with “an iron fist” an area in East Garfield Park, which consisted of a few square blocks.¹³³ The Black Souls’ gang operation was similar to that of a corporation—fully equipped with a management hierarchy, sales quotas, and corresponding rules.¹³⁴ The gang was estimated to have been netting as much as \$11 million in the East Garfield Park drug market.¹³⁵

Ultimately, the jury found that at least four murders were committed by the Black Souls to protect their drug operation and as retali-

126. 720 ILL. COMP. STAT. 5/33G-3(d) (2012 & Supp. 2019).

127. Megan Crepeau, *Six Black Souls Gang Leaders Convicted in Cook County’s First Test of State RICO Law*, CHICAGO TRIBUNE (Dec. 2, 2017), <https://www.chicagotribune.com/news/local/breaking/ct-met-black-souls-gang-trial-20171130-story.html>.

128. *Id.*

129. Jason Meisner, *Black Souls Gang Leaders Ordered Held Without Bail*, CHICAGO TRIBUNE (June 14, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-06-14-chi-black-souls-gang-leaders-ordered-held-without-bail-20130614-story.html>.

130. Megan Crepeau, *Black Souls Gang Trial Goes to Jury in Cook County’s First Test of State Racketeering Law*, CHICAGO TRIBUNE (Nov. 28, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-met-black-souls-gang-racketeering-trial-20171127-story.html>.

131. *Id.*

132. Crepeau, *supra* note 127.

133. Megan Crepeau, *Six reputed gang leaders go on trial in first test of state racketeering law*, CHICAGO TRIBUNE (Oct. 2, 2017), <https://www.chicagotribune.com/news/breaking/ct-met-black-souls-gang-rico-trial-20171002-story.html>.

134. Grimm, *supra* note 87.

135. *Id.*

tion against rival gangs.¹³⁶ One of the murders occurred on October 20, 2012, when Claude Snulligan was executed in broad daylight on the Westside of Chicago by the Black Souls.¹³⁷ Two months prior, Snulligan refused to accept a bribe and cooperate with leaders of the Black Souls in a pending aggravated battery case against Teron Odum.¹³⁸

On June 1, 2018, all six members of the Black Souls who were convicted at trial under the state RICO statute were sentenced to life in prison.¹³⁹ Each of the six defendants were sentenced to life in prison for the RICO charge and to consecutive forty-year terms for narcotics conspiracy.¹⁴⁰ Kimberly M. Foxx, Cook County State's Attorney, stated:

The sentences imposed by the Court hold the defendants accountable for their roles as leaders of the violent Black Souls street gang and for their participation in murders, attempted murders, shootings, kidnappings, beatings and drug trafficking. The severity of these sentences will not only protect the community from these defendants, but also send a strong message to the leaders of other violent gangs that they will be held accountable. I want to thank our law enforcement partners on this case, the Chicago Police Department and Federal Bureau of Investigation, who tirelessly worked to bring the leaders of the Black Souls to justice. My office is committed to working with our law enforcement partners to bring additional prosecutions like this one that strategically target violent offenders preying on communities already ravaged by violent crime and drugs.¹⁴¹

On October 30, 2014, the first set of arrests in Lake County, Illinois under the Illinois RICO statute took place when twenty-one members of the Four Corners Hustlers street gang were arrested.¹⁴² The investigation, beginning in January 2014, referred to as "Operation Shut Down the Hustle," resulted in the recovery of large amounts of guns, cars, money, heroin, cocaine, prescription pills, and marijuana.¹⁴³ The twenty-one gang members were subsequently charged with murder and trafficking heroin, cocaine, and prescription drugs, in addition to

136. *Six Sentenced To Life In Prison In Black Souls Rico Trial*, COOK COUNTY STATE'S ATTORNEY (June 1, 2018), <https://www.cookcountystatesattorney.org/news/six-sentenced-life-prison-black-souls-rico-trial>.

137. *Id.*

138. *Id.*

139. Sobol, *supra* note 1.

140. *Six Sentenced To Life In Prison In Black Souls Rico Trial*, *supra* note 136.

141. *Id.*

142. Michelle Groenke, *Lake County Charges 21 Under RICO Statute*, CHICAGO TRIBUNE (Oct. 31, 2014), <https://www.chicagotribune.com/suburbs/mundelein/ct-rico-arrests-lake-county-met-20141031-story.html>.

143. *Id.*

other offenses.¹⁴⁴ Lake County State's Attorney Mike Nerheim commented that these were the first charges brought under the Illinois State RICO statute in Lake County, and that "anybody involved in street gang activity should know that it will not be the last."¹⁴⁵

One strength of Illinois' RICO statute is its ability to incorporate a prosecutor's involvement at the earliest stages of an investigation.¹⁴⁶ The relationship between a local prosecutor's office and local law enforcement is generally much better than the relationship between local law enforcement personnel and federal prosecutors. Local prosecutors are able to assist local law enforcement officers by providing legal guidance for investigating complex offenses, such as those targeted by the RICO statute.¹⁴⁷ Additionally, prosecutors are able to improve and implement the evidence collection procedures.¹⁴⁸ Prosecutors have a better understanding of what types of evidence and information is required to result in a successful RICO prosecution.¹⁴⁹

However, one main issue for prosecuting RICO cases at the state level is that these cases can be extremely complex.¹⁵⁰ This complexity is felt at all levels, and can create confusion for the jury, the attorneys, and even the judges.¹⁵¹ This complexity creates doubt in a prosecutor's ability to successfully bring RICO charges to a conviction. Prosecutors may not want to put themselves in the middle of developing such important case law, since Illinois' RICO statute is just now being tested in the courts.¹⁵² This results in only the strongest cases being brought to trial, while other cases that could be established under RICO, are instead brought under a variety of individual state statutes.¹⁵³ Charges may be downgraded or even dropped to avoid bringing RICO charges.¹⁵⁴

C. Comparisons

It is clear after looking at the legislative history of both New York's OCCA and Illinois' RICO statute, that both were designed to be similar in purpose, but more limited in scope than the federal RICO Act.

144. *Id.*

145. *Id.*

146. Rebovich et al., *supra* note 41, at 21.

147. *Id.*

148. *Id.*

149. *Id.* at 21-22.

150. *Id.* at 14.

151. *Id.*

152. Rebovich et al., *supra* note 41, at 15.

153. *Id.*

154. *Id.*

In drafting their respective RICO statutes, New York and Illinois had years of federal RICO history to review and dissect and decide what protections, limitations, and restrictions they wanted to implement.

1. *Enterprise*

The most critical departure that both New York and Illinois make from the federal RICO Act is that the criminal enterprise must be an ascertainable structure distinct from the underlying pattern of criminal activity. For example, under the federal RICO Act, the pattern of racketeering activity itself may constitute the criminal enterprise, but in New York and Illinois the criminal enterprise must exist outside of the pattern of criminal activity. The federal RICO Act allows an individual to be convicted of RICO violations, without the prosecutor being required to prove that the underlying predicate activity was in furtherance of a criminal enterprise.

A common fear among the New York and Illinois legislature was state prosecutorial abuse with such a broad sweeping statute as the federal RICO Act. Legislators in both states shared the concern that state prosecutors would inappropriately and indiscriminately use such a broad reaching statute to prosecute individuals who had very little to no connection to a criminal enterprise. Both states wanted to ensure that such individuals would not be charged with RICO violations, and be subject to the severe sentencing that comes with those violations, unless they knowingly advanced a criminal enterprise in the course of committing the underlying criminal predicate activity. Representative André Thapedi explained on the House floor:

What RICO does is it does increase the mandatory minimum sentences and sentences ranging in a major way. But since we already have serious sentences for these serious crimes, the biggest impact of RICO is to create huge penalties for the smaller players in drug conspiracies. Is it the Legislature's goal to incarcerate these little guys in large conspiracies for huge amounts of time? Those legislators who feel that the social benefits of increased incarceration outweigh the huge costs for the investigation, trial and incarceration that will result from this Bill should in fact support RICO. There is no question about that.

But here's how RICO gets the little guys. Law enforcement arrests the small dealers, the small gang members and then threaten them with huge RICO consequences. They will threaten and squeeze these little guys and some of them will then become cooperators, wear wires and testify against other gang members and leaders in particular. The police will obtain eavesdropping orders based upon these statements of these little people. They listen to the conversations of the leaders for a month or two, draw a circle around every-

one who buys or sells for the kingpin and charge everyone within that circle, be it large or small, with the overreaching drug conspiracy and with each member potentially on the line for the full amount of drugs bought and sold by the full group. This means that the indictment of 6, 10, 15, 20 or 65 defendants in the conspiracy will allow the conflicting of all but 1 or 2 defendants at trial. That is a problem. So, while this is definitely a powerful tool for law enforcement and if that is the sole priority for the Legislators, then they should vote for it. But here is the real reason to oppose it. The federal experience has taught us that capitalism is a wonderful thing. When you remove a supplier from the marketplace but demand remains the same, the new suppliers are going to step up and fill the void. This is what has happened as a result of the RICO cases. So, again, I understand what Anita Alvarez wants to do. I understand what you're doing, Mr. Zalewski, I have a lot of respect for you. But I think that we should all recognize what RICO truly is and its implications.¹⁵⁵

2. *Pattern of Criminal Activity*

As noted above, under the federal RICO Act a person commits a pattern of racketeering activity by committing at least two predicate acts: the first of which has to have occurred after October 15, 1970, and the last occurring within ten years of a prior act of racketeering activity.¹⁵⁶ Vaguely drafted, Congress left it to the courts to clarify the "pattern of racketeering activity" requirement.¹⁵⁷ In 1989, nineteen years later, the Supreme Court finally held that, "[i]n order to prove a pattern of racketeering activity, a plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of, continued criminal activity."¹⁵⁸

In a significant departure from the federal RICO Act, New York and Illinois both require three predicate activities.¹⁵⁹ Illinois takes it a step further, requiring that the three predicate acts be within a three-year timeframe.¹⁶⁰ Both New York and the federal RICO Act require those acts be within ten years, although New York does require three predicate acts like Illinois.¹⁶¹ Additionally, state prosecutors in New York and Illinois, not only have to prove that an individual committed

155. Ill. H. Transcription Deb., *supra* note 23, at 20.

156. See 18 U.S.C.A. § 1961(5) (West, Westlaw through Pub. L. No. 116-130).

157. *Id.*

158. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 229 (1989).

159. See *Kessler*, *supra* note 56, at 809; Ill. H. Transcription Deb., *supra* note 23, at 12.

160. See Ill. S. Transcript, *supra* note 90, at 111 (quoting Sen. Raoul).

161. See Ill. H. Transcription Deb., *supra* note 23, at 20.

the three predicate acts, but also that individual's role in the wider criminal enterprise and the connection to those predicate acts.¹⁶²

III. IMPACT

Because Illinois' RICO statute is in its infancy and has yet to be tested in the appellate courts, Illinois trial courts might be tempted to look to federal court opinions interpreting language from the federal RICO act for persuasive guidance. However, this can be a mistake when a state's RICO statute is tailored in a much narrower fashion, and is designed to target a very specific type of criminal activity.¹⁶³ This Part suggests that Illinois trial courts should look to other state court interpretations of similarly enacted state RICO statutes that are more closely constructed to Illinois' RICO statute than the federal RICO Act. This Part further suggests that because Illinois' RICO statute is similar in structure, design, and legislative history and intent to New York's OCCA, it can be instructive to look to the OCCA for possible persuasive guidance and what to expect from Illinois' RICO statute in the future.

New York's OCCA and Illinois' RICO statute have a similar beginning. OCCA, enacted in 1986, had only one case brought to trial under it by 1990, which resulted in an acquittal.¹⁶⁴ In the first four years of OCCA, only seven indictments had been filed.¹⁶⁵ One reason thought to be inhibiting the use of OCCA is its similar safeguards to Illinois' RICO statute. The District Attorney, equivalent to Illinois' State Attorney, must file a special information stating that they had reviewed charges and they are in line with the legislative intent behind the OCCA.¹⁶⁶ The district attorney then must receive the consent of any other district attorney in the state that may be affected or have concurrent jurisdiction over the criminal conduct.¹⁶⁷

In the early application of OCCA, New York courts looked to the federal RICO act for guidance given the lack of state authority available.¹⁶⁸ In 2012, the Court of Appeals of New York drew a line in the sand and made clear that "OCCA, unlike RICO. . . specifically demands that the structure be distinct from the predicate illicit pattern,

162. See N.Y. PENAL LAW § 460.10(4)(b) (McKinney 1986 & Supp. 2008); 720 ILL. COMP. STAT. 5/33G-3(b)(2)(C) (2012 & Supp. 2019); Ill. S. Transcript, *supra* note 90, at 108.

163. *H.J. Inc.*, 492 U.S. at 249.

164. See Kessler, *supra* note 56, at 803.

165. *Id.*

166. *Id.*

167. *Id.*

168. Michael Scotto, *N.Y.'s Organized Crime Control Act After 25 Years*, N.Y.L. J. ONLINE (Feb. 11, 2013).

and not surprisingly there are no New York cases in which the requisite structure has been inferred simply from an underlying pattern.”¹⁶⁹

CONCLUSION

The future of Illinois’ RICO statute appears bleak. It’s tough on paper but fails to flex its muscles in reality. There is a clear separation between the policy makers and policy implementers, resulting in the statute’s purpose not being actualized due to its lack of use. Due to its lack of use, the statute is rarely being tested in the courts, something that would provide state prosecutors a better roadmap on how to proceed on future RICO prosecutions.

However, when the time comes, Illinois trial courts should look to other state court interpretations of similarly enacted state RICO statutes that are more closely constructed to Illinois’ RICO statute, rather than the federal RICO Act. Because Illinois’ RICO statute is similar in structure, design, and legislative history and intent to New York’s OCCA, it can be more instructive to look to the OCCA for persuasive guidance and what to expect from Illinois’ RICO statute in the future.

When RICO cases are charged and analyzed in Illinois courts, it is important for those courts to understand that Illinois’s legislators’ intent was fundamentally different than that of Congress in 1970. As noted above, Illinois’ legislators demanded a narrower reach than federal RICO and more restraint from prosecutors. Illinois’ RICO statute was specifically created to be used restrictively, not expansively.

Derek Keenan

169. *People v. Western Express Int’l*, 19 N.Y.3d 652, 659–660 (2012).