CRIMINALS DON'T PAY: USING TAX FRAUD TO PROHIBIT ORGANIZED CRIME

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I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act ("RICO") prohibits certain types of criminal conduct that involves a pattern of racketeering activity.[1] Congress enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations.[2] The United States Supreme Court has recognized that one of the main reasons for enacting RICO was to protect businesses against injuries caused by organized crime.[3] The Court also stated that the provision conferring right of action on individual plaintiffs had as its "principal target . . . the economic power of racketeers and its toll on legitimate businessmen."[4]

A senator who was a sponsor of a precursor to RICO noted that the act would help to stop criminals from deriving gain from illegal income.[5] The President's Commission on Law Enforcement and Administrative Justice addressed many of the concerns of organized crime within the United States.[6] In addition, the United States Supreme Court held that RICO's importance lies in its ability to undermine organized crime.[7] The Court in *Cedric Kushner* emphasized how RICO's usage in prohibiting organized crime should be consistent with its intended purpose.[8]

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1. 18 U.S.C. § 1962 (1988).

2. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 245, 109 S. Ct. 2893, 2903-04 (1989).

3. *See* Dahlia Lithwick, *RICO Mania: The Supreme Court Contemplates Whether Illegal Hiring is Racketeering*, SLATE, Apr. 26, 2006, http://www.slate.com/id/2140614/ ("Justice Stephen Breyer points out that in enacting RICO, Congress was worried about 'organized crime taking over pizza parlors and trade unions.'").

4. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 513, 105 S. Ct. 3292, 3298-99 (1985) (Marshall, J. dissenting).

5. *Id.* at 514 (Marshall, J. dissenting) (quoting 113 CONG. REC. 17999 (1967) (noting remarks of Senator Hruska, "The evil to be curbed is the unfair competitive advantage inherent in the large amounts of illicit income available in organized crime . . . . When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses.")).

6. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 474, 126 S. Ct. 1991, 2006 (2006) ("[O]rganized crime is also extensively and deeply involved in legitimate business . . . . [I]t employs illegitimate methods - monopolization, terrorism, extortion [and] tax evasion - to drive out or control lawful ownership and to exact illegal profits from the public . . . . The millions of dollars [organized crime] can throw into legitimate economic system gives it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business." (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 187 (U.S. Gov't Printing Office 1967), *available at* http://www.ncjrs.gov/pdffiles1/nij/42.pdf)).

7. Cedric Kushner Promotions v. King, 533 U.S. 158, 165, 121 S. Ct. 2087, 2092 (2001) ("[The] history [of RICO] not only refers frequently to the importance of undermining organized crime's influence upon legitimate businesses but also refers to the need to protect the public from those who would run organization[s] in a manner detrimental to the public interest.").

8. *Id.* at 164. RICO protects a legitimate enterprise from those who would use unlawful acts to victimize it (citing United States v. Turkette, 452 U.S. 576, 591, 101 S. Ct. 2524, 2533 (1981)). RICO also protects the public from those who would unlawfully use an enterprise (whether illegitimate or legitimate) as a vehicle through which unlawful activity is committed. *Id.* (citing Nat'l Org. of Women v. Scheidler, 510 U.S. 249, 259, 114 S. Ct. 798, 804 (1994)).

II. BACKGROUND

A. *The History of RICO*

RICO was developed in 1970 and has helped to provide penalties for various types of criminal acts that form part of a general criminal organization.[9] When Congress developed RICO, its intent was to make it easier for the federal government to prosecute figures who engaged in organized crime.[10] By making it easier to prosecute organized crime figures, the government hoped to ultimately curb the overall effect of organized crime in the United States.[11]

Anyone who commits any two of RICO's defined crimes can be charged with racketeering[12] under RICO.[13] If the government wishes to bring charges under RICO, the two crimes must occur within a ten-year period, and the crimes must be committed with similar purposes or results.[14] To satisfy this requirement, the prosecution must satisfy the "continuity plus relationship test."[15]

Organized crime can take many shapes and forms, and RICO helps to serve as a mechanism to curtail these different aspects of organized crime. RICO is also used to prevent racketeers from investing or reinvesting in illegal activities.[16] In addition, the Supreme Court has stated that RICO is also used to prevent racketeers from acquiring illegal funds and illegitimate enterprises "through a pattern of racketeering activity" and other unlawful activities such as "an illegal gambling business or a loan sharking operation."[17] This conclusion is warranted by the actual statute.[18]

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9. 18 U.S.C. § 1962 (1988).

10. Lithwick, *supra* note 3.

11. *See generally* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 244-45, 109 S. Ct. 2893, 2903-04 (1989).

12. BLACK'S LAW DICTIONARY (8th ed. 2004) (defining racketeering activity as "two or more related criminal acts that amount to, or pose a threat of, continued criminal activity").

13. 18 U.S.C. § 1961(1), (5).

14. *See id.* § 1961(5).

15. Jennings v. Auto Meter Prod., 495 F.3d 466, 473 (7th Cir. 2007) ("To fulfill the pattern requirement, plaintiffs must satisfy the so called 'continuity plus relationship' test: the predicate acts must be related to one another (the relationship prong) and pose a threat of continued criminal activity (the continuity prong).") (citing Midwest Grinding Co. v. Spitz, 976 F.2d 1016, 1022 (7th Cir. 1992)).

16. United States v. Turkette, 452 U.S. 576, 584, 101 S. Ct. 2524, 2529 (1981).

17. *Id.*

18. 18 U.S.C. § 1962(a) provides that:

> It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of [the statute], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

In *Beck v. Prupis*, the Court noted that "Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970 for the purpose of seeking the eradication of organized crime in the United States."[19] The court further states, "Congress found that organized crime in the United States had become a highly sophisticated, diversified, and widespread activity that annually drained billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption."[20] In addition, "[t]he result was to weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten domestic security, and undermine the general welfare of the Nation and its citizens."[21]

Congress resolved to address the problem of organized crime by strengthening new penal prohibitions because the existing remedies and sanctions available to the government were limited in scope and impact.[22] Additionally, Congress provided enhanced sanctions and new remedies to deal with the unlawful activities of individuals who partook in organized crime.[23]

As will later be discussed, RICO is able to serve as a strong conduit for providing stiff penalties for those who participate in organized crime. The problem that occurs with prosecution under RICO is that many believe the penalties are unnecessary[24] and are taking the law in a direction Congress never intended the act to go.[25] On the other hand, because of the broad way in which RICO was written, (which makes it open to broad interpretation) prosecutors have been able to create a range of applications which in turn lead to more potential convictions.[26]

B. *Deciding to Bring Charges under RICO*

When the United States Attorney makes the decision to bring a claim under RICO, there are certain actions he or she may take before the case comes to trial.[27] By seizing property at the beginning of trial, the prosecutors have more than just an arrest.[28] Seizing assets increases the

19. Beck v. Prupis, 529 U.S. 494, 496, 120 S. Ct. 1608, 1611 (2000) (internal citation omitted).
20. *Id.* (internal citation omitted).
21. *Id.* (internal citation omitted).
22. *Id.*
23. *Id.*
24. *See* Lynch, *infra* note 71, at 763-64.
25. *See id.*
26. *See id.*
27. 18 U.S.C. § 1963 (The United States Attorney General can seek a pre-trial restraining order or he or she can seek an injunction to temporarily seize a defendant's assets and prevent the transfer of potential forfeitable property.).
28. *See id.*

possibility of cooperation of the defendant and decreases the flow of assets used for illegal economic activity.[29]

C. *Imposing Criminal Penalties Using RICO*

Those found guilty of crimes under RICO have the potential to face some very stiff penalties.[30] "The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions — which often rely on mail and wire fraud as predicate acts — given the extremely severe penalties authorized by RICO's provisions."[31] Federal prosecutors are instructed to use RICO with particularly careful and reasoned application, even more so than most federal criminal sanctions.[32] The Supreme Court has noted that "RICO imposes no restrictions upon the criminal justice systems of the States,"[33] and further stated, "[t]hus, under RICO, the states remain free to exercise their police powers to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions."[34] The Court also said, "[t]hat some of those crimes may also constitute predicate acts or racketeering under RICO, is no restriction on the separate administration of criminal justice by the States."[35]

When the Department of Justice tries to bring a claim under RICO, it is of great importance that the government brings the strongest case it can possibly bring.[36] Congress has provided federal prosecutors with a great

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29. *See, e.g.*, Theodore A. Levine, *Current Developments Governing Enforcement of the Federal Securities Laws: 1998 through 1990 Overview*, 629 PLI/CORP 79, 148 (1990) (stating "[t]he threat of pre-trial RICO seizures was seen as a significant incentive for settlement of the criminal and civil *Drexel* cases").

30. *Id.* Those found guilty of racketeering can be fined up to $25,000. *Id.* In addition, defendants found guilty of racketeering can face up to twenty years in prison per racketeering count. *Id.* If found guilty, a racketeer must forfeit all ill-gotten gains and interest in any businesses gained through a pattern of racketeering activity. *Id.*

31. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 502, 105 S. Ct. 3292, 3293 (1985) (Marshall, J., dissenting).

32. *Id.*

33. United States v. Turkette, 452 U.S. 576, 587, 101 S. Ct. 2524, 2531 n.9 (1981).

34. *Id.*

35. *Id.*

36. *Cf. Sedima*, 473 U.S. at 503 (Marshall, J., dissenting) (citing UNITED STATES ATTORNEY MANUAL § 9-110.350 (Mar. 9, 1984)); *see also, e.g.*, Steven T. Ieronimo, *RICO: Is it a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?* 11 HOFSTRA LAB. & EMP. L.J. 499, 518 (1994) ("The government presented a very strong and compelling case built around many of the prior violations and convictions of the individual defendants that served as predicate acts for the purposes of RICO.").

> The Justice Department itself recognizes that a broad interpretation of the criminal RICO provisions would violate 'the principal that the primary responsibility for enforcing state laws rests on the state concerned.' Specifically, the Justice Department will not bring RICO prosecutions unless the pattern of racketeering activity required by [RICO] has 'some relation to the purpose of the enterprise.'

Sedima, 473 U.S. at 503 (Marshall, J., dissenting) (citing UNITED STATES ATTORNEY MANUAL § 9-110.350 (Mar. 9, 1984)) (citations omitted).

deal of discretion in the prosecution of crimes under RICO.[37] Therefore, when the time comes to choose what crimes they want to prosecute, federal prosecutors may choose which cases will be most beneficial to prosecute.[38] The benefits or the purposes for federal prosecutors may come in several different forms.[39] By using RICO, Congress can deter other potential defendants from engaging in criminal behavior.[40]

Deterrence is achieved by providing a penalty that is severe enough to ensure that the unexpected cost of wrongful behavior will be greater than the gain derived from the illegal activity itself.[41] When looking at deterrence under RICO, courts can consider the possible gain criminal organizations get from engaging in racketeering and compare that gain with likelihood that the wrongdoer will not be held liable for his or her malfeasance.[42]

D. *RICO and Its Effects on Plea Bargaining*

Because RICO charges are easy for the prosecution to prove,[43] defendants will often choose a plea bargain.[44] RICO focuses on patterns of behavior as opposed to actual criminal acts, which makes it easier for the prosecution to prove its case.[45] When potential defendants are threatened with RICO charges, they are essentially forced into pleading guilty to lesser

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37. *Id.*

> Congress was well aware of the restraining influence of discretion when it enacted the criminal RICO provisions. It chose to confer broad statutory authority on the Executive branch fully expecting that this authority would be used only in cases in which its use was warranted. Moreover, in seeking a broad interpretation of RICO from the [United States Supreme Court], the Government stressed that no 'extreme cases' would be brought . . . .

Id. (citations omitted).

38. *Id* at 503-04.

39. *See* Rita v. United States, 127 S. Ct. 2456, 2463 (2007). When administering sentencing, the judge considers

> (1) offense and offender characteristics; (2) the need for a sentence to reflect the basic aims of sentencing, namely (a) 'just punishment' (retribution), (b) deterrence, (c) incapacitation, (d) rehabilitation; (3) the sentences legally available; (4) Sentencing Guidelines; (5) Sentencing Commission policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution." *Id.* Judges are also authorized to "'impose a sentence sufficient, but not greater than necessary, to comply with' the basic aims of sentencing as set out above.

Id.

40. Smith v. Doe, 538 U.S. 84, 102, 123 S. Ct. 1140, 1152 (2003).

41. *See* BLACK'S LAW DICTIONARY 481 (8th ed. 2004) (defining deterrence as "[t]he act or process of discouraging certain behavior, particularly by fear; [especially], as a goal of criminal law, the prevention of criminal behavior by fear of punishment[ ]").

42. Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571, 589 (2007).

43. *See* Douglas Zolkind, *The Case of the Missing Shareholders: A New Restriction on Honest Services Fraud in* United States v. Brown, 93 CORNELL L. REV. 437, 443 & n.32 (2008).

44. *See* Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 194-95 (2008).

45. *See* Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 476, 126 S. Ct. 1991, 2007 (2006).

charges because, otherwise, the seizure of assets would make it very difficult to pay a defense attorney to defend the accused in a court of law.[46]

If all the assets of a potential defendant have been seized that means they have no spending power, which in turn significantly increases the bargaining power of the prosecution. With that increased bargaining power the prosecution meets the goal of putting the accused behind bars.[47] Plea bargains are extremely important, as plea bargains compel the defendant to admit some level of guilt and that he or she has committed some crime, and the defendant ultimately must accept some type of punishment for his or her actions.[48] Plea bargaining may not keep criminals behind bars for extremely long periods of time, but it still allows prosecutors to decrease the amount of organized crime in the United States.[49]

E. *Losing Funds*

One manner of punishment under RICO is to take away the funds of the defendant.[50] Specifically, RICO may require a defendant to give away the profits from the illegal activities for which he or she is being charged or convicted.[51] However, the courts have determined that taking away profits from all racketeering activities is not necessarily a punishment.[52] This characterization leaves the door open for more punishment in the form of sentencing.[53]

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46. *See, e.g.*, United States v. Capoccia, 503 F.3d 103, 108 (2d Cir. 2007) (discussing a forfeiture hearing); United States v. Gotti, 459 F.3d 296, 346-57 (2d Cir. 2006) (discussing the forfeiture of property).

47. *See* Erik S. Schimmelbusch, Comment, *Pretrial Restraint of Substitute Assets Under Rico and the Comprehensive Drug Abuse Prevention and Control Act of 1970*, 26 PAC. L.J. 165, 168 (1995).

48. *See* BLACK'S LAW DICTIONARY 1190 (8th ed. 2004) (defining plea bargain as "a negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or dismissal of other charges").

49. If defendants accept a plea agreement, they are still subjecting themselves to prison time. *See id.* If the offenders or potential offenders are behind bars, they are not able to do any damage to society.

50. A defendant may be required to forfeit all proceeds of "additional executions of the scheme not specifically charged as substantive counts, but which fall within the boundaries of the overall scheme. . . . The statute criminalizes executions of the scheme; the overall scheme is thus inherently part of the offenses of which the defendant has been convicted." United States v. Capoccia, 503 F.3d 103, 117 (2d Cir. 2007) (quoting United States v. Boesen, 473 F. Supp. 2d 932, 952-53 (S.D. Iowa 2007)).

51. *Capoccia*, 503 F.3d at 117 (noting that the court has held "that a defendant may be required to forfeit all proceeds of the racketeering enterprise forming the basis of his conviction, including proceeds of particular racketeering activities of which the defendant was not convicted"); *see also* United States v. Gotti, 459 F.3d 296, 346-47 (2d Cir. 2006); United States v. Hively, 437 F.3d 752, 763 (8th Cir. 2006).

52. *See* United States v. Fruchter, 411 F.3d 377, 383-84 (2d Cir. 2005) (holding in such a case "the defendant 'is not being punished . . . for committing the substantive acts found to be 'not proven.' He is being punished for conducting the affairs of an enterprise through a pattern of racketeering activity.'" (quoting United States v. Edwards, 303 F.3d 606, 643 (5th Cir. 2002))).

53. *See id.* at 383.

F. *Using the Statute to its fullest capabilities*

Congress revised RICO because it felt that the government was not using the statute sufficiently: there was a statutory limitation that would restrict the amount of property able to be confiscated by the government when arresting violators of RICO.[54] Congress has attempted to strengthen deterrence by confiscating a larger range of property from the offender.[55] The more items or the wider array of items that federal agents are able to confiscate from violators of RICO, the greater impact the agents can have in stopping criminals from participating in unlawful activity from which they gain monetary profit.

III. RELIANCE ON FRAUD TO CATCH CRIMINALS

"Federal prosecutors have long followed the maxim, when in doubt, charge mail fraud."[56] Using mail fraud has helped the federal government curb organized crime in many aspects.[57] It is quite simple to prove mail fraud,[58] so the government uses it frequently as a predicate for racketeering charges.[59] Including an act of mail fraud in racketeering is very beneficial to establishing the pattern requirement for the prosecution to bring an offense under RICO.[60]

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54. Avital Blanchard, *The Next Step in Interpreting Criminal Forfeiture*, 28 CARDOZO L. REV. 1415, 1424-25 & n.50 (2006) ("Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs.") (quoting S. Rep. No. 98-225, at 3374-75).

55. *Id.* at 1425 n.50 ("The GAO concluded that the major reason for forfeiture statutes were . . . (1) that federal law enforcement agencies had not aggressively pursued forfeiture and (2) that the current forfeiture statutes contain numerous limitations and ambiguities that have significantly impeded the full realization of forfeiture's potential as a powerful law enforcement weapon . . . .")

56. Kristen Kate Orr, *Fencing in the Frontier: A Look Into the Limits of Mail Fraud*, 95 KY. L.J. 789, 789 (2006-2007) (quoting Paul Mogin, *Reining in the Mail Fraud Statute*, CHAMPION, at 12, 13 (May 2002)).

57. *Id.* at 789-90. *See also* 2 SARAH N. WELLING ET. AL., FEDERAL CRIMINAL LAW AND RELATED ACTIONS: CRIMES, FORFEITURE, THE FALSE CLAIMS ACT AND RICO (1998) ("To federal prosecutors of white collar crime, the mail fraud statute is . . . our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity."); Ellen S. Podgor, *Mail Fraud: Redefining the Boundaries*, 10 ST. THOMAS L. REV. 557, 558 (1998) ("[M]ail fraud [is a] prosecutor's 'Stradivarius' or 'Colt 45.'"); Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors, and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) (characterizing the "[v]arious federal fraud statutes — in particular, the mail and wire fraud statutes" as "hydrogen bombs on stealth aircraft" when compared "to the statutory weapons available to prosecutors").

58. Orr, *supra* note 56 and accompanying text.

59. Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 263-65 (1992) [hereinafter Podgor, *Letters*].

60. *See* 18 U.S.C. §§ 1341, 1961-62. Both mail fraud and racketeering can be inextricably linked. It is unlawful for any person to receive income from a pattern of racketeering. Racketeering includes any activity that is indictable under mail fraud. Thus each mailing in furtherance of a scheme to defraud is a separate offense under § 1341 and results in pattern predicate acts as each individual act of mail fraud constitutes an act of racketeering.

The use of mail fraud is helpful to prosecutors because of its elasticity.[61] Even though RICO contains other predicate offenses, the government continues to rely heavily upon mail fraud as its most commonly used predicate offense.[62] RICO actually contains nine state offenses[63] and numerous federal offenses.[64]

IV. RICO AND TAX FRAUD: EXPANDING THE USE OF RICO

RICO, similar to the mail fraud statute, is expansive in that jurors may tend to judge the person rather than the actual crime for which he or she has been indicted.[65] After years of neglect, prosecutors finally realized that RICO could be used in a variety of ways to criminalize the action of violators of the act.[66] The United States Supreme Court attempted to limit the wide use of RICO by federal prosecutors in criminalizing various acts of individuals.[67] Prosecutors were still able to maneuver around this problem because the statute also makes it a crime to conspire to commit

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61. Unlike mail fraud, tax offenses are not included as predicate acts for a RICO charge. Therefore, by calling the fraudulently filed returns mail fraud as opposed to tax fraud, the prosecution accomplishes significant penalty enhancement.

62. Podgor, *Letters*, *supra* note 59, at 263-64.

63. The state offenses include "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which are chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1).

64. *See, e.g.*, 18 U.S.C. § 1961(1)(B), which lists the following acts indictable under any of the following provisions of title 18, United States Code: § 201 (bribery), § 224 (sports bribery), §§ 471-473 (counterfeiting), § 659 (theft from interstate shipment if act indictable under § 659 is felonious), § 664 (embezzlement from pension and welfare frauds), § 891-894 (extortionate credit transactions), § 1029 (fraud and related activity in connection with access devices), § 1084 (the transmission of gambling information), § 1341 (mail fraud), § 1343 (wire fraud), § 1344 (financial institution fraud), § 1461-1465 (obscene matter), § 1503 (obstruction of justice), § 1510 (obstruction of State and local law enforcement), § 1512 (tampering with a witness, victim, or informant), 1513 (retaliating against a witness, victim, or informant), § 1951 (interference with commerce, robbery, or extortion), § 1952 (racketeering), § 1953 (interstate transportation of wagering paraphernalia), § 1954 (unlawful welfare fund payments), § 1955 (prohibition of illegal gambling businesses), § 1956 (the laundering of monetary instruments), § 1957, (engaging in monetary transactions derived form specified unlawful activity), § 1958 (use of interstate commerce facilities in the commission of murder-for-hire), §§ 2312-2313 (interstate transportation stolen motor vehicles), §§ 2314-2315 (interstate transportation of stolen property), § 2321 (trafficking in certain motor vehicles or motor vehicle parts), § 2341-2346 (trafficking in contraband cigarettes), § 2421-24 (slave traffic); under subsection (C) any act which is indictable under 29 U.S.C. § 186 (dealing with restrictions on payments and loans to labor organizations) or § 501(c) (embezzlement from union funds); under subsection (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law in the United States; or subsection (E) any act of which is indictable under the Currency and Foreign Transactions Reporting Act. *Id.*

65. Albert W. Alschuler, *The Mail Fraud & RICO Racket*, 9 GREEN BAG 2d 113, 117 (2006).

66. *Id.* at 118.

67. *Id. See also* Reves v. Ernst & Young, 507 U.S. 170, 184, 113 S. Ct. 1163, 1172 (1993) (indicating that RICO should be used against those who in fact control organizations rather than those who do not exercise control).

any other RICO violation.[68] The conspiracy charge is helpful to the prosecution because federal prosecutors can charge people with RICO violations that may not normally fall within RICO.[69]

Prosecutors are able to use RICO to their advantage despite the constraints courts may put on RICO.[70] Although prosecutors found they can use RICO to create more charges than they were initially able to do, some believe prosecutors are using RICO to punish people and not the crimes of that person.[71] While this argument may hold some weight, the fact remains: the people they are punishing have participated in some criminal activity, and for that they should be punished.

A. *An In-depth Look at Tax Fraud*

The Sixteenth Amendment authorizes the United States to tax income.[72] Since the United States has the power to tax income, the country also has the power to enforce penalties against any individuals who fail to abide by the rules that Congress had set forth.[73] Currently, there are many different charges that can be applied towards individuals for not abiding by the rules of income taxation.[74] The 1939 Internal Revenue Code established specific statutes to handle situations in which people violate tax laws.[75] "It is clear that Congress intended by this provision to have a uniform hierarchy of penalties for tax fraud."[76] Also, courts have found it useful to use § 1001 (the false statements section) as an alternative to a tax violation, as well as use the false statements to cumulatively charge a

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68. Alschuler, *supra* note 65, at 118.

69. *See, e.g.*, *id.*

70. *Id.* ("Although a pattern of racketeering activity requires the commission of two predicate racketeering acts, prosecutors may allege as many predicate acts as they like. These acts may extend over two or three decades. They may include crimes in which the statute of limitations has run, crimes that could not themselves be prosecuted in a federal court, crimes that could not be joined with one another in separate prosecutions, crimes of which the defendant already has been convicted and for which he has been punished, and even crimes of which he has been acquitted in a state court.").

71. *See* Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 COLUM. L. REV. 661, 764 (1987).

72. The amendment was ratified in 1913, and provided that "[t]he Congress shall have power to lay and collect taxes on incomes, from whatever source derived without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

73. *See. e.g.*, United States v. Tedder, 787 F.2d 540, 542 (10th Cir. 1986).

74. *See* 26 U.S.C. §§ 7201-07 (1982). The key provisions of this code section are the following: 1) attempt to evade or defeat tax; 2) willful failure to collect or pay over tax; 3) willful failure to file return, supply information or pay tax; 4) fraudulent statement or failure to make statement to employees; 5) fraudulent withholding exemption certificate or failure to supply information; 6) fraud and false statements; and 7) fraudulent returns, statements, or other documents. *Id.*

75. The Internal Revenue Code contained § 3616(a) and § 145(b) that imposed penalties for evasive or fraudulent income tax returns. Ellen S. Podgor, *Tax Fraud—Mail Fraud: Synonymous, Cumulative or Diverse?*, 57 U. CIN. L. REV. 903, 913 (1989) [hereinafter Podgor, *Synonymous, Cumulative or Diverse*] (citing J.S. SEIDMAN, LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS (1938); 14 MERTENS LAW OF FEDERAL INCOME TAXATION § 55A.02 (1988)).

76. Podgor, *Synonymous, Cumulative or Diverse*, *supra* note 75, at 913-14.

taxpayer in violation of one of the various tax provisions.[77] People who engage in tax fraud are subject to some type of punishment.[78] In fact, tax fraud "has always been punishable by a fine or imprisonment or both."[79]

B. *Expansion of Mail Fraud*

The creators of the original fraud statute enacted that statute to stop thieves and other dishonest individuals from taking advantage of innocent victims.[80] Instead of a narrow interpretation, the courts chose to use a broad interpretation of the common law definition of fraud.[81]

Prosecutors have been quick to indicate their reliance on the use of mail fraud in prosecuting defendants.[82] The mail fraud statute has been considered an extremely important tool and powerful weapon in combating a new type of criminal who partakes in white-collar crime.[83] Mail fraud legislation has the potential to be very flexible for prosecuting criminals.[84]

C. *Comparison of Tax Fraud and Mail Fraud*

Although RICO omits tax fraud and includes mail fraud as a predicate act, this does not preclude prosecutors from using tax fraud to indict criminals.[85] As a matter of fact, there have been many cases that have come before the courts in which tax fraud was successfully characterized as

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77. *Id.* at 914-15.

78. *Id.* at 913.

79. *In re Chavez*, 114 Cal. App. 4th 989, 994 (2004) (noting that there is nothing in the rules that gives the defendant mitigation of his punishment after the punishment has already been handed down by the court).

80. Douglas Zolkind, *The Case of the Missing Shareholders: A New Restriction on Honest Services Fraud in* United States v. Brown, 93 CORNELL L. REV. 437, 442 (2008) (citing McNally v. United States, 483 U.S. 350, 356, 107 S. Ct. 2875, 2879-80 (1987)).

81. *See* Durland v. United States, 161 U.S. 306, 313, 16 S. Ct. 508, 511 (1896).

82. Zolkind, *supra* note 80, at 443 (stating that the mail fraud statute "is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart — our true love." (quoting Jed. S. Rakoff, *The Federal Mail Fraud Statute (Part 1)*, 18 DUQ. L. REV. 771, 771 (1980)); *see also* PETER W. LOW & JOSEPH L. HOFFMAN, FEDERAL CRIMINAL LAW 161 (1997) ("[M]ail fraud continues to be the 'true love' of the federal prosecutor, a broad, self-defining statute that can be used to get crooks whose behavior falls between cracks of other statutes."); *see also* Ralph K. Winter, *Paying Lawyers, Empowering Prosecutors and Protecting Managers: Raising the Cost of Capital in America*, 42 DUKE L.J. 945, 954 (1993) ("With regard to the statutory weapons available to prosecutors, [mail and wire fraud] rank by analogy with hydrogen bombs on stealth aircraft.").

83. Zolkind, *supra* note 80, at 443 n.31 (quoting PETER W. LOW & JOSEPH L. HOFFMAN, FEDERAL CRIMINAL LAW 161 (1997)).

84. *Id.* at 444 n.33 (citing Albert W. Alschuler, *The Mail Fraud & RICO Racket*, 9 GREEN BAG 2D 113, 114 (2006) ("The Mail Fraud statute . . . was the first statute to 'federalize' crimes against private individuals that formerly were prosecuted only by state and local authorities.")).

85. Podgor, *Synonymous, Cumulative or Diverse*, *supra* note 75, at 905 (1989); *see also* 18 U.S.C. § 1961 (1988) (Section 1961 expressly includes any act indictable under a mail fraud statute within the definition of "racketeering activity." Tax fraud is omitted, and the list of statutes within the definition appears to be exclusive).

mail fraud.[86] In such a case, the defendant was charged with violating a mail fraud statute based on a tax violation in order for the charges to be brought under RICO.[87] The effect of this has been to allow mail fraud actions to spill over into the realm of civil cases.[88]

D. *Prevalence of Tax Fraud*

Fraud is extremely prevalent in American industry and commerce,[89] and the annual cost of tax fraud is very high in the United States.[90] Tax fraud includes underreporting as well as the illegal use of offshore tax shelters.[91] Tax fraud is committed by individuals from all walks of life.[92]

The underlying problem, then, is most people do not consider the act of avoiding taxes as morally indecent as murder or theft.[93] Many people feel that tax evasion has a low likelihood of being detected and thus being convicted.[94] The problem with tax evasion is that it affects more than just a single individual, but the general public either ignores that fact or is just apathetic toward tax violations.[95]

There is a prevalent economic theory that people are motivated by pecuniary self-interest.[96] People are more likely to commit fraud when it is in their self-interest than when it is not in their self-interest.[97] If people do not see tax fraud as a moral indecency and are motivated by self-interest to commit these types of crimes, it is up to the courts or the legislature to create some type of deterrence.[98] Although deterrence in part still depends on an individual's decision to morally do the right thing and uphold the law,[99] there would be benefits to having very strict penalties for tax fraud. In addition, broadening the usage of tax fraud prosecutions would have the

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86. *See, e.g.,* United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987).

87. *Id.* Mailing fraudulent tax returns is indictable as mail fraud and may serve as a predicate act under RICO based on mail fraud, which is essentially disguising the tax fraud as mail fraud.

88. Podgor, *Synonymous, Cumulative or Diverse, supra* note 75, at 904.

89. Ostas, *supra* note 42, at 572-73.

90. *Id.* at 572 ("The Internal Revenue Service (IRS) recently estimated that tax fraud for the year 2001 totaled $290 billion, or more than 13% of all taxes owed.").

91. *Id.* at 572.

92. *See id.* at 572-73.

93. *See id.* at 583 ("Although these social purposes are important, they do not carry the moral saliency of health and safety on a factory floor or the social stigma of arson."). The purpose of general tax regulation is to generate revenues for the government and to assure that everyone pays their fair share.

94. Because people believe that tax evasion has a low likelihood of getting caught, people are likely to evade their duty to pay taxes. Ostas, *supra* note 42, at 583-84.

95. *See id.* at 583 ("[T]ax evasion has a much more diffuse victim: society itself.").

96. *Id.* at 574. *See also* GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976) (discussing the theory that human beings act in their own self-interest).

97. Ostas, *supra* note 42, at 574.

98. *Id.*

99. *See id.*

end result of making people think twice before they commit tax fraud or evade taxes.[100]

The United States has set up sentencing guidelines which help to determine criminal punishment.[101] One commentator has noted that the, "USSC believed that short, definite sentences for this class of offenders best served the Guidelines' goals of proportionate punishment and deterrence."[102] The Guidelines have established very specific objectives to be used in sentencing.[103] "The stated goals of the Guidelines are, among others, to provide: certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct."[104] The guidelines also work to maintain sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in general sentencing practices.[105]

E. *Tax Fraud and Its Benefit to Mail Fraud*

Using mail fraud in itself has some benefits when it pertains to the sentencing of someone convicted under RICO.[106] Under normal circumstances, mail fraud carries only moderate penalties.[107] However, These penalties are enhanced when the mail fraud relates to financial institutions.[108] The consequences of traditional mail fraud convictions were not very harsh.[109] In contrast, the guidelines in RICO use

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100. *See id.*

101. *See* UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, §2B1.1 (Nov. 2006). This manual covers sentences for economic crimes, including, theft, embezzlement, fraud, and forgery. *Id.* It helps to determine sentences for wire fraud, mail fraud, and securities fraud, which are among the most common white-collar crimes. *Id.* One of the adjustments the United States Supreme Court made was to raise economic sentences above pre-Guidelines levels so that an increased number of defendants would serve prison time. *Id.*

102. Rodney D. Perkins, *Purposes-Based Sentencing of Economic Crimes After Booker*, 11 LEWIS & CLARK L. REV. 521, 524 (2007) (citing Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 22 (1998)).

103. Perkins, *supra* note 102, at 523 (noting that the guidelines include "(1) honesty in sentencing; (2) uniformity between defendants convicted of similar crimes; and (3) proportionality between different sentences").

104. *Id.*

105. *See id.* at 526.

106. *See* Podgor, *Letters, supra* note 59, at 265.

107. *Id.* ("Mail fraud carries a penalty of five years and a fine of one thousand dollars.").

108. *Id.* ("In reacting to the savings and loan crisis Congress increased mail fraud's penalties to a maximum fine of one million dollars and up to thirty years imprisonment when the fraud relates to a financial institution."). *See also* 18 U.S.C. § 1341 (West Supp. 2008).

109. *See* Podgor, *Letters, supra* note 59, at 265 ("In contrast to the classic mail fraud conviction, RICO carries a penalty of twenty years, a fine, and a forfeiture of property. Thus, conviction on RICO charges with a mail fraud predicate not only labels the defendant as a racketeer, but also can significantly raise the stakes of possible punishment.").

significantly different penalties for mail fraud and tax fraud offenses.[110] "Mail fraud is a 'base six offense' while RICO's base is either the greater of a base nineteen or the offense level of the underlying racketeering activity."[111] The difference in the varied base levels plays a significant role in determining the sentencing time frame as well as inducing the person indicted on RICO charges to engage in some form of plea bargaining.[112]

The effects of using mail fraud when establishing predicate crimes under RICO are clear when mail fraud is used in conjunction with tax fraud.[113] The Department of Justice claims that it is easier to prosecute under mail fraud rather than tax fraud.[114] However, tax fraud in conjunction with mail fraud is still a viable option.[115] Even though tax fraud is not a predicate offense under the RICO statute,[116] tax fraud allows mail fraud to be elastic in pursuing criminals and bringing them to justice.[117] Prosecutors of RICO state that it is difficult to convict criminals through the use of tax fraud, but the level of proof required for a mail fraud conviction would be along the same lines of a tax fraud conviction.[118]

Some critics say that the administration or use of tax fraud and RICO brings about stiff penalties.[119] Courts also worry that by using the increased penalties and punishment of tax fraud, federal prosecutors are moving away from the original intent of RICO.[120] On the contrary, the inclusion of

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110. *Id.*

111. Podgor, *Letters*, *supra* note 59, at 265 (citing U.S. SENTENCING GUIDELINES MANUAL § 2F1.1(a) (1990)).

112. *See id.* ("The difference in these base levels results in a possible sentence of zero to eighteen months for mail fraud versus a sentence of thirty to seventy-eight months for RICO.").

113. *Id.* ("The elevated effect of mail fraud, when used as a predicate offense for RICO, is best exemplified by the Government's employment of the RICO charge when two or more predicate acts of mail fraud are mailed tax returns."). *See* Podgor, *Synonymous, Cumulative or Diverse*, *supra* note 75 at 905-06.

114. Podgor, *Letters*, *supra* note 59, at 265 ("[P]rosecutorial discretion . . . has subjected a criminal defendant to a possible twenty-year sentence for offenses that originally, as tax offenses, carried a five-year maximum. Recently the Department of Justice restrained prosecutorial discretion by internally limiting this application to 'exceptional circumstances.'").

115. *Id.* at 266 ("This guideline does not, however, totally preclude future application of RICO when the offense is a fraudulently mailed tax return.") (citing United States v. Regan, 726 F. Supp. 447, 455 (S.D.N.Y. 1989)).

116. *See id.*

117. *Id.* ("[B]y calling fraudulently filed returns mail fraud as opposed to tax fraud, the prosecution accomplishes penalty enhancement for an offense that Congress never even considered during the enactment of the statutory crimes of mail fraud or RICO.").

118. *See* United States v. Gelb, 700 F.2d 875, 879 (2d Cir. 1983) (stating that mail fraud requires specific intent to defraud). *But see* Podgor, *Synonymous, Cumulative or Diverse, supra* note 75, at 925 (noting that tax fraud requires willfulness and that good faith is a defense to mail fraud).

119. Podgor, *Letters, supra* note 59, at 265.

120. *Id.* at 267 (stating that RICO has come to a point where it allows different types of fraud to convict a criminal; that because of RICO's changed nature, it has little to no bearing on the elimination of organized crime or to the legislative intent at the time of the statute's inauguration; and that the inclusion of the various types of fraud extends the possible penalties of RICO to a "draconian" level).

different types of fraud expands the possibilities and opportunities to convict criminal under the language of RICO.[121]

F. *How to Convict Someone of Mail Fraud in General*

The United States Code provides a statute that includes a basis for convicting an individual of mail fraud, 18 U.S.C. § 1341. The statute is broad in its application, punishing persons who commit or plan to commit fraudulent acts through obtaining or selling or exchanging, any money or security or property or the like, through "false pretenses," and then uses the US Postal Service or a similar carrier to execute this fraud.[122] Punishments for such actions can range up to twenty years in prison and the threat of substantial fines.[123] Additionally 18 U.S.C. § 1341 increases the range of punishments to thirty years imprisonment and fines up to one-million dollars, when the fraudulent actions occur during a presidentially declared emergency or when the actions affect "financial institutions."[124]

G. *Proving Mail Fraud and How Tax Fraud Helps*

In order to prove mail fraud under 18 U.S.C. § 1341, the prosecution must prove that the defendant (1) participated in a scheme to defraud, and (2) knowingly used the mail to further the scheme.[125] Although there are hurdles that the prosecution must overcome, mail fraud charges can serve as an effective tool when used properly.[126]

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121. *Cf. id.* (stating that "a clear definition of mail fraud's 'scheme to defraud' is necessary in order to curb its seemingly endless application").

122. The statute states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency . . . or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341.

123. *Id.*

124. *Id.*

125. *See* United States v. Corey, 556 F.2d 429, 430 n.2 (2d Cir. 1977).

126. Zolkind, *supra* note 80, at 443 n.31 ("[M]ail fraud continues to be the 'true love' of the federal prosecutor, a broad, self-defining statute that can be used to get crooks whose behavior falls

Because mail fraud statutes may be interpreted broadly, Congress has the ability to expand the scope of the statutes.[127] If Congress deems it necessary to broaden the powers of a statute it should do so in order to get maximum effectiveness out of the statute.[128] In light of this premise, Congress has recently expanded the applications of the mail fraud statutes.[129] If federal prosecutors used tax fraud in conjunction with mail fraud, prosecutors would be more successful satisfying the requisite elements to convict someone of tax fraud.[130]

H. *Controversy With Intertwining Tax Fraud and Mail Fraud*

There have been Congressional hearings and discussions by the Department of Justice that issued guidelines discouraging the use of mail fraud to prosecute tax fraud.[131] "Because of legitimate concerns about the possible overuse of mail fraud to generate RICO cases out of relatively minor conduct, the Criminal Division has imposed policy limitations on its use as a predicate offense."[132]

In addition, "[t]he Organized Crime and Racketeering Section will not approve a proposed RICO indictment that contains mail fraud predicates involving federal tax evasion or other offenses arising under federal internal revenue laws unless previously approved by the Criminal Section of the Tax Division."[133] Courts have also indicated their unwillingness to convict on some tax fraud cases.[134]

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between the cracks of other statutes." (quoting PETER W. LOW & JOSEPH L. HOFFMAN, FEDERAL CRIMINAL LAW 161 (1997))).

127. *See id.* at 443.

128. *Id.* at 443-44 ("This flexibility has enabled prosecutors to use the statutes to combat 'not only the full range of consumer frauds, stock frauds, land frauds, bank frauds, insurance frauds, and commodity frauds, but . . . even . . . blackmail, counterfeiting, election fraud, and bribery.'" (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 772 (1980))).

129. Zolkind, *supra* note 80, at 444. Mail fraud now includes mailing via private carriers. *Id.* (citing SCAMS Act of 1984, Pub. L. No. 103-322, § 250006, 108 Stat. 1796, 2087 (1994) (codified at 18 U.S.C. § 2326); Congress also broadened the scope of wire fraud to include telemarketing fraud. *Id.* (citing Telemarketing Fraud Prevention Act of 1998, Pub. L. No. 105-184, 112 Stat. 520 (1998) (codified at 15 U.S.C. §§ 6101-6108 (2000))); the maximum punishment for mail fraud and wire fraud has quadrupled from five years to twenty years imprisonment. *Id.* (citing Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 800 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C)).

130. Zolkind, *supra* note 80, at 443 n.32 (quoting United States v. Wingate, 128 F.3d 1157, 1161-62 (7th Cir. 1997)).

131. J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON L. REV. 45, 63 (2007); *See* ORGANIZED CRIME AND RACKETEERING SECTION, U.S. DEPARTMENT OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS § 2(A)(2)(a) (4th ed. 2000) [hereinafter RICO MANUAL FOR FEDERAL PROSECUTORS].

132. Strader, *supra* note 131, at 63 n.78 (quoting RICO MANUAL FOR FEDERAL PROSECUTORS, *supra* note 131, § 2(A)(2)(a)).

133. *Id.*

134. *See id.* at 63 nn.78-79; *see also* United States v. Regan, 937 F.2d 823, 827 (2d Cir. 1991). The court of appeals in this case reversed a tax fraud conviction because the district court did not

I. *Advantage of Using Tax Fraud*

Because of the flexibility of RICO and the ease of the prosecution to use tax fraud against criminals, the charging possibilities could be boundless for prosecution in order to prohibit acts of organized crime. Such prosecution is helpful to the general public because of the negative impact criminals have on society.

> 'Criminal cartels can undermine free competition' through unfair tactics like price cutting financed by tax evasion and cash reserves from illegal business, labor corruption, and violent coercion of suppliers and customers. Moreover, acquisition of legitimate enterprises gives organized criminals the opportunity to engage in new types of ('white collar') crime, such as bankruptcy fraud.[135]

Through research, Congress has determined the methods in which crime organizations have been able to acquire businesses.[136] Now that Congress has taken the initiative to research how criminals function, Congress also needs to take the initiative to eliminate these criminal actions and illegal activities.[137]

If prosecutors were allowed to use tax fraud explicitly, they would be able to use innovation in their prosecutions instead of attempting to reform well-established substantive criminal law.[138] One opponent of heavy RICO prosecutions has argued that existing substantive criminal law is enough to prohibit organized crime.[139] The infiltration of organized crime is said to be "dealt with most effectively through the enforcement of existing civil and regulatory machinery against illegal tactics of organized criminals in operating legitimate businesses."[140] One of those tactics, the use of controlling taxes, is helpful in forcing defendants into plea agreements.[141]

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instruct the jury on whether there was a good faith reliance on the tax code. *Id.* The court stated that "[b]efore this lengthy case is retried, the Government may decide to withdraw the RICO count in view of the Department of Justice's guidelines, which substantially curtail the use of tax frauds as direct or indirect predicate RICO offense, and the district court's judicious decision to eliminate the forfeiture of assets by defendants." *Id.*

135. Lynch, *supra* note 71, at 670.

136. *Id.* at 670 n.41 (explaining that "[c]ontrol of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities, (2) accepting business interest in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion").

137. For instance, the Attorney General in 2001 found that organized crime participants often use financial manipulations to perpetrate crimes. Attorney General Prepared Remarks, Organized Crime Conference (Aug. 7, 2001), http://www.usdoj.gov/archive/ag/speeches/2001/0807organizedcrimerem.htm. This knowledge of faulty financial activity should be used to attack criminals' financial backing.

138. *See* Lynch, *supra* note 71, at 670-71.

139. *See id.* at 670 (citing G. Robert Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME, app. C, at 80 (1967)).

140. *Id.* at 672. Further, consider the following:

There are other potential threats of organized criminals' businesses that also have very strong coercive powers.[142] "Presumably the power of RICO to induce cooperation with legitimate investigators is equally compelling."[143]

V. ATTEMPTS TO CONTROL FINANCES TO PROHIBIT ORGANIZED CRIME

A. *Generally*

There have been attempts by governments abroad to control organized crime by attacking the criminals' finances.[144] After the 9/11 attacks, English legislators decided that there was something more that needed to be done to continue the fight against terrorism,[145] and the English legislators enacted the Anti-Terrorism Crime and Security Act.[146] "The British government acted to ensure that (a) people putting money into the financial system were regulated and that (b) people working in the financial system were also regulated."[147] It is evident that terror financing is a problem.[148]

Other foreign legislatures have also attempted to attack the finances of terrorists in order to prohibit present illegal activity and future illegal

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> The Commission note[s] that State income tax enforcement could be directed at organized criminal's businesses. Food inspectors could uncover regulatory violations in organized criminal's restaurant and food processing businesses. Liquor authorities could close premises of organized crime-owned bars in which illicit activities constantly occur. Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses.

Id. at 672 n.49.

141. *See supra* Part II.D.; *see* United States v. Scharf, 551 F.2d 1124 (8th Cir. 1978) (stating a defendant complained that the government had induced his guilty plea by promising not to seek forfeiture of his business, but then proceeded to take the business anyway by levying against it for back taxes. Allowing for the possibility that the defendant had simply thought better of his bargain, Scharf's complaint has a ring of sincere outrage that suggests that he probably would not have pleaded guilty had he not been threatened with RICO sanctions).

142. For example, in *United States v. Burke*, 781 F.2d 1234 (7th Cir. 1985), a private investigator was convicted of extortion when he deceived a presumably shady businessman, who had received a subpoena, into paying high money on the premise that he could "fix" a nonexistent RICO investigation that could lead to forfeiture of his business. Lynch, *supra* note 71, at 725 n.267.

143. *Id.*

144. *See* Amos N. Guiora & Brian J. Field, *Using and Abusing Financial Markets: Money Laundering as the Achilles' Heel of Terrorism*, 29 U. PA. J. INT'L L. 59, 93 (discussing how, in response to the Irish Republican Army creating many acts of terrorism and because the United Kingdom has seen an increase in terror financing, the country has worked to cut off terror specifically by creating acts of legislation that focus on robberies and tax fraud).

145. *Id.* (noting that after the 9/11 attacks, English legislators enacted more anti-terrorism legislation that focused on decreasing the finances of the various terrorist groups).

146. *Id.* at 93-94. This act established the power of government "to operate in the 'regulated sector' and not inform law enforcement of suspicious activity." *Id.* at 94 (citing Anti-terrorism, Crime and Security Act, 2001, c. 24, (Eng.)).

147. Guiora & Field, *supra* note 144 at 94.

148. *Id.*

activity.[149] Israel has created what can be considered a model approach to counterterrorism efforts.[150] When discussing Israel's response to terror financing, one does not have to look any further than the Prohibition of Financing Terrorism Law of 2004 ("PFTL").[151] The PFTL was passed to serve as an answer to terrorism by defining terrorism[152] "and encouraging nations to enact legislative measures intended to identify, locate, and seize funds intended for terror financing."[153] Additionally, the United Nations Security Council, when enacting Resolution 1373, "created an international obligation for nations to criminalize activities related to terror financing, criminalize possessing assets on behalf of others connected to terrorism, and allow for the freezing of assets known to be tied to terrorism."[154]

The attention given to terror financing in Iraq is also worth mentioning.[155] The laws established in Iraq directly prohibit and discourage money laundering and terror financing by criminalizing these activities.[156] The government in Iraq has gone further than just criminalizing the activities to help prohibit terror financing.[157]

B. *Analogizing Terror Financing to Tax Fraud*

It is clear that countries, especially since the 9/11 attacks, realize there are serious problems with terrorism.[158] Terrorists use complex financial

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149. There is terror financing legislation in several countries and this indicates that there is an issue for the United States to consider. *Id.* The United States needs to take some type of effort prohibit various acts of criminal activity.

150. "Any discussion of the world's interaction with terrorism must begin with Israel, as there is no better laboratory for counterterrorism . . . efforts". *Id.* at 90-91.

151. *See id.* at 91 (citing Prohibition of Financing Terrorism Law, 2005, S.H. 1973 (Isr.), *available at* http://www.justice.gov.il/NR/rdonlyres/4FE9E898-1264-4561-B7AA-0957F6DEA67A/0/ProhibitionTerroristFinancing.doc).

152. *See* Guiora, *supra* note 144, at 92. A similar step can be taken to determine what the major problem is with organized crime and what method is most effective as an answer. *See* Lyudmila Zaitseva, *Organized Crime, Terrorism and Nuclear Trafficking*, 9 STRATEGIC INSIGHTS 5, ¶ 1 (2007), http://www.ccc.nps.navy.mil/si/2007/Aug/ zaitsevaAug07.pdf (highlighting the links between terrorism and organized crime).

153. *Guiora, supra note* 144, at 91 (citing International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 2178 U.N.T.S. 229).

154. *Id.* (discussing S.C. Res. 1373, U.N. Doc. S/RES/1373, which calls for states to prevent and suppress terrorism financing by criminalizing willful transactions of funds for terrorist acts and by freezing the assets of people involved in terrorist or attempted terrorist acts).

155. *Id.* at 92 ("In 2004 the Coalition Provisional Authority ('CPA') instituted the Anti-Money Laundering Act ('AMLA').").

156. *Id.*

157. *See id.* ("[T]he CPA instituted jurisdiction over banking institutions . . . . The AMLA also delegated authority to the Iraqi Central Bank to create and publish [other future] restrictions and regulations.").

158. *See* Laura K. Donahue, *Anti-Terrorist Finance In the United Kingdom and United States*, 27 MICH. J. INT'L L. 303, 304 (2006) ("Preventing terrorist financial flows proves a nearly impossible task."). The economic support terrorists get comes from a variety of activities such as legitimate businesses or illegitimate activities like drug trafficking or intellectual property theft. *Id.*

schemes to fund their criminal activities.[159] Just as terrorists must have some way of financing their activities, organized criminals in the United States must also finance many of their activities.[160] Foreign countries have chosen to combat these terrorist attacks by doing more than just physical combat.[161]

The necessity of combating terrorist attacks has arisen out of concern for the safety of society.[162] Organized crime is also an issue that impacts the safety of society within the United States, and with increased organized crime comes increased danger to the general public in America.[163] Although the original use of fraud may have not been intended to serve as a predicate RICO act to prohibit organized crime,[164] purposes and laws change to adapt to society. If countries can create tools to prohibit the financing of terrorist acts, then the United States could just as easily take a law that presently exists and expand it to prohibit other crimes.[165]

By failing to expand the use of tax fraud as a predicate act under RICO, Congress and the courts are essentially ignoring what could become a very powerful tool to deter organized crime. Terrorist acts cannot be completed without funding,[166] just as organized crime logically cannot be sustained or continued without some type of financial backing. If criminals do not have any money to engage in illegal activity, this in itself could be the first step to reducing the levels of organized crime found in the United States.

If other countries, including the United States, have found a strong need to protect society against terrorist threats and other terrorist activities,[167] then Congress should also find that same need to protect

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159. *See id.* (discussing how terrorists move currency through wire transfers and transfer cash into different types of commodities that are of great value in whatever country they may be stationed).

160. Even if only modest amounts, it takes some money to engage in organized crime. If these criminals did not have the initial financial backing to engage in crime, they are less likely to engage in large scale crimes that require large amounts of money. *See* Juan C. Zarate, U.S. Assistant Sec'y of Treasury, Keynote Address at the Sec. Indus. Ass'n Anti-Money Laundering Compliance Conference, New York, NY (Mar. 17, 2005), http://www.ustreas.gov/press/releases/js2323.htm.

161. *See* Donahue, *supra* note 158, at 303 (discussing the fact that the United Kingdom uses finance initiatives to help combat global acts of terrorism).

162. *Id.*

163. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 514, 105 S. Ct. 3275 (1985) (Marshall, J., dissenting).

164. *See* Podgor, *Letters*, *supra* note 59, at 265.

165. *Id.*

166. Donahue, *supra* note 158, at 304-05 ("The National Commission on Terrorist Attacks Upon the United States (September 11 Commission) estimated that the 1998 East African embassy attacks required just $10,000. The 2002 Bali bombings cost al Qaeda only $20,000," and the September 11 attacks total amount spent on "actual operation was between $400,000 and $500,000." "The Police Service Northern Ireland (PSNI) assesses the Provisional Irish Republican Army's (PIRA) entire running cost at just £1.5 million per year.")

167. *Id.* at 304.

society from the domestic threats that come in the form of organized criminals.[168]

As discussed previously, some people feel as though they have no incentive to properly and legally prepare their taxes.[169] Logic dictates that organized criminals would be even less likely to report income that has come from illegal business dealings. If there is presently no incentive for these criminals to report their illegal activity, Congress or the courts must do something to discourage criminals from engaging in criminal activity altogether. Although this country may never be able to reach a point where there is a zero percent crime rate, organized crime can be decreased, as there would be an indirect relationship between the potency of tax fraud prosecutions if they were to be considered a predicate RICO and the amount of organized crime.

If foreign and domestic legislatures can create new laws without guiding precedent in order to fight multi-million dollar terrorist organizations, then Congress should easily be able to use existing laws and mold these laws to fight against black market and other day-to-day activities of organized criminals. As previously discussed, foreign countries such as England and Iraq have developed laws to combat terror financing.[170] Tax fraud as a statute has been in place for decades.[171] With a simple act of legislation, the statute could be applied more broadly to affect other aspects of the criminal arena just as mail fraud and wire fraud have been broadened to include other offenses and have come to be used as predicate offenses under RICO.

Some critics, however, argue that the cost-benefit analysis of preventing acts of organized crime indicates that one should not take the risk in creating other methods to prevent organized crime.[172] Tax fraud, however, does not have to completely and wholly eliminate organized crime throughout the United States. In the absence of a utopian society, there will always be some type of problem preventing society from living in a "perfect world." Deterring tax fraud can and should be a significant and powerful factor in decreasing the amount of crime that our society experiences. From a Law and Economics standpoint, the death of 30,000 people stemming from "normal" criminal activity and the death of 30,000 people stemming from terrorist-related criminal activity may not be the

168. Guiora, *supra* note 144, at 91.

169. *See* Ostas, *supra* note 42, at 583.

170. *See supra* Part V.A.

171. *See* 26 U.S.C. §§ 7201-07 (1982).

172. *See* Dru Stevenson, *Entrapment and Terrorism*, 49 B.C. L. REV. 125, 181 (2008) (citing Richard Posner, ECONOMIC ANALYSIS OF LAW 245 (7th ed. 2007) (discussing the difference in the cost benefit analysis of preventing different types of crimes, indicating that "[t]he broader point is that prevention is a much more important goal in the case of global terrorism than in the case of ordinary crime. The nation can live with 30,000 ordinary murders a year, but not 30,000 murders by terrorists. Criminal punishments are designed to limit the crime rate, but not to reduce it to zero; the costs would be disproportionate to the benefits. This is much less clear in the case of terrorism.").

same. However, from a realistic perspective, the death of 30,000 from any type of criminal activity means a loss of 30,000 people, regardless of how the deaths occurred. However, some still argue that the punishment for the two types of offenders is viewed differently by those offenders and thus they must be treated differently.[173]

If one accepts the theory that offenders of the two types of crimes should be punished differently, it would seem that punishing "regular criminals" would have a more significant impact on decreasing organized crime. Many theorists, however, firmly believe the heightened need for protecting against acts of terrorism gives the government a strong incentive to do whatever it takes and enact whatever legislation it must in order to prevent these acts of terror.[174]

As a law of last resort, if there is no other way to punish an offender for his or her actions, society resorts to criminal law. Because criminal law serves different purposes,[175] different types of punishments may be called for; nevertheless, *some* type of punishment is necessary to aid the fight against organized crime[176] just as some type of punishment is necessary in the global fight against terrorism.[177]

This comparison of what has been dubbed "typical" organized crime with criminal acts of terrorism is in no way intended to serve the purpose of comparing the relative evils of the two types of crimes. Instead, it is to show that Congress and the courts play a significant role in helping to protect the public. One method of attacking criminal activity can be economic. All acts have some type of cost that are attached to them, which is why an economic analysis may be necessary in order to determine whether or not the activity would provide more cost than benefit.

Criminal acts that involve murder and the degradation of society, no matter the type, put a strain on the people individually affected and on a people as a whole. If simple laws can be enacted to prevent this strain

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173. *Id.* ("Punishment of traditional crimes can serve the ends of retribution and deterrence simultaneously, because the actual wrongdoer suffers and potential wrongdoers become aware of higher costs for pursuing their aims. A would-be terrorist with a martyr complex, however, might view certain increased costs (such as potential punishment, enhanced security systems, and lethal consequences for tiny mistakes) as the stage props of orchestrated heroism, the type of challenges that make the activity even more rewarding.").

174. *Id.* at 182 (arguing that the higher stakes of terrorism as compared with what is considered typical organized crime give Congress the basis for the belief that prevention is more necessary for terrorism than for other crimes, and because prevention is more necessary for terrorist acts, the laws should reflect that notion).

175. Punishment via criminal law under the utilitarian theory can serve as a deterrence to discourage others from doing the same activity, and under the retribution theory of law can punish people for not abiding by the law and steering away from the moral fabric that has been developed and laid out by society.

176. *See, e.g.*, UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 2B1.1(b)(11).

177. *See* Guiora, *supra* note 144, at 93-94.

without significant increases in cost, then it would seem to be reasonable to try to make strides to help prevent organized crime.

VI. HOW TO USE TAX FRAUD

Just because a method of crime prohibition prevents, decreases, or discourages a crime, does not mean it rises to the level of the draconian.[178] It is not draconian to prevent criminal actors from engaging in criminal activity.[179] It is not draconian to punish someone who consistently breaks the established laws of society and shows no remorse for his or her actions.[180]

Courts and Congress alike are making a false assumption that prosecutors will use broadly-interpreted rules and laws to take advantage of criminals[181] and their prior criminal history.[182] Just because there is a new rule created or there is a new use for a law, does not mean that rule or law is too broad to be applied to present cases. If a defendant is breaking a law that does not involve some type of civil disobedience, then it may be considered unconstitutional or too broad.[183] If tax fraud is interpreted so broadly that no one understands what the law is or how that law is to be applied, then there is an issue of enforcement - perhaps even an issue of unconstitutionality.[184]

The purpose for which the crime of tax fraud is currently being used and the purpose for which it can be used in the future seem obvious. Rationally speaking, if someone intentionally lies or cheats on his or her taxes, then they are committing some form of tax fraud.[185] There is no hidden or esoteric loophole that punishes unsuspecting victims who intentionally and successfully attempt or unsuccessfully attempt to defraud the United States government. There are many opportunities to catch them in the act of committing tax fraud because tax fraud is so prevalent among Americans.[186] Instead of disguising tax fraud under the mail fraud or wire fraud statutes,[187] if tax fraud could be coupled with other RICO offenses, or even treated as a predicate offense, there are many goals that this action could accomplish. Setting tax fraud as a predicate offense would help

178. *Cf.* United States v. Gelb, 700 F.2d 875, 879 (2d Cir. 1983).

179. *Id.*

180. *See* Guiora, *supra* note 144, at 60-61.

181. *See* Lynch, *supra* note 71, at 661-62.

182. *See Gelb*, 700 F.2d at 879.

183. *See* Gonzalez v. Carhart, 550 U.S. 124, 127 S. Ct. 1610, 1628 (2007) ("The void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (quoting Kolender v. Lawson, 461 U.S. 352, 307 (1983)).

184. *See e.g.,* U.S. CONST. amend. V.

185. *See* 26 U.S.C. §§ 7201-07 (1982).

186. Ostas, *supra* note 42, at 572.

187. *See, e.g.,* United States v. Busher, 817 F.2d 1409, 1412 (9th Cir. 1987).

address two problems.[188] In terms of a general tax fraud offense, Congress is punishing someone who has committed tax fraud and that is it,[189] but when thinking about tax fraud as applied to a predicate offense, it does much more.[190]

VII. CONCLUSION

When it comes to innovation, we must stand on the shoulder of what has come before us. Using innovative yet powerful tools to prohibit organized crime can serve as a very effective tool to keep criminals off the streets and from adversely affecting our society. Congress has already provided us with tools in tax fraud statutes and rules,[191] but it is now up to courts and Congress to allow prosecutors to use these tools in ways other than those in which they were used in the past.[192]

Critics who complain of the harshness of RICO in its prosecution seem to ignore the benefit of the act. RICO is not used simply to convict high level executives or large corporations; white-collar crime is not committed solely by people who work in chief executive positions.[193] White-collar crimes, such as tax fraud, are just as easily committed by people considered to be underworld criminals. The fact that RICO discourages businesses from cheating the public is an acceptable goal;[194] this benefits our society as a whole. However, just because the act serves one particular benefit does not mean that the act cannot serve other public benefits to our society.

RICO discourages fraud in particular and crime in general.[195] Although it may not catch each and every single criminal, it *catches*

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188. If tax fraud is used to punish people who engage in organized crime, it does two things: First, it discourages people in general from committing tax fraud because of the stiff penalties that could ensue from committing this type of fraud. Second, it discourages organized criminals from engaging in such activities because they would have to report this on their tax return; and, if they reported what they were actually doing, then they would be essentially giving themselves up to the federal government. *Id.* at 585.

189. *See* Podgor, *Synonymous, Cumulative or Diverse*, *supra* note 75, 906-07.

190. You are given the opportunity to punish someone who has contributed much more harm to society than merely cheating on his taxes. Do not make the mistake of assuming this Comment condones tax fraud and ignores the detriment it causes to society, but this Comment does encourage one to realize the important fact that tax fraud, when combined with robbery, illegal gambling, and other illegal acts that come along with organized crime and organized criminals, can result in stiff penalties which can help deter criminals from engaging in tax fraud.

191. *See* 26 U.S.C. §§ 7201-07 (1982).

192. The tax fraud statutes can be used as Congress originally intended or as a predicate RICO act. These statutes, when used in the latter manner and combined with another criminal activity, can bring about stiff penalties for defendants. *See* 18 U.S.C. § 1963.

193. Zolkind, *supra* note 80, at 443 n.31 (quoting PETER W. LOW & JOSEPH L. HOFFMAN, FEDERAL CRIMINAL LAW 161 (1997)).

194. *See* United States v. Turkette, 452 U.S. 576, 588, 101 S. Ct. 2524, 2531 (1981).

195. 18 U.S.C. § 1962-1963 (1988).

criminals. It is not unjust for society to catch a criminal using tax fraud;[196] these potential defendants have done something to warrant conviction. Prosecutors would then seek to punish them for their wrongdoing and not just punish the offender for the sake of punishment itself. Federal prosecutors who praise the use of mail fraud for its broad applicability[197] could have the same success with the use of tax fraud if tax fraud statutes are broadly applied. Because so many people commit tax fraud, the potential pool of defendants is vast for federal prosecutors.[198]

Although there may be no perfect solution to the problem that plagues America in the form of organized crime, there is a very powerful tool that can be used to assist in deterring organized crime — tax fraud statutes. Congress has the authority to tax the public;[199] organized criminals who choose not to abide by these tax laws should suffer the consequences. If tax fraud is used in conjunction with RICO as a predicate offense, these organized criminals will not be untouchable.

Donald Crump

196. *See* 26 U.S.C. §§ 7201-07 (1982).
197. *Podgor, Letters*, *supra* note 59 at 266
198. *See* Ostas, *supra* note 42, at 599.
199. U.S. CONST. art. I, § 8, cl. 1.