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Counteracting Theft and Fraud: The Applicability of RICO to Organized Retail Crime

Ryan Stai*

For thirty years, Donnie Ellis terrorized financial institutions in the Minneapolis-St. Paul metropolitan area. During the 1990s, Ellis ran his own criminal ring of over thirty members. His group stole automobiles, broke into homes, forged checks, and used stolen credit cards. According to law enforcement officials, Ellis's ring earned an astounding $500,000 per year from its fraud and forgery activity, and caused another $250,000 in burglary damage to homes and vehicles. Police estimated that the ring grossed $5 million in profits from 1993 to 2004 while victimizing thousands of people and businesses. In the fall of 2003, the group was responsible for over sixty percent of the car thefts in the city of St. Paul.

"Ellis [was] the kingpin," said one of the law enforcement investigators responsible for Ellis's arrest in February 2004 after months of surveillance. "[His group has] been here for 10 to 1391

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2. Id.
5. Id.
6. Id.
7. Id.
Ellis oversaw a theft and fraud ring in which each member played an "independent role." The ring first obtained stolen credit cards, checking accounts, and driver's licenses to create false identities. "Middle management," composed of individuals working directly under Ellis, recruited people, often prostitutes, to make fraudulent purchases at retail establishments. Different people returned the merchandise for a full cash refund.

Ellis "always tried to keep two to three layers between him and the point of the crime" and rarely engaged in criminal acts. He used several cellular telephones under different people's identities to coordinate the activity. The group quickly used the checks and credit cards it obtained, making it more difficult for law enforcement to catch the members. Ellis was "always in control via cell phone a few blocks away, never in the action where he could get arrested." While several departments acting alone failed to get Ellis, it took the effort of a multijurisdictional task force to finally apprehend him. According to law enforcement officials, his arrest will "greatly impact [St. Paul's property crime] numbers." Removing Ellis as the ring's leader "will have a sizable impact" on fraud losses.

In many ways, Ellis's ring is reminiscent of traditional organized crime groups, complete with a kingpin, middlemen, and runners. While it appears that Ellis's group has finally

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8. Id.
10. Id.
11. Id.
12. Id.
13. Id. (quoting a law enforcement investigator).
15. Gottfried, supra note 3.
17. Id. (quoting a law enforcement investigator).
18. See id. Ellis's broad activity and evasiveness prevented any single police department from apprehending him. See id. The involvement of the multijurisdictional Minnesota Financial Crimes Task Force supplied the necessary investigative resources to capture Ellis. Id. The apprehension finally occurred after an informant tipped off police that Ellis's drug addiction required him to actually start passing forged checks. Id. Within hours, investigators arrested Ellis. Id. "He went out and tried to cash stolen checks himself," said an investigator. Id. This activity deviated from Ellis's normal hands-off approach toward fraudulent acts. See id; see also infra note 47 (discussing the Minnesota Financial Crimes Task Force).
20. Adams, supra note 1 (quoting a law enforcement investigator).
been eviscerated, the question arises as to whether an approach under the federal racketeering statutes could have eliminated the ring well before it amassed $5 million in profits. Just as the federal criminal Racketeer Influenced and Corrupt Organizations Act (RICO)\textsuperscript{21} was successfully implemented against the mob,\textsuperscript{22} perhaps it can also be used against major theft and fraud rings. In general terms, RICO requires a pattern of racketeering activity—which is defined as committing two or more predicate criminal acts from a list of over seventy-five statutorily defined crimes—conducted by either a legal entity or an informal “association in fact” that affects interstate commerce.\textsuperscript{23} Ellis’s ring operated for over ten years, continually engaging in acts of forgery, identity theft, and burglary. Ellis undoubtedly led the ring.\textsuperscript{24} The activity affected interstate commerce through the thousands of impacted victims and fraudulent transactions that occurred between Minnesota and Wisconsin.

This Note addresses the applicability of the federal criminal RICO statute to organized retail criminals. Part I explains the economic impact and structure of organized retail crime rings. Part II discusses the individual elements necessary under RICO and analyzes RICO’s potential applicability to organized retail crime rings. Part III analyzes the practicality of using RICO to prosecute organized retail crime rings. This Note concludes that RICO can be an effective means of decreasing economic losses through the prosecution of organized retail crime rings.

I. THE ECONOMIC IMPACT AND STRUCTURE OF ORGANIZED RETAIL CRIME RINGS

Retail crime is estimated to create annual economic losses in excess of $80 billion.\textsuperscript{25} While the exact economic loss caused by organized retail crime rings is unknown,\textsuperscript{26} one expert places

\begin{footnotesize}
\textsuperscript{22} See infra Part II.A (discussing the history of RICO and its use to counteract mob activity).
\textsuperscript{24} See Adams, supra note 1 (discussing Ellis’s “kingpin” role in organizing and overseeing the individual acts of fraud and theft).
\textsuperscript{25} See infra notes 31, 37, 44 and accompanying text.
\textsuperscript{26} NAT’L WHITE COLLAR CRIME CTR., ORGANIZED CRIME 3 (Sept. 2002), available at http://www.nw3c.org/downloads/Organized_Crime.pdf (concluding that “[a]ssessing the nature and extent of harm caused by organized crime is difficult because of its multifaceted nature”).
\end{footnotesize}
the annual loss attributable solely to these rings at $30 billion. For purposes of this Note, retail crime will be separated into two categories: retail financial fraud and retail theft.

A. THE ECONOMIC IMPACT OF FINANCIAL FRAUD AND RETAIL THEFT

Check fraud, including check counterfeiting, is one prevalent type of financial fraud. It represents rapidly increasing problems damaging the nation's financial system. Overall, losses from check fraud exceed $20 billion each year and are expected to increase at a rate of 2.5% each year. Check fraud is ranked second highest when top American companies are asked about crimes affecting their businesses.

Credit card fraud is another prevalent type of financial fraud. The Federal Trade Commission includes credit card fraud, including credit card counterfeiting, in its top ten list of consumer frauds. Credit card fraud includes stolen credit cards, account takeovers, counterfeit cards, and the opening of unauthorized accounts using a victim's personal identification.

27. Interview with Chris Nelson, Dir. of Investigations, Target Corp., in Minneapolis, Minn. (Oct. 29, 2003) [hereinafter Nelson]. Target Corporation is the parent company of retailers Target Stores, Mervyn's California, and Marshall Field's Department Stores. Id. Nelson has eight years of experience in retail investigations of organized theft and fraud rings with Target. Id. Prior to his career in retail investigations, Nelson received law enforcement training as a military police officer with the United States Army. Id.


29. See infra notes 39–40 and accompanying text.

30. See Walter N. Hansen, Combating Check Fraud, 68 FBI L. ENFORCEMENT BULL. 10 (May 1999) (stating that "check fraud represents the most important crime problem affecting our nation's financial community"); NAT'L WHITE COLLAR CRIME CTR., CHECK FRAUD 2 (Sept. 2002), available at http://www.nw3c.org/downloads/Check_Fraud.pdf (discussing the fact that advances in computer and printing technology have made check forgery an easier crime to commit).


32. NAT'L WHITE COLLAR CRIME CTR., supra note 30, at 2.

33. Litster, supra note 31, at 29.
fraud as a form of identity theft, and further categorizes credit card fraud into subcategories, depending on the method utilized to complete the act of fraud.\textsuperscript{34} Annually, more than three million Americans are victims of crimes in which a fraudulent credit account is opened in their name, resulting in a nationwide financial loss of $32.9 billion.\textsuperscript{35} Crimes in which a victim's existing credit account is misappropriated annually affect more than six million Americans and produce a financial loss of $14 billion.\textsuperscript{36} The overall annual loss to identity theft is $47.6 billion.\textsuperscript{37} In the past five years, approximately twenty-seven million Americans have been victims of identity theft.\textsuperscript{38}

Retail theft falls into two categories—petty shoplifting\textsuperscript{39} and organized retail theft.\textsuperscript{40} Organized retail theft represents a more detailed and complex criminal scheme than simple shoplifting.\textsuperscript{41} Retailers annually lose $31.8 billion due to shoplift-

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\item \textsuperscript{34} FED. TRADE COMM‘N, supra note 28, at 4 n.1. The FTC divides credit card fraud into such categories as “New Accounts & Other Frauds,” “Misuse of Existing Credit Card or Card Numbers,” and “Misuse of Existing Non-Credit Card Accounts or Account Number.” Id. The crime of identity theft is committed when “an individual appropriates another’s name, address, social security number, or other identifying information to commit fraud.” Erin M. Shoudt, Comment, Identity Theft Victims “Cry Out” for Reform, 52 AM. U. L. REV. 339, 341 (2002) (quoting The Identify Theft and Assumption Deterrence Act: Hearing on S.J. Res. 512 Before the Senate Comm. on the Judiciary, Subcomm. on Tech., Terrorism, and Gov’t Info., 105th Cong. 17 (1998) (statement of David Medine, Assoc. Dir. of Credit Practices, Bureau of Consumer Prot., Fed. Trade Comm’n)).
\item \textsuperscript{35} FED. TRADE COMM‘N, supra note 28, at 7. This category, referred to as “New Accounts & Other Frauds,” is defined as misusing a victim’s personal information to “open new credit accounts, take out new loans, or engage in other types of fraud, such as misuse of the victim’s name and identifying information when someone is charged with a crime, when renting an apartment, or when obtaining medical care.” Id. at 4.
\item \textsuperscript{36} Id. at 7. “Misuse of Existing Accounts” consists of “the misuse of one or more existing credit cards or credit card account numbers” and the “misuse of one or more of [a victim’s] existing accounts other than credit cards—for example checking or savings accounts or telephone accounts.” Id. at 4.
\item \textsuperscript{37} Id. at 7.
\item \textsuperscript{38} Id. at 12.
\item \textsuperscript{39} CHARLES I. MILLER, FOOD MKTG. INST., A REPORT ON ORGANIZED RETAIL THEFT 3 (2003), available at http://www.fmi.org/loss/ORT/ORT_report.pdf. Petty shoplifting is “the lower tier . . . in the misdemeanor category.” Id. It can be best thought of as a crime of opportunity. Petty theft is not considered in this Note.
\item \textsuperscript{40} Id. at 4. Professional or organized retail theft is committed by people that use shoplifting as a means of living. See id.
\item \textsuperscript{41} See Nelson, supra note 27. Organized theft is a “preconceived criminal idea or enterprise with the express concern of taking large quantities of commodity product.” Id.
and organized retail theft represents "the most pressing security problem confronting retailers." Theft losses from organized groups are estimated to be as high as $15 billion per year.

B. THE ORGANIZATION OF RETAIL CRIME RINGS

While figures do not exist to quantify the number or economic impact of organized retail crime rings in operation, one retail investigations expert conservatively estimates the number to be more than five hundred. From a financial standpoint, organized financial fraud rings may be responsible for more than half of all financial fraud.

Though slightly larger in the number of associated members, Donnie Ellis's group typifies the general structure of a financial fraud ring. Rings generally consist of eight to twelve

43. MILLER, supra note 39, at 1.
44. Id.; cf. King Rogers, Organized Retail Theft: From Prison Training Grounds to a Store Near You, LOSSPREVENTION, Fall 2001, at 18, 22 (citing an industry expert that estimated the loss to be $12 billion annually).
45. See supra note 26 and accompanying text.
46. See Nelson, supra note 27. Nelson estimates that hundreds of these rings operate on a national or multistate level. Id. From January 2003 to October 2003, Target Corporation investigators had a role in the arrests of more than five hundred individuals stemming from over three hundred cases. Id. During that time, Target Corporation investigators managed more than five hundred active investigations on organized retail crime rings. Id.
47. E-mail from John McCullough, Director, Retailers Protection Association, to Ryan Stai (Oct. 1, 2003) [hereinafter McCullough] (on file with author). McCullough spent twenty-two years in the retail loss prevention industry. Id. He is a Certified Protection Professional and Certified Fraud Examiner. Id. For the past five years, he has directed the Retailers Protection Association, a group of 270 retail and banking members and 750 participating law enforcement members. Id.
48. See supra notes 1–20 and accompanying text for a discussion of Ellis's
group members.49 Often, the leader of the ring organizes the members and coordinates their fraudulent activity, producing and dispersing counterfeit checks to "runners," distributing the profits from fraudulent activity, and recruiting individuals to pass counterfeit and stolen checks.50 Generally, members below the leader conduct the fraudulent activity, in a role similar to "mules" in the drug trafficking world.51

A theft ring serves as an "organized criminal enterprise"52 consisting of members who frequently are "former convicted felons who learned of this new way to make a substantial tax-free cash income during conversations with other inmates."53 Generally, a "booster"54 steals specifically requested merchan-

49. See McCullough, supra note 47.
50. See, e.g., United States v. Hunter, 323 F.3d 1314, 1316 (11th Cir. 2003) (discussing a counterfeit check ring with two primary leaders responsible for the printing and distribution of counterfeit checks, three middlemen in charge of recruitment and serving as drivers, and approximately nineteen "runners" that passed the counterfeits); United States v. Taylor, No. 98-3514, 1999 U.S. App. LEXIS 30656, at *2 (6th Cir. Nov. 19, 1999) (involving a counterfeit check-cashing ring led by two individuals that recruited and instructed "cashers" to pass the counterfeit checks, paying the cashers twenty-five percent of the proceeds); United States v. Bigger, No. 97-2005, 1998 U.S. App. LEXIS 2042, at *2 (7th Cir. Feb. 9, 1998) (describing a nationwide counterfeit check ring operated from California with numerous regional "organized cells" for the purposes of printing, distributing, and passing counterfeit checks). But see, e.g., Kelly Scott, Police Arrest 8 in Forged Check Ring, ST. CLOUD TIMES (Minn.), Nov. 14, 2003, at 1A (discussing the arrest of eight individuals for passing over $35,000 in counterfeit payroll checks, limited solely to five counties in central Minnesota). Individuals that pass counterfeit and stolen checks are referred to as "runners." See Hunter, 323 F.3d at 1316.
51. See McCullough, supra note 47. These individuals "are nothing more than 'pawns or tools'... In the fraud business [they] are also call[ed] mules." Id.
52. MILLER, supra note 39, at 4. Organized retail theft rings generally consist of three levels. Id. The lowest level consists of thieves that support themselves by stealing and selling the stolen merchandise to a fence. Id. The middle level consists of groups of professional shoplifters that are "recruited, trained and supervised by street fences." Id. It is not uncommon for these "booster"s to have annual incomes of $100,000 stemming from their theft activities. Id. The final level consists of operations that repackaged stolen items purchased from fences and illegitimate wholesalers who sell the repackaged merchandise to legitimate retailers. Id. at 5; see also Rogers, supra note 44, at 20–21.
53. Rogers, supra note 44, at 20.
54. A "booster" is the industry term for "someone who steals for a living and who is involved in an organized criminal enterprise." Id.; see also supra note 52.
dise and sells it to a "fence." The fence then sells the merchandise either to legitimate consumers or to an illegitimate repackaging entity. Illegitimate repackaging entities "clean up stolen product," repackage it, and sell it either to legitimate retailers or to wholesalers who mix the stolen merchandise with legitimate products. The entire scheme results in substantial profits for everyone involved. It is not uncommon for organized retail theft rings to employ more than fifty members Regardless of the type of ring, someone sits at the top of the hierarchy and oversees the entire organization. The more profitable and structurally complex rings take measures to insulate the leadership of the ring from the runners of the group. Identifying, catching, and prosecuting the high-ranking members of the ring is extremely difficult. Removing the hierarchical leadership generally results in dissipation of the ring, most often through prosecution of all of its identifiable members. As one retail investigations expert commented, "if you do

55. See Miller, supra note 39, at 16–17 (reproducing a list supplied to a booster containing specific merchandise the booster was requested to steal).
56. Rogers, supra note 44, at 20. A "fence" is someone who buys merchandise from professional shoplifters for a fraction of its retail value and generally recruits and trains boosters.
57. Id.
58. Id. at 20–21. "Cleaning up" is the process of removing price tags and security devices from stolen product. Id. It may also involve changing expiration dates on perishable items. Id.
59. Id. at 20. One booster admitted to a cash income of $120,000 to $150,000 per year. Id.
60. Nelson, supra note 27. Target Corporation routinely investigates groups composed of forty to fifty members. Id.
61. Id. ("As a general rule, on each side, you have somebody that's up top, pulling the strings and orchestrating.").
62. Id. (noting that the good groups are similar to terrorist cells in that they "take steps to isolate" the different subparts of the ring).
63. Hansen, supra note 30, at 12 (stating that "[i]t remains extremely difficult to identify, let alone convict, the [check] passer's associates, such as the thief or counterfeiter and those involved in distributing the checks"); Paul E. Coffey, The Selection, Analysis, and Approval of Federal RICO Prosecutions, 65 Notre Dame L. Rev 1035, 1038 (1990) (noting that the leaders of crime families are "difficult to convict due to their insulation from crimes committed by their underlings"); Nelson, supra note 27 (commenting that it is difficult to catch the leader of a ring and that identifying and apprehending this person takes up the "lion's share of investigative time").
not stop them, they will continue. They will do multiple criminal acts and they'll continue to do it as a process until they are stopped or caught.”

Financial fraud rings and theft rings are formed through similar means. A ring is formed either from associations within a prior criminal syndicate or when an individual envisions a lucrative criminal endeavor and recruits members to assist. Origins of the ring are often highly selective of the individuals they bring into the organization. Violence may be used either to enforce group loyalty or to punish individuals for conduct harmful to the continued existence and profitability of the organized crime ring. Once formed, the rings are often run with a criminal mindset similar to a gang or, in some cases, a legal business.

While many financial fraud and theft rings conduct their activity in local metropolitan areas, several rings operate on a membership losses to La Cosa Nostra due to the government's continuous investigation and prosecution left vacancies in the leadership and resulted in operational difficulty).

65. Nelson, supra note 27. Nelson also stated that the important fact about organized rings “is that they have devised a criminal scheme that is perpetrated over and over again in order to make money. The way that they make money is the fact that they do it over and over again.” Id.; see also United States v. Gonzalez, 491 F.2d 1202, 1206 (5th Cir. 1974) (noting that organized criminal rings “do not normally conceive of the association as engaging in one unlawful transaction and then disbanding,” but that “the nature of such organizations seems to be an ongoing operation”).

66. See Nelson, supra note 27 (stating that other than the method of criminal activity, financial fraud and theft rings are generally formulated and structured in similar fashion).

67. See Rogers, supra note 44, at 20 (commenting on the number of felons that engage in organized retail crime).

68. See Nelson, supra note 27 (stating that while the initiative behind some rings originates in prison, others are formed by individuals “that get good ideas”).

69. Id. (commenting that some rings have a “very clear cut selection process”).

70. Id. (admitting that some groups have an enforcement wing that punishes individuals that have spoken to law enforcement agencies); see also Rogers, supra note 44, at 20 (identifying a former booster that feared for his life due to his cooperation with law enforcement officials).

71. See Nelson, supra note 27 (adding that ring members can be equated with “business people . . . on the wrong side of the law”).

72. See McCullough, supra note 47 (stating that most of the organized financial fraud groups in Minnesota operate solely within the Minneapolis-St. Paul area); Nelson, supra note 27 (stating that “numerically, it's probably more common that [organized retail crime is] done in a metro area”).
multistate or national level. Highly profitable rings are often mobile groups that travel on a multistate or national level. Groups are mobile for many reasons. First, because several of the crimes committed by organized retail rings are predicated on the group remaining anonymous, members of the group do not want to be recognized. Second, rings are conscious of criminal laws and move around to prevent “rais[ing] up the level of the crime” in any one jurisdiction. Rings recognize that mobility “provides them better cover and . . . a bigger venue to victimize.” The difficulty in efficiently prosecuting multistate activity works to assist their broad-scale endeavors.

Finally, it is common for rings engaged in retail crime to partake in other illegal acts, such as narcotics trafficking, weapons, and prostitution. Car theft and burglary have also been associated with retail crime rings. The ring leaders and

73. See Press Release, U.S. Dep't of Justice, Five Women Arrested on Financial Fraud Charges Allegedly Scammed $600,000 in Merchandise at Retail Stores Using False IDs (Oct. 2, 2002), available at http://www.usdoj.gov/usao/ln/pr/2002/pr1002_01.pdf (discussing a financial fraud group that traveled throughout the Midwest and Florida passing counterfeit checks); supra notes 46, 50 and accompanying text (discussing nationally based groups).

74. Nelson, supra note 27 (stating that rings that operate interstate “are the ones that really generate a lot of the money”); see also Press Release, supra note 73 (commenting on a traveling group that earned more than $600,000 in four years from its activity).

75. Nelson, supra note 27 (indicating that groups “don’t like to be recognized”).

76. Id.; see also Hansen, supra note 30, at 12 (acknowledging that forgery suspects avoid committing too many offenses in one area).

77. Nelson, supra note 27.

78. See Gerard E. Lynch, RICO: The Crime of Being a Criminal, Parts III & IV, 87 COLUM. L. REV. 920, 924 (1987) (noting that multijurisdictional criminal activity “may prevent any court from having jurisdiction over enough of the case to permit unified prosecution of the entire operation in a manner that makes significant penalties available” and that RICO has effectively permitted prosecutions in these cases).

79. See U.S. DEP’T OF HOMELAND SEC., INVESTIGATIVE PROGRAMS: PROTECTING AMERICA’S FINANCIAL SYSTEMS 4 (July 8, 2003), http://www.dhs.gov/interweb/assetlibrary/Financial_Crimes_Press_Kit.doc (noting that identity crimes are “almost always associated with other crimes such as narcotics and weapons trafficking, organized crime, mail theft and fraud, money laundering, immigration fraud, and terrorism”); Adams, supra note 1 (noting that the police recovered a semiautomatic handgun and crack cocaine from Donnie Ellis and that Ellis frequently recruited prostitutes to write fraudulent checks).

80. Nelson, supra note 27 (describing types of criminal activity associated with organized retail crime); see also Adams, supra note 1 (detailing Ellis’s ve-
fences pay many boosters with drugs.\textsuperscript{81} Financial fraud rings may conduct criminal acts of general counterfeiting, pick pocketing, and illegal cash transactions.\textsuperscript{82} Additionally, some rings will use members of their group to infiltrate legitimate businesses in an effort to obtain information critical to the group’s profitable crimes.\textsuperscript{83} An increasing trend is the funneling of theft- and fraud-related profits to fund foreign terrorists groups.\textsuperscript{84}

II. FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT

A. THE HISTORY AND PURPOSE OF RICO

In 1970, Congress passed the federal racketeering statutes,\textsuperscript{85} collectively known as the Racketeer Influenced and Corrupt Organizations Act.\textsuperscript{86} The purpose of RICO was to “seek the eradication of organized crime . . . by strengthening the legal tools in the evidence-gathering process . . . and by providing enhanced sanctions and new remedies to deal” with organized criminals.\textsuperscript{87} Congress specifically found that organized crime was a “highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy”\textsuperscript{88} and that “organized crime activities in the United States weaken the stability of the Nation’s economic system, . . . interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine

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  \item \textsuperscript{81} Nelson, supra note 27.
  \item \textsuperscript{82} See Hansen, supra note 30, at 11.
  \item \textsuperscript{83} Nelson, supra note 27 (noting that, on occasion, members of the ring will seek employment at banks, credit unions, and other financial institutions to secure vital information such as victim identities and credit histories and as a means of monitoring the criminal acts and potential detection of the group’s efforts).
  \item \textsuperscript{84} Id. (commenting that in 2003, Target Corporation investigated three significant cases where the rings’ profits were sent overseas to fund foreign-based terrorist groups); see also NAT’L WHITE COLLAR CRIME CTR., supra note 30, at 3 (discussing the activity of a North Carolina–based group that was funding the Middle Eastern terrorist group Hezbollah).
  \item \textsuperscript{87} 84 Stat. at 923.
  \item \textsuperscript{88} Id. at 922.
\end{itemize}
the general welfare of the Nation and its citizens.\textsuperscript{99} Congress felt RICO was necessary because "the sanctions and remedies available to the Government [were] unnecessarily limited in scope and impact."\textsuperscript{90}

In its thirty years of existence, RICO has been the most effective governmental tool to combat organized crime.\textsuperscript{91} The difficulty in prosecuting organized crime leaders prior to RICO rested in their insulation from the activities of the organized group.\textsuperscript{92} Initially, attempts at prosecuting organized crime were performed at a "piecemeal" level, only charging individual members with single criminal acts.\textsuperscript{93} The leaders of the rings, "when caught, were only penalized for what seemed to be unimportant crimes," and criminal prosecutions of the overall organization were inhibited.\textsuperscript{94} For successful prosecution of the entire organization, the government needed to pierce this complex structure, which usually proved impossible.\textsuperscript{95}

The advent of RICO brought to the government a "powerful weapon in this battle"\textsuperscript{96} to counter the primary purpose of or-

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\textsuperscript{89} Id. at 923; see also Michael Goldsmith, \textit{RICO and Enterprise Criminality: A Response to Gerard E. Lynch}, 88 COLUM. L. REV. 774, 775 (1988) (stating that in enacting RICO, Congress realized the government's prior failure in focusing on individual members rather than the criminal group as an organized body, allowing organized crime to prosper).

\textsuperscript{90} 84 Stat. at 923.


\textsuperscript{92} See Coffey, supra note 63, at 1038; see also Lynch, supra note 78, at 967 (noting that the difficulty in prosecuting the leaders of organized crime has to do with the inability to produce enough evidence to directly connect them to the predicate crimes).

\textsuperscript{93} Id.; see also Morgan Cloud, \textit{Organized Crime, RICO, and the European Union}, 27 SYRACUSE J. INT'L L. & COM. 243, 255 (2000) (noting that the arrest and conviction of a few members has very little impact on the continued success of an organized ring).

\textsuperscript{94} Coffey, supra note 63, at 1038; see also Attack on La Cosa Nostra, supra note 64, at 3–4 (noting the Mafia's strict code of behavior and its propensity for violence).

\textsuperscript{95} Coffey, supra note 63, at 1038.
\end{flushright}
organized crime: earning money. RICO allowed prosecutors to charge and present evidence against the organization as a whole, resulting in the indictment of key leaders of the organized group. Subsequent successful prosecution resulted in the removal of organized crime leadership and the forfeiture of ring assets. As prosecutors and law enforcement gained experience, RICO became an even more effective tool.

RICO proved effective because it focused law enforcement on organized crime and rewarded prosecutors by securing convictions of crime leaders. As a result, membership in organized criminal groups became "fearful prospects for professional

97. Attack on La Cosa Nostra, supra note 64, at 4. However, the Supreme Court eliminated the need for an economic purpose in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994).
98. Attack on La Cosa Nostra, supra note 64, at 14.
99. Richard L. Worsnop, Mafia Crackdown: Has Relentless Prosecution Fatally Weakened the U.S. Mafia?, 2 CQ RESEARCHER 265, 268 (1992) (stating that RICO's application allowed prosecutors to attack the leadership and revenue of the ring and that successful prosecution of Mafia leadership created a "devastating ripple effect" as "unseasoned successors," unqualified to lead, stepped into the vacancies).
100. See Attack on La Cosa Nostra, supra note 64, at 14.
101. Worsnop, supra note 99, at 269. "In the 1960s, [prosecutors] figured out who the mob leaders were . . . . In the 1970s, [prosecutors] drafted the legislation to fight organized crime. And in the 1980s, [prosecutors] found out how to apply the legislation effectively." Id. (quoting University of Notre Dame law professor G. Robert Blakey). According to the director of New York's Organized Crime Task Force, "[C]urrent law enforcement efforts . . . in the next five to 10 years [will render the mob] totally recognizable." Id. But cf. id. (referring to another source as saying organized crime is only in a "transitional phase" and may turn out stronger); John M. Nonna & Melissa P. Corrado, RICO Reform: "Weeding Out" Garden Variety Disputes Under the Racketeer Influenced and Corrupt Organizations Act, 64 St. JOHN'S L. REV. 825, 832 (1990) (stating that recent Congressional action to expand the number of RICO predicate acts "acknowledges that racketeering activity and activity commonly associated with racketeering takes many forms").
102. Coffey, supra note 63, at 1039. The advantageous effects of RICO outweigh the negatives of complex litigation and joinder that can result from the application of RICO. See id. Additionally, while RICO was a key element in the prosecution of organized crime, other measures, such as increased witness protection, the creation of guidelines in pretrial detention, and enhanced surveillance tools, contributed to the government's success. See Attack on La Cosa Nostra, supra note 64, at 16. But cf. Coffey, supra note 63, at 1045 (noting the legitimacy of the argument that organized criminal activities can be prosecuted using less complicated statutes and that the use of RICO introduces the negative potential that the trial will become too complex and filled with "foreign concepts of enterprise, racketeering, and pattern"); C.J. William H. Rehnquist, Get RICO Out of My Courtroom, WALL ST. J., May 19, 1989, at A14 (expressing concern that RICO cases are flooding the federal docket).
criminals," and the power of traditional organized crime groups greatly decreased. Additionally, the legislative history behind RICO directs that the statute "shall be liberally construed to effectuate its remedial purposes." This principle actively guides judicial interpretations of RICO, because "courts are without authority to restrict the application of the statute." The Supreme Court has noted that in creating RICO, Congress understood that the "stereotypical" organized crime ring was expanding its activity beyond traditional organized crimes. RICO's broad application "encompass[es] a wide range of criminal activity, taking many different forms and [is] likely to attract a broad array of perpetrators operating in many different ways." RICO establishes criminal and civil actions, as well as forfeiture of any interest a person obtains in property as a result of the RICO violation. Criminal RICO contains four substantive offenses. First, it forbids using racketeering income to invest in a legitimate business. Second, it bans the use of racketeering income to obtain control of a legitimate business. Third, RICO prohibits the running of an enterprise

103. Attack on La Cosa Nostra, supra note 64, at 13.
104. See Hansen, supra note 30, at 10 (noting that the identification of "organized check fraud activity... can have a measurable impact on this pervasive crime problem"); Cloud, supra note 94, at 255; supra note 94 and accompanying text.
108. Id. at 248–49.
110. Id. § 1964.
111. Id. §§ 1963(c), 1964(a).
112. Artie Jones et al., Racketeer Influenced and Corrupt Organizations, 39 AM. CRIM. L. REV. 977, 980 (2002); see also Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 495 (1985) (stating that § 1962 makes it illegal for a person "to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity").
114. Id. § 1962(b).
through racketeering activity. Finally, it makes it a crime to conspire in any of the first three substantive offenses. Because organized retail crime rarely attempts to infiltrate a legitimate business, its activity is analogous to running an enterprise through racketeering activity. Thus, the remainder of this Note focuses exclusively on the applicability of the RICO provision that prohibits running an enterprise through racketeering activity, 18 U.S.C. § 1962(c).

B. THE ELEMENTS OF RICO AND ITS APPLICATION TO ORGANIZED RETAIL CRIME RINGS

RICO requires three general elements: a pattern of racketeering activity, the existence of an enterprise, and an effect on interstate commerce. The first two elements, however, consist of several subelements.

1. Pattern of Racketeering Activity

The statutory definition of RICO requires a "pattern of racketeering activity," consisting of defined predicate offenses committed within a ten-year period. Supreme Court jurisprudence, however, renders the statutory definition virtually meaningless. In Sedima, S.P.R.L. v. Imrex Co., the Supreme Court noted that "while two acts are necessary, they may not be sufficient." The Court later elaborated that a pattern involves a relationship between the predicate acts and the threat of continued activity. Illegal acts of a ring that "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events" establish the necessary relationship between the predicate acts. The Court also decided that a "series of related predicates extending over a substantial period of time" fulfills the "continuity" re-

115. Id. § 1962(c).
116. Id. § 1962(d).
117. Few criminal charges are brought under 18 U.S.C. §§ 1962(a) or (b). Jones, supra note 112, at 997–98; see also Coffey, supra note 63, at 1042 (stating that "fraud cases are uncommon RICOs").
118. Jones, supra note 112, at 981.
120. 473 U.S. 479 (1985).
121. Id. at 229, 239 (1989).
123. Id. at 240 (quoting 18 U.S.C. § 3575(e)).
quirement. While the government must independently establish the “continuity plus relationship” element, the evidence required for each often overlaps.

Several of RICO's predicate offenses apply in the context of organized retail crime. For example, organized rings that commit acts of theft from retail establishments in different states violate federal laws if they transport stolen merchandise between states. Rings that perpetrate cargo theft violate statutes prohibiting theft of interstate shipments of merchandise. Financial fraud rings utilizing fake identification cards violate laws relating to fraudulent activity involving identification documents or “access devices.” Rings that defraud financial institutions violate additional federal laws. Organized rings communicating by mail or wire violate laws relating to mail and wire fraud. Finally, groups dealing in valuable stolen

124. Id. at 242. The Court elaborated that “[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy” the continuity requirement. Id. Instead, Congress intended “long-term criminal conduct” to be the activity targeted as prohibited. Id. The Court also recognized that RICO actions can be brought before continuity is established if “the threat of continuity is demonstrated.” Id. (emphasis omitted).

125. Jones, supra note 112, at 984.

126. See 18 U.S.C. § 2314 (2000) (forbidding the transportation in interstate commerce of stolen merchandise exceeding $5000); id. § 2315 (barring the reception or possession of stolen merchandise valued beyond $5000 that has been shipped in interstate commerce).

127. “Cargo theft” is the theft of merchandise being transported. “The typical cargo theft is backing up to a trailer full of product with another tractor . . . and taking it.” Nelson, supra note 27.

128. See 18 U.S.C. § 659 (prohibiting theft from any vehicle “with intent to convert to [the thief’s] own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight, express, or other property”); id. § 2314; id. § 2315.

129. See id. § 1028 (prohibiting the use, transfer, and possession of fraudulent identification cards appearing to be issued under the authority of either the federal or state government and the transfer or use of another person's legitimate identification card for the purpose of committing a felony crime).

130. See id. § 1029 (prohibiting the production, use, or trafficking of one or more counterfeit “access devices,” defined as any “card or . . . account number” used either alone or with another access device to obtain money or property, or the possession of fifteen or more counterfeit access devices).

131. See id. § 1344 (barring the execution of a plan to defraud or to obtain money under the control of a financial institution).

132. See id. § 1341 (prohibiting the use of the mail in a fraud scheme to obtain money or property).

133. See id. § 1343 (prohibiting the use of wire or radio communications in a fraud scheme to obtain money or property and imposing an enhanced sentence for affecting a financial institution).
property violate statutes involving criminally derived property.\textsuperscript{134}

Organized retail crime is not profitable unless several acts of theft and fraud are committed.\textsuperscript{135} Due to transactional price limits and the desire to minimize attention to their activity, fraud rings generally engage in numerous small fraudulent purchases.\textsuperscript{136} In doing so, these rings typically pass fraudulent instruments—checks, credit cards, and identification documents—several times.\textsuperscript{137} This activity frequently occurs over a prolonged period of time, often years.\textsuperscript{138} This type of sustained activity is standard for fraud rings.\textsuperscript{139} The threat of continued activity remains until the group is completely broken apart.\textsuperscript{140}

2. The Existence of an Enterprise

RICO defines an "enterprise" as either a legal entity or "any union or group of individuals associated in fact."\textsuperscript{141} RICO's definition includes both legitimate and illegitimate enterprises\textsuperscript{142} and is "equally applicable to a criminal enterprise that has no legitimate dimension or has yet to acquire one."\textsuperscript{143}

The Supreme Court expressed the test for an enterprise in \textit{United States v. Turkette}.\textsuperscript{144} According to the Court, an enterprise has two requirements. First, there must be a common purpose among a group of individuals.\textsuperscript{145} Second, there must be

\begin{itemize}
  \item \textsuperscript{134} See id. § 1957 (forbidding transactions of a participant that "knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000").
  
  \item \textsuperscript{135} See supra note 65 and accompanying text.
  
  \item \textsuperscript{136} See supra note 75 and accompanying text.
  
  \item \textsuperscript{137} See Press Release, supra note 73 (commenting on a fraud ring's use of more than one hundred fake identities and that the ring passed counterfeit checks for hundreds of dollars of merchandise per transaction while amassing over $600,000 in fraudulent activity over four years).
  
  \item \textsuperscript{138} See supra note 65 and accompanying text.
  
  \item \textsuperscript{139} Id.
  
  \item \textsuperscript{140} See supra notes 65, 91–104 and accompanying text.
  
  
  \item \textsuperscript{142} United States v. Turkette, 452 U.S. 576, 587 (1981). The Supreme Court has also held that an enterprise for RICO purposes does not require a "property interest" or "economic motive." Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 259 (1994).
  
  \item \textsuperscript{143} Turkette, 452 U.S. at 591.
  
  \item \textsuperscript{144} Id. at 576.
  
  \item \textsuperscript{145} Id. at 583 (stating that for the purposes of RICO, an enterprise exists when a group of individuals are associated for the "common purpose of engaging in a course of conduct").
\end{itemize}
evidence of an "ongoing organization" and individuals that function as a continuous unit. The Court declared that an enterprise is "an entity separate and apart from the pattern of activity in which it engages." While "enterprise" and "pattern of racketeering activity" remained separate elements that the government was required to prove, the Court acknowledged that the evidence used to establish these elements may often be the same.

Organized retail criminal rings exist for a common purpose, and their economic motivations are well documented. That these rings commit illegal acts as a means of profit while a hierarchy exists to divide the proceeds evidences this common purpose. An additional common purpose is proven through the ring's goal of acquiring profits.

The hierarchical structure of retail crime rings evidences their ongoing nature. Typically, one person acts as the group leader in organizing the individual acts of theft or fraud for the group. This includes determining which retail establishments the individual members of the group will victimize, the specific merchandise to target, whether to return merchandise for a cash refund or to sell it to some other group, and, if the merchandise is returned, which retail establishments to utilize for returns. The leaders of the ring act as a gateway for the col-

146. Id; see also United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (pointing to such evidence as hierarchical organization, planned activity, consistent pattern of conduct in committing criminal acts, social ties among the individuals, the number of criminal offenses, the number of victims, and the unlikelihood of the conduct ceasing); United States v. White, 116 F.3d 903, 924–25 (D.C. Cir. 1997) (highlighting evidence such as conduct over a geographic area, centralized operations, hierarchical organization, the existence of "middlemen," instructing other members on how to act, and the substitution of leadership during the organizer's incarceration).

147. Turkette, 452 U.S. at 583.

148. Id.

149. See supra note 65 and accompanying text.

150. See supra note 59 and accompanying text.

151. See supra note 61 and accompanying text.

152. See United States v. London, 66 F.3d 1227, 1244 (1st Cir. 1995) (stating that a common purpose can be shown through the economic gain of a ring); see also Thomas S. O'Neill, Functions of the RICO Enterprise Concept, 64 NOTRE DAME L. REV. 646, 713 (1989) (indicating that common purpose can easily be proven through the "showing that the associates wanted to make money").

153. See supra notes 61–65 and accompanying text.

154. See supra note 61 and accompanying text.

155. See supra note 55 and accompanying text.
lection of stolen merchandise, coordinate acts of cargo or interstate shipment theft, and establish or contact enterprises to repackage and sell the stolen goods. Furthermore, the organizational heads are typically responsible for distributing the profits of the group. Finally, the leaders of financial fraud rings generally obtain and organize necessary account and victim data and then create fraudulent instruments or pass the information on to runners so that they may produce counterfeit checks or credit cards.

The runners of the group—those who actually commit the individual acts of fraud and theft—closely follow the orders handed down to them by the group leader. If asked, these same individuals recruit additional members of the group and also return the profits to the leader. The ring leaders instruct runners, often with the threat of violence, to avoid implicating other members of the organization upon arrest.

As previously discussed, the continuing nature of organized retail crime rings is clear. In the case of organized retail theft, evidence proving the existence of a pattern also proves the continuing nature of the organization.

In addition to Turkette's evidentiary requirements of a common purpose and a continuous unit, the majority of circuits additionally demand that an enterprise entail a separate and distinct structure, creating a three-step analysis in defining

156. See supra notes 50–61 and accompanying text.
157. See supra note 50 and accompanying text.
158. See supra notes 50–51 and accompanying text.
159. See supra notes 50–51, 54–56 and accompanying text.
160. See supra notes 50–51 and accompanying text.
161. See supra note 70 and accompanying text.
162. See supra notes 135–40 and accompanying text.
163. The Supreme Court affirmed this “dual use” in United States v. Turkette, 452 U.S. 576, 583 (1981); see supra note 148 and accompanying text.
164. See, e.g., Handeen v. Lemaire, 112 F.3d 1339, 1351 (8th Cir. 1997); United States v. Rogers, 89 F.3d 1326, 1336 (7th Cir. 1996); Chang v. Chen, 80 F.3d 1293, 1297–98 (9th Cir. 1996); United States v. Sanders, 928 F.2d 940, 944 (10th Cir. 1991); Montesano v. Seafirst Commercial Corp., 818 F.2d 423, 427 (5th Cir. 1987); United States v. Tillett, 763 F.2d 628, 631 (4th Cir. 1985); United States v. Riccobene, 709 F.2d 214, 221 (3d Cir. 1983); see also O'Neill, supra note 152, at 708–10 (discussing the additional requirement some circuits impose).

Other circuits have taken a less restrictive approach, refusing to acknowledge the separate and distinct enterprise requirement. See United States v. Mazzei, 700 F.2d 85, 89 (2d Cir. 1983) (holding that nothing in RICO's legislative history or language requires that the “alleged enterprise must engage in activities separate and distinct”); see also United States v. Perholtz, 842 F.2d
an enterprise. This third element requires that the enterprise be a separate and distinct group "beyond that which is necessary merely to commit each of the . . . predicate racketeering offenses." These circuits require more than a simple agreement to commit criminal offenses. Evidence that the ring is involved in multiple predicate acts and other functions on a continual basis, or that the organizational structure stretches beyond what is necessary to effectuate the predicate offenses, is sufficient to satisfy the separate and distinct requirement. It is unnecessary to show that a ring exists for a purpose completely unrelated to its racketeering activity.

A defendant must also "participate in the operation or management of the enterprise itself." In providing additional guidance, the Supreme Court has said that "[a]n enterprise is 'operated' not just by upper management but also by lower rung participants . . . who are under the direction of upper

343, 356–59, 362–63 (D.C. Cir. 1988) (per curiam); United States v. Qauod, 777 F.2d 1105, 1115–16 (6th Cir. 1985); United States v. Cagnina, 697 F.2d 915, 921 (11th Cir. 1983). As long as the evidence sufficiently satisfies both the enterprise and pattern elements, there is no requirement that a separate and distinct structure be present. Mazzei, 700 F.2d at 89.

165. See, e.g., Handeen, 112 F.3d at 1351; United States v. Console, 13 F.3d 641, 650 (3d Cir. 1993); Riccobene, 709 F.2d at 221. The requirement of a separate and distinct structure is said to prevent the use of RICO from completely eliminating the enterprise element. United States v. Bledsoe, 674 F.2d 647, 664 (8th Cir. 1982) (stating that allowing an enterprise to be an informal association compiled solely to commit acts of racketeering would "simply punish . . . the commission of two of the specified crimes within a 10-year period" and altogether eliminate the enterprise element).

166. Riccobene, 709 F.2d at 224; see also O'Neill, supra note 152, at 711–12 (stating that evidence of a separate and distinct structure can be proven with the existence of a decision-making hierarchy, a division of labor indicating specialized or permanent roles, or a "sophisticated financial structure").

167. United States v. Masters, 924 F.2d 1362, 1367 (7th Cir. 1991) (noting that "[i]f the 'enterprise' is just a name for the . . . agreement to commit . . . crimes, . . . then it would not be an enterprise within the meaning of the statute").

168. See Montesano, 818 F.2d at 427 (noting that committing several criminal acts sufficiently satisfies the separate structure requirement).

169. See Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 996 (8th Cir. 1989) (advising that "a diverse pattern of crimes or . . . an organizational pattern or system of authority beyond what [is] necessary to perpetrate the predicate crimes" satisfies the separate structure element (quoting Bledsoe, 674 F.2d at 665)).

170. United States v. Darden, 70 F.3d 1507, 1521 (8th Cir. 1995).

management.\textsuperscript{172} While the Court refused to decide how far down the "ladder" RICO liability extended,\textsuperscript{173} federal courts have generally extended liability to individuals that carried out the instructions of a superior.\textsuperscript{174} Individuals who knowingly execute decisions made by the leadership of the ring also participate in the organization.\textsuperscript{175}

In practice, courts broadly construe the enterprise requirement.\textsuperscript{176} Courts have considerable discretion in determining the existence of an enterprise.\textsuperscript{177} Prosecutions under RICO have rested primarily on the "expansive prohibition of the operation of an enterprise through a pattern of racketeering activity . . . directed at the operations of illegitimate criminal enterprises themselves."\textsuperscript{178} RICO charges have been brought against criminals whose racketeering activity consists of a "series of crimes having looser connections than have traditionally been permitted even in conspiracy prosecutions."\textsuperscript{179} The Supreme Court has acknowledged that, in accordance with RICO's legislative history, the enterprise requirement is to be broadly construed.\textsuperscript{180}

The most difficult part of the enterprise analysis as it relates to organized retail crime rings is determining whether a separate and distinct structure exists.\textsuperscript{181} Organized retail crime
rings frequently exist for purposes other than committing organized retail fraud. These groups often traffic in illegal narcotics, either for consumption by the group or to profit from the sale of these drugs. Some of these groups also sell the merchandise they obtain to individuals associated with fences and organized retail theft. Lastly, these groups serve as social units, often composed of individuals who have known each other for several years, extending beyond their fraudulent activity.

Theft and fraud activities of organized rings often extend beyond the requisite acts of the predicate offense. For example, theft of merchandise from either a retail establishment (a state, not federal, crime) or an interstate shipment of goods (a federal offense) does not require an organizational aspect that involves middlemen, repackaging, and distribution. Moreover, financial fraud rings that acquire counterfeit identification (a federal crime) also engage in an enterprise unit involving a complex scheme of creating and passing counterfeit checks before either returning the merchandise to retail stores or selling it to fences to earn profits.

However, not all organized rings exhibit these characteristics. Certainly groups exist that do not operate on a multistate level, instead concentrating their activity solely within one state or metropolitan area. Some rings utilize only stolen blank checks or credit accounts without relying on counterfeit identification, thereby removing their activity from the federal RICO predicate offenses. Some theft rings may steal merchandise only for their own personal consumption, removing

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182. See supra notes 79–84 and accompanying text.
183. See supra note 79 and accompanying text.
184. See supra notes 56–57 and accompanying text.
185. See supra note 146 (discussing the social ties between members of organized rings).
186. See supra notes 54–58 and accompanying text.
187. See, e.g., Adams, supra note 1; Press Release, supra note 73 (detailing the complex scheme involved in each ring's criminal activity).
188. See Scott, supra note 50, for an example of a local group confining its activity to one specific area and arguably not committing any predicate RICO acts.
189. Stealing someone's existing checkbook and passing stolen checks by using the victim's altered identification would be an example of non-counterfeiting activity that arguably does not fall within RICO's predicate offenses.
the enterprise element from the structured group. Smaller groups may not exhibit the same structured leadership and instead rely heavily on the decisions of individual ring members to commit the predicate crimes.\footnote{See, e.g., Scott, \textit{supra} note 50 (reporting fraudulent activity by eight individuals that arguably did not exhibit any hierarchal structure).} This latter distinction is critical because it may remove smaller, less-organized retail crime rings from the purview of RICO or make prosecution based solely on the predicate offenses effective enough to eliminate their existence.

3. Effect on Interstate Commerce

Finally, RICO requires an effect on interstate commerce.\footnote{18 U.S.C. § 1962(c) (2000).} The predicate offenses, however, need only have a minimal impact on commerce,\footnote{See, e.g., United States v. Miller, 116 F.3d 641, 674 (2d Cir. 1997) (holding that “the government need only prove that the individual subject transaction has a de minimis effect on interstate commerce”).} shown by “proof of a probable or potential impact” on interstate commerce.\footnote{See, e.g., United States v. Atcheson, 94 F.3d 1237, 1243 (9th Cir. 1996).} Other courts have held that only the enterprise’s overall conduct needs to affect interstate commerce.\footnote{See, e.g., United States v. Bagnariol, 665 F.2d 877, 892 (9th Cir. 1981) (per curiam) (noting that only the overall activity of the enterprise needs to impact interstate commerce, not each predicate act).} An enterprise’s activities “may affect interstate commerce by impacting the victim,”\footnote{United States v. Juvenile Male, 118 F.3d at 1349.} and the purchase of or trafficking in goods that originate in interstate commerce generally satisfies this prong.\footnote{See, e.g., United States v. Feliciano, 223 F.3d 102, 118 (2d Cir. 2000) (stating that the trafficking of drugs has a “substantial effect” on interstate commerce); United States v. Diecidue, 603 F.2d 535, 547 (5th Cir. 1979) (holding that the purchase of dynamite originating in interstate commerce satisfies the requirements of RICO).} In either case, the required impact on interstate commerce remains minimal and relatively easy to prove.

Organized retail crime groups affect interstate commerce in several ways. First, their criminal acts often reach a regional or national level.\footnote{See supra note 73 and accompanying text.} Further, they target nationally based retail establishments.\footnote{See supra note 73 and accompanying text.} Groups engaging in acts of identity theft victimize individuals, financial institutions, and businesses
throughout the country.\textsuperscript{199} Finally, they often transport their illegally obtained merchandise across state lines, repackage the merchandise in states different than from where it was stolen, and ultimately distribute that product to numerous states.\textsuperscript{200} The overall mobility of these groups alone is enough to evidence a drastic impact on interstate commerce. Even rings that operate solely within one state arguably impact interstate commerce enough to satisfy the minimal standard required by the law.\textsuperscript{201} Simply victimizing a multistate retailer may have an impact on interstate commerce.\textsuperscript{202}

III. THE PRACTICALITY OF APPLYING RICO TO ORGANIZED RETAIL CRIMINALS

Retail theft and fraud are not the "sexiest" crimes and generally receive lower priorities from law enforcement and prosecutors than violent crimes.\textsuperscript{203} However, as technological advances have made retail crime easier to commit and reduced the chances of detection,\textsuperscript{204} organized rings have begun to perpetrate these crimes more frequently. Because RICO has proven to be a powerful and effective weapon in counteracting organized crime,\textsuperscript{205} the potential for its equal effectiveness on organized retail criminals needs to be evaluated.

It is important to recognize why RICO has yet to be used against organized retail crime. Two primary reasons exist. First, because of RICO's incredible strength and flexibility as a tool for combating crime, the Justice Department has been extremely hesitant to expand its use of RICO for fear that legislators or courts will curtail the powers of RICO.\textsuperscript{206} Recent state-

\begin{enumerate}
\item \textsuperscript{199} See supra note 73 and accompanying text.
\item \textsuperscript{200} See supra note 73 and accompanying text.
\item \textsuperscript{201} See supra note 192 and accompanying text.
\item \textsuperscript{202} See supra note 195 and accompanying text.
\item \textsuperscript{203} See Nelson, supra note 27 (stating that retail crime is not the "sexiest crime in the world" and that law enforcement rightfully concentrates on violent crime and crimes with individual victims).
\item \textsuperscript{204} See NAT'L WHITE COLLAR CRIME CTR., supra note 30, at 2 (discussing how advances in computer and printing technology have made forgery an easier crime to commit).
\item \textsuperscript{205} See supra notes 91–104 and accompanying text.
\item \textsuperscript{206} See U.S. DEP'T OF JUSTICE, RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS (RICO): A MANUAL FOR FEDERAL PROSECUTORS 217 (14th ed. 2000) (expressing the fear that the "injudicious use of RICO may reduce its impact"); Coffey, supra note 63, at 1045 (commenting on the concern that expanded use of RICO could lead to the development of "restrictive RICO case law"); Dennis, supra note 91, at 652, 658 (noting that heavy criticism of civil
ments from two Supreme Court Justices justify this concern.\textsuperscript{207} Additionally, the Justice Department recognizes federalism concerns resulting from the use of RICO.\textsuperscript{208} However, to date, the government has withstood criticism and prevented the restrictive tightening of RICO by adhering to its strict procedural guidelines for prosecuting criminal RICO cases.\textsuperscript{209}

Second, because of the requirement of predicate offenses, different statutes already cover acts committed by organized retail criminals.\textsuperscript{210} Thus, state crimes encompassing fraud and theft can form the basis for a criminal indictment.\textsuperscript{211} Under certain circumstances, RICO may actually complicate a prosecution due to its introduction of the "somewhat foreign concepts of enterprise, racketeering, and pattern."\textsuperscript{212}

Furthermore, assessing the practicality of RICO begs the question of whether the current practice of prosecuting single acts of theft and fraud is sufficient. Organized retail crime rings could easily be prosecuted for their predicate acts alone.\textsuperscript{213} However, prosecuting only the predicate acts would prove in-

\begin{addendum}
\item RICO may tarnish criminal RICO and lead Congress to needlessly restrict the criminal RICO provisions).
\item \textsuperscript{207} See H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 254 (1989) (Scalia, J., concurring) (stating that the Supreme Court ineffectively addressed constitutional issues that will arise in the future); Rehnquist, supra note 102 (expressing concern that RICO cases are clogging the federal docket).
\item \textsuperscript{208} See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, § 9-110.200 (1999) (stating that the "utilization of the RICO statute... requires particularly careful and reasoned application, because, among other things, RICO incorporates certain state crimes"). While federalism concerns are beyond the scope of this Note, it is important to note that RICO, with its incorporation of state crimes, presents federalism concerns. See generally, e.g., Michael A. Simons, Prosecutorial Discretion and Prosecution Guidelines: A Case Study in Controlling Federalization, 75 N.Y.U. L. REV. 893 (2000) (arguing that prosecutorial guidelines and discretion control federalization). But see G. Robert Blakey & Thomas A. Perry, An Analysis of the Myths That Bolster Efforts to Rewrite RICO and the Various Proposals for Reform: "Mother of God—Is This the End of RICO?", 43 VAND. L. REV. 851, 920–24 (1990) (arguing that RICO neither frustrates nor is inconsistent with the principles of federalism).
\item \textsuperscript{209} See Dennis, supra note 91, at 654–55 (arguing that the Justice Department's guidelines for RICO have not led to many failed RICO prosecutions); see also H.R. REP. No. 102-312, at 5 (1991) (finding that the Justice Department has been "restrained and responsible in its use" of RICO).
\item \textsuperscript{210} See Coffey, supra note 63, at 1045; see also MANUAL FOR FEDERAL PROSECUTORS, supra note 206, at 217 (acknowledging that RICO does not criminalize any actions that were not already crimes).
\item \textsuperscript{211} See Coffey, supra note 63, at 1045.
\item \textsuperscript{212} Id.
\item \textsuperscript{213} See supra notes 210–12 and accompanying text.
\end{addendum}
adequate for most of these groups, as it would not permit prosecution of the ringleaders. For example, on the federal level, individual members could be prosecuted each time they use a counterfeit identification document to assist their fraudulent purchase. They could also be prosecuted for transporting fraudulently obtained merchandise across state lines. These prosecutions, however, would fail to implicate individuals in charge of either creating the fraudulent instruments or procuring the information used to create those instruments. They also fail to implicate the individuals responsible for the organization of those efforts, who are often the people profiting the most from the illegal activity. Members of organized theft rings could also be prosecuted for transporting stolen merchandise across state lines, but this would fail to implicate the thieves who originally stole that merchandise, the people in charge of organizing both its theft and transportation, and the individuals that repackage and distribute the merchandise. Overall, prosecution based on these predicate acts alone would only end the activity of a few unimportant, easily replaced members of the group. It could not connect integral leadership members of the organization who seldom participate directly in the actual commission of the predicate offense. Donnie Ellis, mentioned at the outset of this Note, provides the perfect example of how a ringleader, and the ring itself, can survive efforts directed at its individual criminal acts, but crumble when law enforcement focuses on the entire ring.

RICO proved effective against traditional organized criminals because it allowed law enforcement and prosecutors to focus on the economic motivation of the groups and to attack them by eliminating the organizational structure responsible for deriving and enhancing profitability. In a similar fashion, the government can attack an organized retail crime ring’s profitability and work to eliminate its supporting structure. In the context of traditional organized crime, the government’s initial efforts to prosecute mob families on a crime-by-crime ba-

214. See supra notes 63, 94 and accompanying text (discussing the insulation of ringleaders from a group’s criminal activity).
215. See supra notes 129–31 and accompanying text.
216. See supra note 126 and accompanying text.
217. See supra note 94 and accompanying text.
218. See supra note 126 and accompanying text.
219. See supra notes 92–104 and accompanying text.
220. See supra notes 98–104 and accompanying text.
sis were futile, as the history behind RICO and its subsequent success shows.\(^{221}\) Simply prosecuting individual retail criminals for their single acts of forgery, counterfeiting, and theft will prove as inadequate in eliminating the impact of organized retail crime rings as it did with traditional organized crime. While efforts to block the acquisition of profits—i.e., implementing stricter legislative controls over the handling of personal identification by financial institutions as a means of deterring criminal activity—may alleviate the problem of financial fraud and organized theft, these efforts do not eliminate the ring itself. Certainly the innovation and intelligence of such rings will allow them to find new ways to generate illegitimate profits.\(^{222}\) Therefore, prosecution of the entire group through RICO is a viable method that will eliminate the group and its profit-generating ability, rather than simply deter its practices.

Another advantage of RICO is that it permits the forfeiture of criminally obtained money, property, and any existing ongoing interests of the enterprise.\(^{223}\) Though a discussion of RICO's forfeiture provision is beyond the scope of this Note, forfeiture is another tool that can quickly remove the profit incentive of organized criminal rings.\(^{224}\) While several organized retail crime rings may not have substantial profits to seize, it is important to retain the forfeiture provision of RICO as a potential tool, as the full scope of its effectiveness remains to be seen in the retail crime context. Forfeiture appears to be a plausible weapon to counter organized theft rings that have established packaging and distributing enterprises. Similarly, in cases where a fraud ring uses its profits for personal consumption aside from drug use, forfeiture can be used to seize items purchased with illegally obtained funds. This can also be used as a source of restitution to the retail victims of such crimes.

RICO further provides a means for the centralization of often complex and multijurisdictional crimes.\(^{225}\) A unified focus is

\(^{221}\) See supra note 89 and accompanying text.

\(^{222}\) See, e.g., Beauford v. Helmsley, 865 F.2d 1386, 1393 (2d Cir. 1989) (en banc) (noting that organized criminals are "sufficiently resourceful and enterprising that one constantly is surprised by the variety of offenses that they commit").


\(^{224}\) See Attack on La Cosa Nostra, supra note 64, at 11 (discussing the seizure of assets and cash from Mafia organizations).

\(^{225}\) See supra note 102 and accompanying text.
required to effectively combat retail crime.\footnote{226} RICO can centralize investigations and prosecution of these rings in entities capable of handling them.\footnote{227} For example, state entities only have resources and authority to counter enterprise activity within their borders. However, the United States Attorney's Office and FBI have expansive jurisdiction. While criticism of the federalization of state crimes exists,\footnote{228} it is important to recognize that RICO attaches only to crimes that have already been federalized,\footnote{229} as indicated by the predicate acts specified in the statute. Additionally, RICO federalizes the enterprising aspect of organized crime rings.\footnote{230} RICO can be used as a weapon to promote the efficient and complete investigation and prosecution of organized crime rings.

CONCLUSION

Historically, RICO has proven its worth. Enacted as a means of eliminating the strength of the mob, RICO enabled the government to strike at organized criminal activity. While the creators of RICO may have envisioned removing traditional mob influence as RICO's sole purpose, they had the foresight to develop a powerful and versatile weapon capable of combating all forms of organized criminal activity. The broad and liberal construction of RICO, as mandated by statute, proves that an extension of RICO into the realm of organized retail crime is within the intent of its drafters. RICO is a viable weapon to counteract the tremendous growth of organized theft and fraud rings, as apparent by the staggering economic losses attributable to these groups.

Unfortunately, RICO alone cannot eliminate these groups. Instead, as was the case with traditional forms of organized crime, other components must be involved. The efforts of investigative units such as the FBI and prosecutorial agencies such as the United States Attorney's Office must focus upon organ-
ized retail crime. The assistance of individual retailers is also required. However, without the use of RICO to strike at the criminal enterprise, focused and joint investigative efforts will only result in solidifying single criminal charges based on the predicate act. Even though the government will be able to pursue an airtight criminal charge of counterfeiting, for example, the structure of the ring will remain intact. RICO provides a stepping stone to contain and ultimately eliminate the problems associated with organized retail crime.